STATE OF MICHIGAN
IN THE SUPREME COURT

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant/Appellant,

v

LOUISE M. FORTSON, RICHARD A. FORTSON, Individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs/Appellees.

Supreme Court No. 158302

Court of Appeals No. 337728

Berrien County Circuit Court
No. 14-260-CK

/

APPENDIX TO PLAINTIFF-APPELLANT MEEMIC INSURANCE COMPANY'S REPLY BRIEF ON APPEAL

Policy Number: PAP0632676

Policy Period:
07/29/09 to 01/29/10
12:01 A.M. Standard Time

MEEMIC Insurance Company
P.O. Box 217019
Auburn Hills, MI 48321-7019
www.meemic.com 1-888-4 MEEMIC

DECLARATIONS PAGE
ATTACH TO POLICY

Policy Type:
AUTOMOBILE Renewal
Policyholder Since: 1997
Date Mailed: 06/26/09
Change Effective: 07/29/09

Named Insured:
LOUISE M FORTSON
RICHARD A FORTSON
819 HIGHLAND
SAINT JOSEPH MI 49085-2511

Representative: (800) 628-9165
DEAN & BARBARA HAGEN
P O BOX 787
NILES MI 49120-0787

Vehicles Covered:

Veh. #	Vehicle Year	Vehicle Description	Vehicle I.D. Number	Assigned Driver #	Territory	Vehicle Symbol	Class
1	2002	HOND CR-V EX	JHLRD78882C089979	2	718	12	045W2M
2	2005	FORD F-150 SUPE	1FTPX14505NA46783	2	718	14	045SXM
3	2003	CHEV CAVALIER	1G1JC52F137158507	1	718	14	055W1M

Coverages and Limits of Liability		Premiums Veh. 1	Veh. 2	Veh. 3
LIABILITY COVERAGES				
Bodily Injury	$100,000/300,000**	23.00	21.00	16.00
Property Damage	$100,000*	4.00	4.00	3.00
NO-FAULT COVERAGES				
Personal Injury Protection		49.00	45.00	38.00
Excess Medical, Full Work Loss				
Property Protection Insurance	$1,000,000*	4.00	4.00	4.00
UNINSURED MOTORIST	$100,000/300,000**	8.00	8.00	8.00
CAR DAMAGE INSURANCE COVERAGES - Actual Cash Value				
Minus Deductibles By Auto:	Veh. 1 Veh. 2 Veh. 3			
Comprehensive Deductible	$100 $100 $100	52.00	60.00	51.00
Collision Deductible	$500 $500 $500	118.00	134.00	103.00
	BROAD BROAD BROAD			
OTHER COVERAGES				
Statutory Assessment Recoupment		80.00	80.00	80.00
TOTAL PREMIUM PER AUTO		338.00	356.00	305.00

*Coverage is per occurrence
**Coverage is per person/per occurrence

Premium Change: 999.00
Total Term Premium: 999.00

INSURANCE IS PROVIDED WHERE PREMIUM IS SHOWN AND ONLY IN AMOUNTS OF COVERAGE UP TO THE LIMIT OF LIABILITY SET FORTH ABOVE.

Drv.#	Driver(s)	Points	Drv.#	Driver(s)	Points
1	LOUISE M FORTSON	0			
2	RICHARD A FORTSON	0			

Veh.#	Lienholder(s)	Address	City, State and Zip Code
1	AMERICAN HONDA LEASE TRUST	PO BOX 650201	HUNT VALLEY MD 21065
2	CAPITAL ONE AUTO FINANCE	PO BOX 360907	MINNEAPOLIS MN 55439

Veh.#	Additional Insured(s)	Address	City, State and Zip Code
1	AMERICAN HONDA LEASE TRUST	PO BOX 650201	HUNT VALLEY MD 21065

AUDEC (04/2007)

INSURED'S COPY

Policy Number: PAP0632676

MEEMIC Insurance Company
P.O. Box 217019
Auburn Hills, MI 48321-7019
www.meemic.com 1-866-4 MEEMIC

DECLARATIONS PAGE

Policy Type:
AUTOMOBILE

NAMED INSURED:
LOUISE M FORTSON
RICHARD A FORTSON

POLICY FORMS AND ENDORSEMENTS

FORM NUMBER	DESCRIPTION
NF101-8(11/04)	AUTO INSURANCE POLICY
NF-101-AMD(09/07)	AUTO AMENDATORY ENDORSEMENT

ADDITIONAL RATING INFORMATION

AIR BAG DISCOUNT
ANTI THEFT DISCOUNT
EDUCATIONAL SERVICE EMPLOYEES
LOYALTY REWARDS PROGRAM MEMBER
MULTI CAR DISCOUNT
MULTI POLICY DISCOUNT
SAFE DRIVER DISCOUNT - DRV 001
SAFE DRIVER DISCOUNT - DRV 002
SEAT BELT DISCOUNT

Meemic

Meemic Insurance Company

MICHIGAN AUTO INSURANCE POLICY

1685 North Opdyke Rd. - P.O. Box 217019 - Auburn Hills, MI 48321-7019 - 1-888-4MEEMIC

GENERAL INSURING AGREEMENT

In exchange for the premium deposit, or premium payment and compliance with all applicable provisions of this policy, **we** agree with the **Named Insured** to provide insurance for the Coverages and Limits of Liability stated on the Declarations Page made a part of this Policy. This agreement is subject to all the terms of this Policy which is issued in reliance upon the declarations made in this application and contained on the Declarations Page. The Declarations Page together with the policy form and endorsements completes the Policy. If this policy form is revised, it will be amended or replaced at the beginning of the next Policy Term.

WHAT MUST BE DONE IN CASE OF CAR ACCIDENT OR LOSS

NOTICE

In the event of an accident, occurrence or **loss**, you (or someone acting for you) must inform **us** or our authorized agent promptly. The time, place and other facts must be given, to include the names and addresses of all involved persons and witnesses.

OTHER DUTIES

1. A person claiming any coverage under this Policy must:
   A. cooperate and assist **us** in any matter concerning a claim or suit;
   B. promptly send **us** copies of any notice or legal papers received in connection with an accident or **loss**;
   C. provide any written Proofs of Loss we request;
   D. submit to examinations under oath in matters that relate to the **loss** or claim as often as we reasonably request. If more than one person is examined, we have the right to examine and receive statements separately from each person and not in the presence of any other insured;
   E. assist in the conduct of suits. This includes being at trials and hearings;
   F. cooperate with **us** to enforce the right of recovery or indemnification against all parties who may be liable to an insured for the injury or damage;
   G. assist **us** in the securing of and giving of evidence; and
   H. assist **us** in obtaining the attendance of all witnesses at all related proceedings requiring their attendance.
2. A person claiming Personal Injury Protection Insurance, Underinsured Motorist Coverage or Uninsured Motorist Coverage must:
   A. give **us** written notice of any injury;
   B. submit to physical and mental examinations at our request by doctors we select as often as we may reasonably require;
   C. authorize **us** to obtain medical, wage and other records;
   D. give **us** a copy of any legal papers served in connection with any lawsuit started by **you**, or anyone claiming under this policy, or their legal representative, to recover damages for **bodily injury** against a person or organization who may be liable;
   E. under Uninsured Motorist Coverage report a hit-and-run accident within 24 hours to the police.
   F. file with **us**, within 30 days, written notice of the hit-and-run accident.
   G. Under Uninsured Motorist Coverage, allow **us** to inspect the **car occupied** by the **insured person** if the **car** is within the possession and control of the insured or his representative.

   If it is shown that it is not reasonably possible to give such notice within the prescribed time, notice must be given as soon as reasonably possible.
3. A person claiming Car Damage Insurance Coverages must:
   A. immediately report theft, attempted theft or vandalism of the **insured car** to the police;
   B. when required, prior to payment of a claim for damages caused by fire, submit a report to the fire department in the locale where the fire occurred;
   C. promptly report a hit-and-run accident to the police;
   D. take reasonable steps to protect the **insured car** from further loss. If the **loss** is covered by Car Damage Insurance Coverage, we will pay all reasonable expenses incurred by **you**. We will not pay for further damage if **you** fail to protect the **insured car**;
   E. report the loss to **us** in a prompt manner as soon as is reasonably possible after its occurrence;
   F. allow **us** to inspect and appraise the damaged **insured car** before its repair or disposal.

4. A person claiming Underinsured Motorist Coverage must notify us in writing of a tentative settlement between an insured person and the insurer of the underinsured motor vehicle and allow us 30 days to advance payment to that insured person in an amount equal to the tentative settlement to preserve our rights against the insured, owner or operator of such underinsured motor vehicle.
5. A person who claims Bodily Injury Liability Coverage or Property Damage Liability Coverage must promptly notify us;
   a. How the accident or loss happened.
   b. Where and when the accident or loss occurred.
   c. Include the names and addresses of any injured persons; and
   d. Include the names and addresses of any witnesses.

Your notice to our authorized representative is considered notice to us. Failure to give any notice required by this paragraph shall not invalidate any claim made by a person seeking coverage if it shall be shown not to have been reasonably possible to give such notice promptly and that notice was given as soon as was reasonable possible.

CONTENTS OF POLICY

DEFINITIONS USED THROUGHOUT THIS POLICY

DEFINED WORDS ARE SHOWN IN BOLD BLACK TYPE. IN EACH PART, THERE ARE ADDITIONAL DEFINITIONS FOR THAT PART ONLY.

1. **Additional Car** means a **car**, other than a **replacement**, acquired by **you** after the effective date of this Policy if we insure all cars owned by **you** and we are notified within 30 days of such acquisition. If we are not notified of an **additional car** within 30 days of its acquisition, no coverage is provided under this Policy.
2. **Additional Insured** means any person listed as an **additional insured** on the Declarations Page.
3. **Bodily Injury** means injury, sickness, disease or death of any person.
4. **Car** means a vehicle of the same type as the one described on the Declarations page with four wheels or more that is a private passenger, stationwagon or jeep-type **car**. Its wheel base must be 56 inches or more. It must be a **car** licensed, registered, and designed for use on public highways.
5. **Car Business** means the business or occupation of selling, repairing, servicing, storing or parking motor vehicles including road testing and delivery.
6. **Code** means Chapter 31 of the Michigan Insurance Code, the Michigan No-Fault Law.
7. **Insured Car** means:
   a) **your car** which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number. **Your car** also includes a **replacement car**, a **temporary substitute car**, an **additional car**, and a **trailer** owned by **you**; and
   b) **other car**, which is any car that **you** or any resident of **your** household does not own, lease for 31 days or more, or have furnished or available for frequent or regular use.
8. **Lessee** means a person renting a motor vehicle under a lease for a period that is greater than 30 days.
9. **Lienholder** means **lienholder** or other loss-payee named on the Declarations Page. For General Condition 21, Loss Payable, **lienholder** also means lessor and **additional insured**.
10. **Loss** is defined in Part V - Car Damage Insurance Coverages.
11. **Occassional** is defined as infrequent, relating to a special event, or only from time to time.
12. **Occupying** and/or **Occupied** means in, getting into or getting out of.
13. **Permanently Attached** means installed in such a way as to require the use of hand tools to remove.
14. **Property Damage** means damage to, or destruction of, tangible property, including loss of its use.
15. **Replacement Car** means a **car**, ownership of which is acquired by **you** after the effective date of this Policy when it replaces the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number. We must be told about it within 30 days after acquisition or no coverage is afforded under this Policy for any accident or **loss**.
16. **Resident relative** means a person who is a resident of **your** household related to **you** by blood, marriage or adoption, or is **your** foster child. **Resident relative** also includes **your** unmarried child engaged in a full-time course of study at a school away from home. Full-time course of study is determined by the educational institution attended. In (Part II) - Michigan No-Fault Insurance Coverages, **relative** includes **spouse**.
17. **Special Equipment** means equipment, devices, accessories, enhancements, and changes, **permanently attached** to **your car**, other than those which are original manufacturer installed, which alter the appearance or performance of the car. This includes any electronic equipment, antennas, and other devices used exclusively to send or receive audio, visual or data signals, or play back recorded media, other than those which are original manufacturer installed, that are **permanently attached** to **your car** using bolts or brackets. Radar and laser detectors are not covered.
18. **Spouse** means **your** husband or wife if a resident of **your** household. If **your spouse** ceases to be a resident of your household during the term of this policy, he or she will be considered a resident **spouse** under this policy until the end of the policy term, unless he or she is named as an insured on another policy effective before the end of this policy term.
19. **Student** means someone who attends a school, college or university for the purpose of obtaining an education, diploma or a degree.
20. **State(s)** includes the District of Columbia, and any state, territory or possession of the United States, and any province of Canada.
21. **Temporary Substitute Car** means a **car** or **trailer**, not owned by **you** or any resident of **your** household, used when **your car** or **trailer** is out of use because of its breakdown, repair, servicing, **loss** or destruction.
22. **Titleholder** means a person who holds legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by a lessee for a period that is greater than 30 days.
23. **Trailer** means a vehicle owned by **you** without motive power designed for carrying property and designed to be towed only by a private passenger **car**.
24. **War** means war, including undeclared or civil war, insurrection, rebellion, revolution, usurped power, or

action taken by governmental authority in hindering or defending against any of these.

25. **We, us, our(s)** means MEEMIC Insurance Company (MEEMIC).

26. **You, your(s), Named Insured** means any person or organization listed as a **Named Insured** on the Declarations Page as:

a) assigned driver, but only for the specific vehicle when so named. It includes the **spouse** of the assigned driver;

b) an Other Named Insured, but only for the specific vehicle when so named, as their interest may appear.

PART I - BODILY INJURY AND PROPERTY DAMAGE LIABILITY COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s)** means:
   A. For **your car**;
      (1.) **You**;
      (2.) **Your resident relatives**;
      (3.) Or other persons using **your car** with **your** permission;
   B. For **Other Cars**, used with the permission of a person having the right to grant it and if **your car** is a private passenger **car**;
      (1.) **You**, if an individual;
      (2.) **Your resident relative** who does not own a private passenger **car**;
   C. Any other person who does not own or hire, but is legally responsible for the use of, any **insured car** operated by an **insured person.**

The Limits of Liability are not increased because a claim is made or suit is brought against more than one **insured person.**

BODILY INJURY LIABILITY COVERAGE

PROPERTY DAMAGE LIABILITY COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability of this Policy, **we** will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** arising out of the ownership, maintenance, or use including the loading or unloading of an **insured car.** The **insured car** means: **your car**, which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a **temporary substitute car**, an **additional car**, and a **trailer** owned by **you**; and an **other car**, which is a private passenger **car**, or **trailer** that **you** or any **resident relative** of **your** household does not own, does not lease for 31 days or more, or does not have furnished or available for frequent or regular use.
2. **We** will defend any suit with lawyers of **our** choice or settle any claim for these damages as thought appropriate by **us.** **We** will not defend or settle, however, after **we** have paid **our** Limit of Liability for this coverage.
3. **We** will pay for damages, up to the maximum established by the **Code**, to motor vehicles for which an **insured person** is legally liable because of an accident arising out of the use of the **insured car.**

ADDITIONAL PAYMENTS

1. In addition to its Limits of Liability for this coverage, as shown on the Declarations Page, **we** will also pay:
   A. all costs **we** incur in the settlement of any claim or defense of any suit;
   B. interest on damages awarded in any suit **we** defend accruing after judgment is entered and before **we** have paid, offered to pay, or deposited in court that portion of the judgment which is not more than **our** Limit of Liability. **We** will also pay pre-judgment interest as required by law on that part of the judgment which **we** pay;
   C. premiums on appeal bonds and attachment bonds required in any suit **we** defend. **We** will not pay the premium for attachment bonds for any amount beyond **our** Limits of Liability;
   D. any charge up to $250 for a bail bond required due to a traffic law violation or auto accident causing **bodily injury** or **property damage** covered by this Part. **We** have no obligation to apply for or furnish this type of bond;
   E. loss of earnings, but not other income, up to $100 a day when the **insured person(s)** is asked by **us** to attend trials or hearings;
   F. any other reasonable expenses incurred at **our** request that have been approved by **us.**

EXCLUSIONS

1. **PERSONS AND VEHICLES NOT COVERED.** The Liability Coverage does not cover:
   A. the United States of America and any of its agencies;
   B. a person covered by any contract of nuclear energy liability insurance;
   C. a person covered by the Federal Tort Claims Act;
   D. a named excluded driver;
   E. persons using a vehicle which is:
      1. owned,
      2. leased for 31 days or more, or
      3. furnished or available for the frequent or regular use by **you** or any **resident relative** unless it is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a **temporary substitute car**, an **additional car**, or **trailer** owned by **you**;

F. persons using any **additional car** or **replacement car** the acquisition of which is not reported to us within 30 days;

G. persons using a vehicle without a reasonable belief that the person is entitled to do so.

2. **CARS NOT COVERED.** The Liability Coverage does not cover:

A. your **car** if used in the course of the **car business**. You or a **resident relative**, however, are covered;

B. an **other car** if used in the course of any other business of an **insured** person except a private passenger car operated or occupied by **you**.

3. **BODILY INJURY AND PROPERTY DAMAGE NOT COVERED.** We will not pay for:

A. **bodily injury** during the course of employment: To an **insured persons** domestic employee who is entitled to Workers' Compensation; or to any other employee of an **insured person**;

B. **bodily injury** to an **insured** person's fellow employees while using an **insured car** in the course of employment. However, we will cover **you**;

C. **bodily injury** or **property damage** if you assume liability by contract or agreement;

D. **bodily injury** or **property damage** caused intentionally by or at the direction of the **insured person**. The determination of whether **bodily injury** or **property damage** was caused intentionally shall be determined by objective factors irrespective of the **insured person's** stated intent;

E. **bodily injury** or property damage sustained as the result of racing or speed contest activities;

F. **property damage** to any property owned by, in charge of, transported by or rented to an **insured person**; however, **property damage** to a residence or private garage or carport rented to an **insured person** is covered;

G. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any motorized vehicle having less than four wheels;

H. **bodily injury** or **property damage** arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee.

1. This exclusion does not apply to a share-the-expense car pool or to the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.

2. This exclusion does not apply to an educators **occasional** transportation of **students** to/or from school or a school event.

I. **bodily injury**, personal injury, or **property damage** arising out of:

1. toxic or pathological properties of lead, lead compounds, or lead contained in any materials;

2. any cost or expense to abate, mitigate, remove or dispose of lead, lead compounds or materials containing lead;

3. any supervision, instruction, recommendations, warnings or advice given or which should have been given in connection with paragraphs 1) or 2) above; or

4. any obligation to share damages with or repay someone else who must pay damages in connection with injury or damage as described in any subsection above.

J. **bodily injury**, personal injury, or **property damage** arising out of:

1. Any "fungus" or "spore";

2. Any substance, vapor or gas produced by or arising out of any "fungus" or "spore". This includes, but is not limited to, any metabolite such as a mycotoxin or a volatile organic compound; or

3. any:

I. Material, product, building, or structure, including components thereof; or

II. Concentration of water, moisture, humidity, or other liquids on or within such items in 3. (I.) above; that contains, harbors, nurtures or act as a medium for growth of any "fungus" or "spore".

But this only applies to the extent that any of the items in 3. (I.) or 3. (II.) above result in , cause or contribute concurrently or in any sequence to such injury or damage described in 1) or 2) above;

4. costs expended by anyone for testing for, monitoring, abatement, mitigation, removal, remediation or disposal of any of the items described in items 1), 2), or 3) above;

5. other cause or event to the extent that it contributed concurrently or in any sequence to such injury, damage or costs described in items 1) through 4) above;

6. supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with items 1) through 5) above;

7. obligation to share damages with or repay someone else who must pay damages because of such injury, damage, or costs described in items 1) through 6) above.

CONFORMITY WITH FINANCIAL RESPONSIBILITY

1. When we certify this policy as proof under any Financial Responsibility Law of any **state**, so that if the coverage and limits of liability of this policy are less than those required by that law, they shall be revised to include coverage and limits of liability required by that law.

2. If an exclusion in this policy is deemed void in the **state** with jurisdiction over the loss, the exclusion shall be applied or omitted to the extent required to make this policy conform with the law of the **state** with jurisdiction.

LIMITS OF LIABILITY

1. The Limits of Liability shown on the Declarations Page apply as follows:
   A. The **bodily injury** Liability Limit for each person is the maximum amount that will be paid for **bodily injury** sustained by one person in any one occurrence. This limit includes all claims for derivative damages allowed under the law;
   B. Subject to the **bodily injury** Liability Limit for each person, the **bodily injury** Liability for each occurrence is the maximum amount that will be paid for **bodily injury** sustained by two or more persons in any one occurrence. This limit also includes all claims for derivative damages allowed under the law;
   C. The **property damage** Liability Limit for each occurrence is the maximum amount that will be paid for **property damage** sustained in any one occurrence;
2. We will pay no more than the limits shown on the Declarations Page for a car described and identified by a Vehicle Identification Number when the liability is due to that car, a **temporary substitute car**, a **replacement car**, an **additional car**, or a **trailer** owned by you.
3. If the liability is due to an other car, we will pay no more than the highest Limit of Liability shown on the Declarations Page for any one car described and identified by a Vehicle Identification Number on this and no other policy.
4. A car with a trailer attached or in use is considered one car with respect to the Limits of Liability in Part I.
5. The Limit of Liability shown on the Declarations Page is the most we will pay regardless of the number of:
   A. **Insured persons**;
   B. Claims made;
   C. Vehicles or premiums shown in the Declarations; or
   D. Vehicles involved in the auto accident.

OTHER INSURANCE

If the car involved in the loss and described on the Declarations Page is also covered by other liability insurance, we will pay the ratio of our Limit of Liability to the total applicable Liability Limit. With respect to an other car, **temporary substitute car**, **replacement car** or **additional car**, insurance afforded under this Part is excess over any other valid or collectible car liability insurance.

PART II - MICHIGAN NO-FAULT INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Motor Vehicle** means a vehicle, including a **trailer**, with more than two wheels required to be registered in Michigan. The **motor vehicle** must be operated, or designed for operation, upon a public highway by power other than muscular power. **Motor vehicle** does not include: a **motorcycle**, **moped**, vehicle designed for off-road use, or farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan Vehicle Code.
2. **Motorcycle** means a vehicle having a saddle or seat for use of the rider, designed to travel on not more than three wheels and with a motor that exceeds 50 cubic centimeters piston displacement. **Motorcycle** does not include a **moped**.
3. **Moped** means a two or three-wheeled vehicle, with operable pedals, with a motor that does not exceed 50 cubic centimeters piston displacement, produces 1.5 brake horsepower or less, and cannot propel the vehicle at a speed greater than 25 miles per hour on a level surface.
4. **Insured Motor Vehicle** means:
   A. a **motor vehicle** described on the Declarations Page and identified by a Vehicle Identification Number, for which
      (1.) the Liability Insurance of this Policy applies, and
      (2.) **you** are required to maintain security under the provisions of the **Code**; or
   B. a **motor vehicle** to which the Liability Insurance of this Policy applies, if it
      (1.) does not have the security required by the **Code**, and
      (2.) is operated, but not owned, by **you** or a **resident relative**;
   C. An **additional car** or **replacement car** the acquisition of which has been reported to us within 30 days;
   D. A trailer with more than two wheels designed for use with a private passenger car that is owned or used by **you** or any **resident relative** if it does not have the security required by the **Code**;
   E. A **trailer** with less than three wheels for the purposes of Medical Benefits (Allowable Expenses) only.
5. **Insured Person(s)** means:
   A. **You**, if an individual;
   B. **Your spouse**;
   C. **your resident relative**;
   D. any other person **occupying** the **insured motor vehicle**, or any person, subject to the priorities set forth in the **Code**, injured as a result of an accident involving the **insured motor vehicle** while not **occupying** any motor vehicle.
6. **Dependent Survivor(s)** means:
   A. The surviving **spouse**, if residing in the same household at the time of death, or if dependent upon the deceased at the time of death,

Dependency ends upon death or remarriage of the surviving **spouse**;

B. any person who was dependent upon the deceased at the time of death and is:

(1.) under the age of 16 years;

(2.) physically or mentally incapacitated from earning; or

(3.) engaged full time in a formal program of academic or vocational training.

Dependency ends upon death of the **dependent survivor**.

INSURING AGREEMENTS

1. **PERSONAL INJURY PROTECTION INSURANCE COVERAGE.** We agree to pay only as set forth in the **Code** the following benefits to or for an **insured person** [or, in the case of his/her death, to or for the benefit of his/her **dependent survivor(s)**,] who suffers accidental **bodily injury** arising out of the ownership, operation, maintenance or use of a **motor vehicle** as a **motor vehicle**.

   A. **MEDICAL BENEFITS (ALLOWABLE EXPENSES).** All reasonable charges incurred for reasonably necessary products, services and accommodations for an **insured person's** care, recovery or rehabilitation.

   B. **WORK LOSS BENEFITS.** Loss of income from work the **insured person** would have performed if that person had not been injured. We will pay expenses, not to exceed the dollar limit established by the **Code**, reasonably incurred in obtaining ordinary and necessary services an **insured person** would have performed not for income but for the benefit of that person or dependents.

   C. **SURVIVORS' LOSS BENEFITS.** Contributions of tangible things of economic value that the **dependent survivor(s)** of the deceased at the time of death would have received for support. We will pay expenses, not to exceed the dollar limit established by the **Code**, reasonably incurred by these **dependent survivors** in obtaining ordinary and necessary services the deceased would have performed for their benefit.

2. **PROPERTY PROTECTION INSURANCE COVERAGE.** We agree to pay in accordance with the **Code** for **property damage** caused by accident and arising out of the ownership, operation, maintenance or use of an **insured motor vehicle** as a **motor vehicle**. The accident must happen in the State of Michigan.

EXCLUSIONS

1. **BODILY INJURY NOT COVERED.** This insurance does not apply to **bodily injury** to:

   A. any person using a **motor vehicle** or **motorcycle** taken unlawfully unless that person reasonably believes that there was permission to take and use that **motor vehicle** or **motorcycle**;

   B. any person, other than **you** or any **resident relative**, not **occupying** a **motor vehicle** if the accident occurs outside the State of Michigan;

   C. **you** while **occupying**, or through being struck by while not **occupying**, a **motor vehicle** owned or registered by **you** and which is not an **insured motor vehicle**;

   D. **you** while **occupying** or through being struck by while not **occupying** an **additional** car or **replacement** car owned or registered by **you** the acquisition of which is not reported to **us** within 30 days;

   E. a **resident relative** while **occupying**, or through being struck by while not **occupying**, a **motor vehicle**, if the **resident relative** is the owner or registrant of that **motor vehicle** and has failed to maintain security required by the **Code** on that **motor vehicle**;

   F. any person arising out of the ownership, operation, maintenance or use, including loading or unloading, of a parked **motor vehicle**, unless:

      (1.) the **motor vehicle** was parked in such a way as to cause unreasonable risk of the **bodily injury** which occurred, or

      (2.) **bodily injury** was a direct result of physical contact with

         (a.) equipment permanently mounted on the **motor vehicle** while the equipment was being operated or used, or

         (b.) property being lifted onto or lowered from the **motor vehicle** in the loading and unloading process, or

      (3.) the person was **occupying** the **motor vehicle**;

   G. any person while **occupying** a **motor vehicle** located for use as a residence or premises;

   H. any person while **occupying** a **motor vehicle** operated in the business of transporting passengers for which security is maintained as required by the **Code**, unless the **motor vehicle** is an **insured motor vehicle** or the person is a passenger in:

      (1.) a school bus;

      (2.) a bus operated as a common carrier;

      (3.) a bus operated under a government sponsored transportation program;

      (4.) a bus operated by or providing service to a non-profit organization; or

      (5.) a **motor vehicle** operated by a livery, including but not limited to a canoe or other watercraft, bicycle or horse livery, used only to transport passengers to or from a destination point; or

      (6.) a taxicab;

I. you or any resident relative while occupying a motor vehicle owned or registered by your employer or their employer for which security is maintained as required under the provisions of the Code;

J. any resident relative entitled to Personal Protection Insurance Benefits as a person named under the terms of any other policy;

K. any person, other than you or any resident relative, entitled to Personal Protection Insurance Benefits under the terms of any other policy;

L. the owner or registrant of a motor vehicle or motorcycle involved in the accident who has failed to maintain security on that motor vehicle or motorcycle as required by the Code;

M. any non-resident of this state while occupying a motor vehicle or motorcycle not registered in this state and not insured by an insurer which has filed a certification in compliance with the Code;

N. any person involved in racing or speed contest activities.

2. **BODILY INJURY AND PROPERTY DAMAGE NOT COVERED.** This insurance does not apply to bodily injury or property damage suffered intentionally or caused intentionally by a person claiming benefits.

3. **PROPERTY DAMAGE NOT COVERED.** This insurance does not apply to property damage:

A. to any vehicle and its contents, including trailers, designed for operation on a public highway by power, other than muscular power, unless the vehicle is parked so as not to cause unreasonable risk of the property damage which occurred;

B. to any property owned by you or a resident relative;

C. to the property of any person who is using the insured motor vehicle without your express or implied consent;

D. to any utility transmission lines, wires, or cables arising from the failure of a municipality, utility company, or cable television company to comply with the requirements of Michigan law;

E. to any vehicle and its contents involved in racing or speed contest activities.

LIMITS OF LIABILITY

1. **PERSONAL INJURY PROTECTION INSURANCE.** Our liability for Personal Injury Protection Insurance Benefits payable to or on behalf of any one person who sustains bodily injury in any one motor vehicle accident is limited as set out below.

A. 1. **MEDICAL BENEFITS (ALLOWABLE EXPENSES)** shall include reasonable and customary charges for semi-private hospital accommodations except when the insured person requires special care;

2. Funeral and burial expenses of not less than $1,750 nor more than $5,000 which are reasonably incurred;

3. If the Declarations Page shows Excess Medical Benefits [Excess A (med.)], you or any resident relative must first obtain benefits from any other health or accident insurance or plan prior to making a claim for benefits under this Policy. We will pay Medical Benefits in excess of any valid limitations as to amount or duration of benefits under the other plan. We will pay Medical Benefits for services or accommodations not available from the other plan or insurance only if:

a. they are reasonably necessary for the injured person's care, recovery or rehabilitation as required by the Code, and;

b. there is no provider within the other health or accident insurance or plan qualified and competent to render comparable services or accommodations.

1. **WORK LOSS BENEFITS** shall include payment for loss which occurs during the life of the insured person and within three years of the date of the accident; loss of services benefits not to exceed $20 per day, or as amended by the Code.

2. Benefits payable for loss of income from work shall be reduced by 15%. If the insured person's income tax advantage is less than 15%, the actual percentage shall apply.

3. After the application of the above limits, the combined total amount payable for Work Loss in any 30-day period and the income earned shall not exceed the maximum amount established under the Code.

4. If the Declarations Page shows Excess Work Loss Benefits [Excess B (wage)], sums paid or payable to you or any resident relative for loss of income from work shall be reduced by any amount paid or payable under any valid and collectible: individual, blanket, group accident or disability insurance; salary or wage continuation plan; Workers' Compensation Law, disability law of a similar nature, or any other state or federal law.

B. 1. **SURVIVORS' LOSS BENEFITS** shall include payment for loss which occurs after the death of the insured person and within three years of the date of the accident; loss of services benefits not to exceed $20 per day, or as amended by the Code.

2. After the application of the above limits, the combined total amount payable in any 30-day period for Survivors' Loss shall not exceed the maximum amount established under the Code.

2. **GOVERNMENTAL BENEFITS SET-OFF.** From the benefits otherwise payable under this coverage, we will subtract benefits provided or required to be provided under any Workers' Compensation Law, disability benefits law of a similar nature or any other state or federal law. It is **your** obligation to apply for and reasonably pursue any benefits provided or required to be provided by the above laws.

3. **PROPERTY PROTECTION INSURANCE.** Regardless of vehicles insured or policies held, the Limit of our Liability under this coverage for all **property damage** from one accident is $1,000,000. Payment is limited to the lesser of reasonable repair costs less depreciation and, where applicable, the value of loss of use.

OTHER INSURANCE

1. **PERSONAL INJURY PROTECTION INSURANCE.**
   A. An **insured person** shall recover under all applicable policies no more than the amount payable under the policy providing the highest dollar limit.
   B. If the accident causing injury occurs outside Michigan, this insurance shall be excess over that provided under No-Fault Automobile Insurance Laws of any other **state**.
   C. Under no circumstances may an **insured person** recover duplicate similar benefits payable under the **Code**.
   D. An **insured person**, occupying a **motorcycle**, who sustains **bodily injury** in an accident involving a **motor vehicle** shall claim Personal Injury Protection Insurance Benefits from insurers in the following order of priority:
      (1.) the insurer of the owner or registrant of the **motor vehicle** involved in the accident;
      (2.) the insurer of the operator of the **motor vehicle** involved in the accident;
      (3.) the **motor vehicle** insurer of the operator of the **motorcycle** involved in the accident;
      (4.) the **motor vehicle** insurer of the owner or registrant of the **motorcycle** involved in the accident.

2. **PERSONAL INJURY PROTECTION INSURANCE AND PROPERTY PROTECTION INSURANCE.**
   A. If two or more insurers are in the same order of priority, the insurer paying benefits is entitled to a pro-rata payment from the other insurer(s) including a pro-rata amount of expenses incurred.
   B. If we are in the same order of priority with other insurer(s), our obligation to
      (1.) pay benefits, or
      (2.) make reimbursement to other insurer(s),
      shall be prorated on the basis of the number of insurers in the same order of priority rather than the number of policies in the same order of priority.

REIMBURSEMENT AND TRUST AGREEMENT

1. In the event of payment to any person under Personal Injury Protection Insurance and Property Protection Insurance:
   A. we shall be entitled (to the extent of that payment) to the proceeds of any settlement or judgment from the exercise of any right of recovery of that person against any person or organization legally responsible for the **bodily injury** or **property damage**. We shall have a lien to the extent of its payment;
   B. that person shall:
      (1.) hold in trust for our benefit all rights of recovery;
      (2.) do nothing after loss to prejudice any rights of recovery;
      (3.) execute and deliver to **us** any papers necessary to secure the rights and obligations as established by this provision.

ARBITRATION

1. If we do not agree with the **insured person(s)** that they are entitled to receive any benefits under this Part (No-Fault Insurance Coverages), then the **insured person(s)** and we may agree in writing that the issues, excluding matters of coverage, be determined by arbitration.
2. We and the **insured person(s)** will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.
3. The **insured person(s)** will pay the arbitrator they select. We will pay the arbitrator we select. The expenses of the third arbitrator will be shared equally. Fees paid to medical or other expert witnesses are to be borne by the party which incurs the expense.
4. Unless it is agreed otherwise, arbitration will be conducted in the county in which the **insured person** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan.
5. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the hearing shall be conducted in the county in which we maintain our principal place of business. The arbitration proceeding will be in accordance with the usual rules governing procedure and admission of evidence in courts of law. The written decision of any two arbitrators will be binding.
6. All rights, remedies, obligations and limitations of the **Code** will apply.

PART III - UNINSURED MOTORIST INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s)** means:
   A. **You**, if an individual, and
   B. any **resident relative**.

   Person(s) shall not be considered **insured person(s)** if they use a **motor vehicle** without having a reasonable belief that the use is with the permission of someone having the right to grant it.
2. **Motor Vehicle** means a land motor vehicle or **trailer**, requiring vehicle registration, but does not mean:
   A. a vehicle used as a residence or premises;
   B. a vehicle, whether the accident occurs on or off the highway, which is:
      (1.) a snowmobile; or
      (2.) operated on rails or crawler treads, or a farm-type tractor; or
      (3.) designed for use principally off the highway; or
      (4.) equipment designed for use principally off the highway.
3. **Uninsured Motor Vehicle** means a **motor vehicle** which is:
   A. not insured by a **bodily injury** liability policy or bond that is applicable at the time of the accident;
   B. a hit-and-run **motor vehicle** of which the operator and owner are unknown and which negligently makes physical contact with
      (1.) **you** or a **resident relative**, or
      (2.) a **motor vehicle** which an **insured person** is **occupying**;

      and which the accident has been reported within 24 hours to the police.
   C. insured by a **bodily injury** liability policy or bond at the time of the accident issued by a company that is or becomes insolvent.
4. **Uninsured Motor Vehicle** does not include a **motor vehicle**:
   A. owned by **you** or any resident of **your** household;
   B. furnished or available for the frequent or regular use of **you** or any resident of **your** household;
   C. self-insured within the meaning of any Financial Responsibility Law, Motor Carrier Law or similar law of any **state** in which it is registered;
   D. owned by any governmental unit or agency.
   E. operated on rails or crawler treds.
   F. designated mainly for use off public roads while not on public roads.
   G. while located for use as a residence premise.

INSURING AGREEMENT

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay damages for **bodily injury** which is:
   A. sustained by an **insured person**;
   B. is caused by accident; and
   C. arises out of the ownership, operation, maintenance or use of an **uninsured motor vehicle**;
   D. results in death, serious impairment of body function or permanent serious disfigurement; and
   E. an **insured** is legally entitled to recover as a proximate cause of the negligence of the owner or operator of an **uninsured motor vehicle**.
2. We will pay under this coverage only if the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgment or settlements; or
3. We will not be bound by the acts of the **named insured** or anyone acting on his or her behalf in obtaining a legal judgment or entering into a settlement agreement or by any other means, that prejudices our ability to contest by arbitration or trial in accordance with the provisions of this policy:
   A. whether a **named insured** is legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle**.
   B. the amount of damages to which a **named insured** is legally entitled.
4. The **named insured** may not settle with anyone responsible for the accident without our written consent. We shall be obligated to respond within thirty (30) days of receiving a **named insureds** written request to settle. If we fail to respond within the 30-day period, the consent provision shall be waived.

For purposes of this Part, serious impairment of body function means an objectively manifested injury to an important body function which substantially affects an **insured person's** general ability to lead a normal life.

EXCLUSIONS

1. This coverage does not apply to **bodily injury** sustained by an **insured person**:
   A. while **occupying** a **motor vehicle** which is owned by an **insured person** which is not insured for this coverage under this policy. This includes a **trailer** of any type used with that vehicle.;
   B. while **occupying** a **motor vehicle** which provides the same or similar coverage for an **insured person**;
   C. while **occupying**, or through being struck by while not **occupying**, any vehicle other than a **motor vehicle**;

D. while **occupying a motor vehicle** furnished by an **insured person's** employer and operated in the course of that **insured person's** employment unless the **motor vehicle** is **your car**;

E. if the **named insured** or their legal representative settles or prosecutes to judgment their **bodily injury** claim with the owner, operator or other person or organization legally responsible for an **uninsured motor vehicle** without our written consent. This exclusion does not apply if the insured person makes a written request for our consent, and we fail to respond within 30 days of receipt of the written request.

F. which is caused intentionally by or at the direction of another person;

G. while **occupying your car** when it is being used as a public or livery conveyance. This exclusion does not apply to a share-the-expense car pool or to the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.

H. while **occupying** an **additional car** or **replacement car** the acquisition of which has not been reported to us within 30 days.

I. arising out of the participation in any prearranged, organized or spontaneous racing or speed contest or use of a track or course designed for racing or high performance driving.

2. Uninsured Motorist Coverage shall not apply to the benefit of an insurer or self-insurer under any Workers' Compensation or disability benefits law, or law providing for direct benefits without regard to fault, or any similar law.

LIMITS OF LIABILITY

1. We, under any circumstances, will not pay more than the maximums shown on the Declarations Page:

   A. For **bodily injury** sustained by one **insured person** in one accident. This limit also includes all claims for derivative damage allowed under the law.

   B. For damages for **bodily injury** sustained by two or more **insured persons** in one accident. This limit also includes all claims for derivative damages allowable under the law.

   C. Regardless of the number of:

   (1.) **Insured persons**;

   (2.) Claims made;

   (3.) Vehicles or premiums shown in the Declarations; or

   (4.) Vehicles involved in the auto accident.

2. The Limit of Liability for Uninsured Motorist Coverage shown on the Declarations Page shall be reduced by:

   A. payment made by the owner or operator of the **uninsured motor vehicle** or organization which may be legally liable;

   B. payment under the Liability Insurance or Uninsured Motorist Coverage of this or any other policy for the same **bodily injury**;

   C. payment made under any Medical Payments Coverage, Health and Accident Coverage, or Personal Injury Protection Coverage of this or any other policy and in the absence of which payment would be required by the **Code**;

   D. the comparative negligence of the **insured person**.

   Items B. and C. above do not apply unless paid Liability and Medical Payments benefits cover the same elements of loss for which the **named insured** would receive Uninsured Motorist benefits.

3. Any amount payable will be excess over payment made or amount payable under any Workers' Compensation or disability benefits law, the **Code** or other law providing for direct benefits without regard to fault, or similar law.

4. Coverage from this Part does not apply to punitive damages, exemplary damages, or statutorily imposed treble or multiplied damages.

OTHER INSURANCE

If there is Uninsured Motorist Coverage with us or any other insurer for a loss covered by this Part, then for purposes of this coverage, damages shall be limited to the maximum amount shown on the Declarations Page for any one **insured person** and/or for two or more **insured persons**. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle the **insured person** does not own shall be excess over any other valid or collectible insurance.

ARBITRATION

1. If we do not agree with the **insured person(s)**:

   A. that they are legally entitled to recover damages from the owner or operator of an **uninsured motor vehicle**; or

   B. as to the amount of payment;

   either they or we must demand, in writing, that the issues, excluding matters of coverage, be determined by arbitration. A Demand for Arbitration must be filed within three years from the date of the accident or we will not pay damages under this Part. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, whether or not a **motor vehicle** is an **uninsured motor vehicle** or the timeliness of a Demand for Arbitration, are not subject to arbitration and suit must be filed within three years from the date of the accident.

2. If arbitration occurs, we and the insured person will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.

3. The **insured person(s)** will pay their arbitrator. We will pay **ours**. The expenses of the third arbitrator will be shared equally. Attorneys' fees and fees paid to medical or other expert witnesses are to be borne by the party which incurs them.
4. Arbitration, unless otherwise agreed, shall be conducted in the county in which the **insured person(s)** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the hearing shall be conducted in the county in which we maintain our principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law.
5. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.

PART IV - UNDERINSURED MOTORIST INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s):**
   A. You, if an individual, and
   B. any **resident relative.**

   Person(s) shall not be considered **insured person(s)** if they use a **car** without having a reasonable belief that the use is with the permission of someone having the right to grant it.
2. **Motor Vehicle** means a land motor vehicle or trailer, requiring vehicle registration, but does not mean:
   A. a vehicle used as a residence or premises;
   B. a vehicle, whether the accident occurs on or off the highway, which is:
      (1.) a snowmobile; or
      (2.) operated on rails or crawler treads, or a farm-type tractor; or
      (3.) designed for use principally off the highway; or
      (4.) equipment designed for use principally off the highway.
3. An **underinsured motor vehicle** is:
   A. a **motor vehicle** which has **bodily injury liability** protection in effect and applicable at the time of the accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of Michigan, but less than the limits of liability for Underinsured Motorists Coverage shown on the Declarations page; and
   B. in which the limits of liability are less than the amount of damages the **insured person** is legally entitled to recover for **bodily injury.**

However, **underinsured motor vehicle** does not include a **motor vehicle:**

1. owned by or furnished or available for regular use to **you** or anyone living with **you;**
2. owned or operated by a self-insurer under any **motor vehicle** law;
3. owned by any governmental unit or agency;
4. located for use as a residence or premises;
5. operated on rails or crawler treads;
6. that is designed for use primarily off public roads; or
7. that is an **uninsured motor vehicle.** As defined under Part III - Uninsured Motorist Insurance of this policy.

INSURING AGREEMENT

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay compensatory damages which an **insured person** is legally entitled to recover as a proximate cause of the negligence of the owner or operator of an **underinsured motor vehicle** because of **bodily injury** which is:
   a. sustained by an **insured person;**
   b. is caused by accident; and
   c. arises out of the ownership, operation, maintenance or use of an **underinsured motor vehicle;** and
   d. results in death, serious impairment of body function or permanent serious disfigurement.
2. We will pay under this coverage only if:
   A. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgment or settlements; or
   B. A tentative settlement has been made between an **insured person** and the insurer of the **underinsured motor vehicle** and **we:**
      (1.) Have been given prompt written notice of such tentative settlement; and
      (2.) Advance payment to the **insured person** in an amount equal to the tentative settlement within 30 days after receipt of the notification.
3. We will not be bound by the acts of the named insured or anyone acting on his or her behalf in obtaining a legal judgment or entering into a settlement agreement or by any other means, that prejudices **our** ability to contest by arbitration or trial in accordance with the provisions of this policy:
   A. whether a named **insured** is legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle.**
   B. the amount of damages to which a named **insured** is legally entitled.
4. The named insured may not settle with anyone responsible for the accident without **our** written consent.

We shall be obligated to respond within thirty (30) days of receiving a **named insureds** written request to settle. If we fail to respond within the 30-day period, the consent provision shall be waived.

EXCLUSIONS

BODILY INJURY NOT COVERED

1. We do not provide Underinsured Motorists Coverage for **bodily injury** sustained:
   A. By an **insured person** while **occupying**, or when struck by, any **car** owned by an **insured person** which is not insured for this coverage under this policy. This includes a **trailer** of any type used with that vehicle.
   B. By any **resident relative** while **occupying**, or when struck by, any **car** owned by an **insured person** which is insured for this coverage on a primary basis under any other policy.
2. We do not provide Underinsured Motorists Coverage for **bodily injury** sustained by any **insured person**:
   A. If that **insured person** or their legal representative settles the **bodily injury** claim without our knowledge and written consent.
   B. While **occupying your insured car** when it is being used a public or livery conveyance. This exclusion does not apply to a share-the-expense car pool or the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.
   C. Using a vehicle without a reasonable belief that the **insured person** has permission to do so.
   D. While **occupying** or operating an owned motorcycle or moped.
   E. While **occupying a motor vehicle** which is owned by **you** or a **resident relative** unless that **motor vehicle** is **your car**;
   F. While **occupying**, or through being struck by while not **occupying**, any vehicle other than a **motor vehicle**;
   G. While **occupying a motor vehicle** furnished by an **insured person's** employer and operated in the course of that **insured person's** employment unless the **motor vehicle** is **your car**;
   H. If **you** or **your** legal representative settles or prosecutes to judgment **your bodily injury** claim with the owner, operator or other person or organization legally responsible for an **underinsured motor vehicle** without **our** written consent. This exclusion does not apply if you make a written request for our consent, and we fail to respond within 30 days of receipt of the written request;
   I. Which is caused intentionally by or at the direction of another person;
   J. While **occupying** an **additional car** or **replacement car** the acquisition of which has not been reported to us within 30 days.
   K. while **occupying a motor vehicle** which provides the same or similar coverage for **an insured person**;
3. We do not provide Underinsured Motorists Coverage for punitive or exemplary damages.

LIMITS OF LIABILITY

1. We, under any circumstances, will not pay more than the maximums shown on the Declarations Page:
   A. For **bodily injury** sustained by one **insured person** in one accident. This limit also includes all claims for derivative damage allowed under the law.
   B. For damages for **bodily injury** sustained by two or more **insured persons** in one accident. This limit also includes all claims for derivative damages allowable under the law.
   C. Regardless of the number of:
      (1.) **Insured persons**;
      (2.) Claims made;
      (3.) Vehicles or premiums shown in the Declarations; or
      (4.) Vehicles involved in the auto accident.
2. The Limit of Liability for Underinsured Motorist Coverage shown on the Declarations Page shall be reduced by:
   A. payment made by the owner or operator of the **underinsured motor vehicle** or organization which may be legally liable;
   B. payment under the Liability Insurance or Underinsured Motorist Coverage of this or any other policy for the same **bodily injury**;
   C. payment made under any Medical Payments Coverage, Health and Accident Coverage, or Personal Injury Protection Coverage of this or any other policy and in the absence of which payment would be required by the **Code**;
   D. the comparative negligence of the **insured person.**

   Items B. and C. above do not apply unless paid Liability and Medical Payments benefits cover the same elements of loss for which the **named insured** would receive Underinsured Motorist benefits.
3. Underinsured Motorists Coverage shall be reduced by the sum of the limits of liability under all bodily injury bonds or policies, other than this policy, applicable at the time of the accident.
4. If none of **your insured cars** are involved in the accident, Underinsured Motorists Coverage is available to the extent of coverage of any one of your **insured cars**. Coverage on any other of **your insured cars** shall not be added to that coverage.
5. No one will be entitled to receive duplicate payments for the same elements of **bodily injury** under this coverage and Part I, Part II or Part III of this policy.
6. We will not make a duplicate payment under this coverage for any element of **bodily injury** for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

7. We will not pay for any element of **bodily injury** if a person is entitled to receive payment for the same element of **bodily injury** under any of the following or similar law:
   A. Workers' Compensation law; or
   B. Disability benefits law.
8. Any amount payable will be excess over payment made or amount payable under any Workers' Compensation or disability benefits law, the **Code** or other law providing for direct benefits without regard to fault, or similar law.

OTHER INSURANCE

If there is Underinsured Motorist Coverage with us or any other insurer for a **bodily injury** covered by this Part, then for purposes of this coverage, damages shall be limited to the maximum amount shown on the Declarations Page for any one **insured person** and/or for two or more **insured persons. Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle the **insured person** does not own shall be excess over any other valid or collectible insurance.

ARBITRATION

1. If we do not agree with the **insured person(s)**:
   A. that they are legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle**; or
   B. as to the amount of payment;

   either they or we must demand, in writing, that the issues, excluding matters of coverage, be determined by arbitration. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, whether or not a car is an **underinsured car** or the timeliness of a Demand for Arbitration, are not subject to arbitration and suit must be filed within three years from the date of the accident.
2. If arbitration occurs, we and the **insured person** will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.
3. The **insured person(s)** will pay their arbitrator. We will pay **ours**. The expenses of the third arbitrator will be shared equally. Attorneys' fees and fees paid to medical or other expert witnesses are to be borne by the party which incurs them.
4. Arbitration, unless otherwise agreed, shall be conducted in the county in which the **insured person(s)** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the hearing shall be conducted in the county in which we maintain **our** principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law.
5. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.
6. For damages caused by an **underinsured motor vehicle**:
   A. the decision agreed to in writing by two of the arbitrators will be binding if the amount of damages determined by the arbitrators does not exceed $50,000 for **bodily injury** to any one person or $100,000 for **bodily injury** to two or more persons in any one motor vehicle accident. Judgment upon the award rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.
   B. if the amount exceeds $50,000 for **bodily injury** to any one person or $100,000 for **bodily injury** to two or more persons then the decision of the arbitrators will not be binding and either party may demand the right to a trial, unless the parties agree otherwise by prior written agreement.

   Trial shall be on all issues of the arbitrators' decision. This demand must be made within 60 days of the arbitrators' decision and suit filed in the court of proper jurisdiction within 120 days of the arbitrators' decision. If this demand is not timely made or if suit is not timely filed, the decision of the arbitrators' will be binding. Judgment upon any binding award rendered by the arbitrators may be entered in the Circuit Court in the county in which arbitration was filed.

PART V - CAR DAMAGE INSURANCE COVERAGES

A coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s)** means:
   A. For use of **your car**, which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a temporary **substitute car**, an **additional car** and a **trailer** owned by you:
      (1.) **You**;
      (2.) **your resident relatives**;
      (3.) any other person, other than a carrier or bailee for hire, using it with **your** permission;
   B. For **other cars**, (which is any car that **you** or any **resident relative** do not own, do not lease for 31 days or more, or do not have furnished or available for frequent or regular use) used with the permission of a person having the right to grant it and if **your car** is a private passenger car:
      (1.) **you**, if an individual;
      (2.) any **resident relative** who does not own a private passenger car.
2. **Collision** means impact of an **insured car** with an object other than a bird or animal or upset of an **insured car**.
3. **Comprehensive loss** means loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, colliding or contact with a bird or animal, operation of car-wash equipment or breakage of glass. If breakage of glass occurs together with other **loss** due to a **collision**, you may elect to have it treated as **loss** caused by **collision**.
4. **Diminution in Value** means the actual or perceived reduction in market or resale value which results from a direct and accidental **loss**.
5. **Loss** means direct and sudden accidental physical damage to or theft of the **insured car**, including its **equipment**. **Loss** does not include consequential damages such as **diminution in value** of the **insured car** but does include loss of use of:
   A. A **temporary substitute car**; or
   B. An **other car**;
   that you rent from an agency or company on a daily or weekly basis.
6. **Equipment** means **equipment** that is permanently **attached** by the manufacturer or dealer and appears on the new or used car purchase invoice. It also includes, while in the car, two tapes or two discs or two cassettes or two records used with a device for the recording or reproduction of sound.
7. **Substantially at Fault** means a person's action or inaction was 51 percent or more the cause of the accident.

COMPREHENSIVE COVERAGE

1. We will pay for **loss** caused by **comprehensive loss**, to an **insured car** less any deductible amount shown on the Declarations Page.
2. If there is a total theft of **your car**, and it is a private passenger **car**, we will pay up to $20 per day, but no more than $600, for the cost of transportation incurred by **you**. Payment begins 24 hours after the theft has been reported to us and the police and ends when **your car** is returned to use or when we tender or pay the **loss**. The amount to be paid for the cost of transportation is in addition to the Limit of Liability for the direct **loss** to **your car**. Payment for the cost of transportation may not exceed either the amount incurred or the actual cash value of **your car**, whichever is less.
3. We will pay up to $50 for the expense you incur for locksmith service if **your car's** ignition key is lost, stolen, or locked in the **insured car**
4. If you have a loss on school property or during a school event at the location the event is taking place, and have comprehensive coverage, the deductible will be reduced to $25.

COLLISION COVERAGES

1. **LIMITED COLLISION COVERAGE**
   Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay for **loss** caused by **collision** to an **insured car** when the operator of that **car** is not **substantially at fault** in the accident from which the damage arose.
2. **STANDARD COLLISION COVERAGE**
   Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay for **loss** caused by **collision** to an **insured car** less the deductible amount shown on the Declarations Page regardless of fault.
3. **BROAD COLLISION COVERAGE**
   Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay for **loss** caused by **collision** to an **insured car** less the deductible amount shown on the Declarations Page. You will not have to pay the deductible if your car:
   A. Is a private passenger car and it is in a **collision** with another car described separately on the Declarations Page of this Policy or another policy issued by us; or
   B. Is in a **collision** and the operator of your car is not **substantially at fault** in the accident from which the damage arose.

4. **Pet Injury Protection**
   A. We will pay up to $500 if **your pet** sustains injury or death as a result of loss caused by collision to the **insured car** and a the time of the accident:
      (1.) Limited, Basic or Broad Collision Coverage applies to a private passenger car insured under this policy; and
      (2.) **your pet** is inside the **insured car.**

   B. If as a result of a covered accident:
      (1.) **your pet** is injured, we will pay for reasonable and customary costs incurred by **you** or a **resident relative** for veterinary fees including medications and procedures prescribed by **your pet's** veterinarian for treatment of such covered injuries;
      (2.) **your pet** dies, we will pay the cost to replace the deceased dog or cat with one of like kind and quality.

   C. In any event, the most we will pay as a result of any one accident is a total of $500 regardless of the number of dogs or cats that are injured or die in the accident.

CAR RENTAL AND TRAVEL EXPENSE COVERAGE

1. Car Rental Expense
   A. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay up to the daily limit shown on the Declarations Page for rental by **you** of a **temporary substitute car** for a period of up to 30 days. This applies when **your car** (if a private passenger car)
      (1.) is withdrawn from service for more than 24 hours because of **loss**, other than by total theft, covered under this Part; and
      (2.) if Car Rental Coverage is in effect at the time of that **loss**; and
      (3.) the amount of the loss exceeds the deductible.

   B. If you are entitled to coverage for a loss by total theft of **your car**, the amount provided under Comprehensive Coverage for the cost of transportation will be that shown on the Declarations Page for Car Rental Coverage.

   C. Coverage will begin 24 hours after the total theft has been reported to **us** and the police, and will continue for a total time period of up to 30 days.

   D. Car Rental Coverage payment stops when:
      (1.) **your car** has been replaced, repaired if damaged, or returned to **you** if undamaged; or
      (2.) settlement for the total **loss** of **your car** has been made or tendered; or
      (3.) the limits of this coverage have been exhausted.

   E. In no event will payment under Car Rental Coverage exceed either the
      (1.) actual cash value of **your car**; or
      (2.) the amount incurred for car rental, whichever is less.

2. Travel Expense
   A. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay up to $400.00 for Travel Expenses incurred by **you** or a **resident relative** if **your car** is not drivable due to a **loss** which occurs more than 100 miles from home and which is payable under **your** comprehensive or collision coverages and Car Rental and Travel Expense Coverage is listed on the declarations page for the **insured car** involved on the **loss**. We will pay for expenses incurred by **you** or any **resident relative** for:
      (1.) Commercial transportation fares, excluding car rental, to continue to **your** destination or home;
      (2.) Extra meals and lodging needed when the **loss** to **your car** causes a delay enroute. The expenses must be incurred between the time of the **loss** and **your** arrival at **your** destination or home or by the end of the fifth day, whichever occurs first; and
      (3.) Meals, lodging and commercial transportation fares, excluding car rental, incurred by **you** or a person **you** choose to drive **your car** from the place of repair to **your** destination or home.

SPECIAL EQUIPMENT COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, when a **comprehensive** or **collision** coverage is applicable to a **loss**, we will pay not more than $1,000.00 for **special equipment** designed for use in a car and in or on **your car** at the time of the **loss**. Our liability under this coverage shall not exceed $1,000.00 unless you purchase Total **Special Equipment** Coverage described below. The deductible amount shown on the Declarations Page under the applicable **comprehensive** or **collision** coverage will be applied to the **loss**.
2. Coverage for **special equipment** shall not cause our Limit of Liability for loss to **your car** under Part V of the policy to be increased to an amount in excess of the actual cash value of **your car**.
3. **You** will be required to maintain and present proof of purchase, to include, but not limited to an original purchase receipt, and proper installation of the **special equipment** covered under the Policy as proof of **loss** for any claim under this coverage.

TOTAL SPECIAL EQUIPMENT COVERAGE

1. If **you** have purchased additional coverage on **special equipment**, the total amount of **special equipment** coverage is shown on the Declarations Page. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, we will pay for **loss** to **special equipment** that is designed for use in a **car** and is in or on **your car** at the time of the **loss** when **your car** is identified on the Declarations Page as having total special equipment coverage and the **special equipment** is endorsed onto the Policy. The deductible amount shown on the Declarations Page under the applicable **comprehensive** or **collision** coverage will

be applied to the loss. Our total liability for special equipment shall not exceed the amount indicated on the Declarations Page.

2. Additional coverage for special equipment shall not cause our limit of liability for loss to your car under Part V of the Policy to be increased to an amount in excess of the actual cash value of your car.
3. You will be required to maintain and present proof of purchase, to include, but not limited to an original purchase receipt, and proper installation of the special equipment covered under the policy as proof of loss for any claim under this coverage.

ROAD SERVICE/TOWING COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, we will pay the reasonable cost incurred by you, up to the Limit identified on the Declarations Page, for your car for:
   A. mechanical labor up to one hour at the place of its breakdown;
   B. towing to the nearest place where the necessary repairs can be made during regular business hours if it will not run;
   C. towing it out if it is stuck on or immediately next to a public highway;
   D. delivery of gas, oil, loaned battery, or change of tire.

We will not pay such expenses unless submitted within a reasonable time period after they are incurred.

EXCLUSIONS
LOSSES NOT COVERED

1. We will not pay for loss:
   A. to an other car that is not a private passenger car or trailer; such as a rental truck or U-Haul type vehicle.
   B. to an other car while used in the car business;
   C. caused by war or radioactive contamination, discharge of a nuclear weapon (even if accidental), or any consequence of them;
   D. to tires, unless stolen, damaged by fire or vandalism or the damage happens along with other covered loss to the insured car;
   E. limited to wear and tear, freezing, mechanical or electrical breakdown or failure unless the damage results from the total theft of the insured car;
   F. to an office, store, display or passenger trailer that is not described on the Declarations Page;
   G. to an insured car while operated in any:
      (1.) race;
      (2.) hill climb
      (3.) demonstration;
      (4.) speed contest;
      (5.) stunting contest; or
      (6.) performance contest.
   H. to a house trailer owned by an insured person, and not described on the Declarations Page;
   I. to any other type trailer, cap or camper unit body, owned by an insured person, that is not described on the Declarations Page and not attached to a vehicle specifically described on the Declarations Page at the time of loss;
   J. in excess of $1,000 to any other type utility trailer owned by an insured person, that is not described on the Declarations Page when attached to a vehicle specifically described on the Declarations Page;
   K. to any commercial trailer;
   L. to any non-owned private utility trailer;
   M. to your personal watercraft trailer if covered by any other policy issued by us. However, we will pay up to $1,000 for your personal watercraft trailer that is not described on the Declarations Page of any policy issued by us;
   N. to any vehicle contents;
   O. to a replacement car or additional car, the acquisition of which has not been reported to us within 30 days;
   P. if you assume liability by contract or agreement;
   Q. to an other car or temporary substitute car when the insured person is not covered by any other insurance that applies unless the insured person is legally obligated to pay for the loss;
   R. to any radar detection device;
   S. to equipment unless that equipment is permanently attached to the insured car in or on an area of the insured car normally used by the car manufacturer for the installation of equipment of that type;
   T. resulting from seizure, or confiscation or forfeiture of any insured car by, or surrender of an insured car to, any:
      (1.) legally constituted authority; or law enforcement agent, official, officer, department or bureau.
      (2.) lienholder, subrogee, assignee, or person with a superior right of ownership or possession;
      if upon acquisition of the car you knew or should have known that the car had likely been stolen or wrongfully taken away from its rightful owner or possessor;
   U. to any vehicle being used as a taxi;
   V. which is caused intentionally by a titleholder or lessee of that car;
   W. to an insured car due to diminution in value.
   X. to an insured car and its equipment while you or any resident relative or anyone driving with express or implied permission from you or a resident relative:
      (1.) is using your insured car in any unlawful activity (other than a traffic violation), illicit trade or transportation; or
      (2.) using or operating your insured car in an attempt to flee a law enforcement agent; and

(3.) such person is a willing participant in such activity listed in (1.) or (2.) above.

LIMITS OF LIABILITY

1. Our Limit of Liability for loss shall not exceed the lesser of:
   A. the actual cash value of the stolen or damaged property, an adjustment for depreciation, physical condition and obsolescence will be made in determining actual cash value at the time of loss; or
   B. the amount necessary to repair or replace the property with other property of like kind and quality; or
      (1.) we have the right to choose one of the following to determine the cost to repair the insured car:
         (a.) the cost agreed to by both the owner of the insured car and us;
         (b.) a bid or repair estimate approved by us; or
         (c.) a repair estimate that is written based upon or adjusted to:
            (i) the prevailing competitive price;
            (ii) the lower of paintless dent repair pricing established by an agreement we have with a third party or the paintless dent repair price that is competitive in the market; or
            (iii) a combination of (i) and (ii) above.

      The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. If asked, we will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition.

      You agree with us that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

      You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.
   C. for Total Special Equipment Coverage, the amount shown on the Declarations Page.
2. A car with a trailer attached is considered separate cars, including any deductibles in Part V.

NO BENEFIT TO BAILEE

Car Damage Insurance Coverages shall not directly or indirectly benefit any carrier or other bailee for hire liable for loss to an insured car.

OTHER INSURANCE

If you have other insurance against a loss covered by this Part of the Policy (Part V), we shall not be liable under this Policy for a greater proportion of such loss than the applicable Limit of Liability of this Policy bears to the total applicable Limit of Liability of all valid and collectible insurance against such a loss; provided, however, the insurance with respect to a temporary substitute car or other car shall be excess insurance over any other valid and collectible insurance. If the insured car is damaged by collision while parked so as not to cause unreasonable risk, subject to the applicable deductible as shown on the Declarations Page, we will pay for damage not recovered under the provisions for Property Protection Insurance described in the Code. We will have recovery rights under General Condition 5.

DEFENSE

If suit is brought against any insured person for damage to the property of another for a loss which would be covered under this Part, we will provide the same defense and Additional Payments as is provided by the Liability Insurance Coverage Part of this Policy.

APPRAISAL AND ARBITRATION

If there is a disagreement as to the amount of the loss, either you or we must demand Appraisal of the loss within 60 days after the proof of loss is filed. In such event, you and we shall each select and pay a competent and disinterested appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss, and failing to agree, shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. You and we shall each bear equally the other expenses of the Appraisal and of the umpire. We shall not be held to have waived any of our rights by any act relating to Appraisal.

If there is a disagreement between us and you as to whether the operator of your car was substantially at fault, you or we shall demand in writing that the matters be settled by arbitration. Disagreements concerning insurance coverage or the insurance afforded by this coverage are not subject to arbitration except by express written consent of both parties. You and we will each select an arbitrator. The two arbitrators will select a third arbitrator. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third. You will pay the arbitrator you select. We will pay the arbitrator we select. The expenses of the third arbitrator shall be shared equally. Fees paid to expert witnesses are to be borne by the party which incurs the expense. Unless it is agreed otherwise, arbitration will be conducted in the county where the accident occurred. However, in the event that the accident occurred outside of the State of Michigan, the arbitration shall be conducted in the county in which we have our principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.

PAYMENT OF LOSS

We may, at our option, pay for the loss in money, or by repairing or replacing the damaged or stolen property. We may, at any time before the loss is paid or the property replaced, return at our expense, any stolen property either to you or to the address shown on the Declarations Page. We may keep all or part of the property replaced, return at our expense, any stolen property either to you or to the address shown on the Declarations Page.

We may keep all or part of the property at the agreed or appraised value. The property may not be abandoned to us. If the insured car is stolen, and has not been recovered, payment will not be made before 30 days from the time notice of the theft has been given to us and to the police.

PART VI - ADDITIONAL CAR OPTION

The Definitions found on Page 3 also apply to this Part.

We grant an option to the Named Insured to purchase insurance under this policy for an additional car effective on the date of its acquisition if we insure all cars owned by the Named Insured.

Exercise of this option must be made within 30 days of the acquisition of the additional car. No coverage is provided under this Policy for an additional car the acquisition of which is not reported to us within 30 days. The election to exercise this option must be made under this and no other policy. The Additional Car Option shall expire at 12:01 a.m. on the 31st day after acquisition of the additional car.

If the Named Insured elects to exercise the Additional Car Option, we will provide Liability Insurance Coverages, Michigan No-Fault Insurance Coverages, Uninsured Motorist Coverages and Underinsured Motorist Coverages for the additional car identical to those coverages described on the Declarations Page for 30 days after acquisition (but in no case beyond 30 days of acquisition).

If the Named Insured elects to exercise the Additional Car Option for a vehicle four or less years old, as determined by the vehicle title, we will provide Car Damage Coverages equal to the car on the Declarations Page with the greatest level of Car Damage Coverage from the date of acquisition to the date the Named Insured notifies us of the additional car (but in no case beyond 30 days of acquisition). After the date on which the Named Insured notifies us of an additional car (but in no case beyond 30 days of acquisition) the Named Insured must designate to us one of the cars described on the Declarations Page and the Car Damage Coverages provided for that car shall serve as the basis for the selection of coverages and Limits of Liability for the additional car insurance. The Named Insured may not select coverages with limits in excess of those effective for the designated car.

If the Named Insured elects to exercise the Additional Car Option for a vehicle greater than four years of age, as determined by the vehicle title, we will not provide Car Damage Coverages from the date of acquisition to the date that the Named Insured notifies us of the additional car. After the date on which the Named Insured notifies us of an additional car (but in no case beyond 30 days of acquisition) the Named Insured must designate to us one of the cars described on the Declarations Page and the Insurance provided for that car shall serve as the basis for the selection of coverages and Limits of Liability for the additional car insurance. The Named Insured may not select coverages with limits in excess of those effective for the designated car.

If insurance under this Policy is issued under the Additional Car Option, coverage shall be excess over any other valid and collectible insurance.

PART VII - ADDITIONAL INSURED - TITLEHOLDER OR LESSEE

The Definitions found on Page 3 also apply to this Part.

Liability and Car Damage Insurance Coverages provided by this Policy for your car also apply to the titleholder or lessee named on the Declarations Page as an additional insured. In addition to the Definitions, Exclusions, Conditions and Limits of Liability found in the Liability and Car Damage Insurance Coverages, this insurance is subject to the following additional provisions:

1. we will pay damages for which the titleholder or lessee is legally liable only if the damage arises out of the ownership, maintenance or use of your car by you, a resident relative or any other person using your car with your permission;
2. Michigan No-Fault Insurance Coverages - Personal Injury Protection and Property Protection do not apply to the titleholder or lessee as an additional insured;
3. if we cancel or decline to renew the Policy or the Named Insured declines our offer to renew the Policy, we will mail notice of cancellation or non-renewal to the additional insured at the address shown on the Declarations Page;
4. the additional insured is not responsible for payment of premiums;
5. the description of the titleholder or lessee as an additional insured shall not increase our Limit of Liability.

GENERAL POLICY CONDITIONS APPLYING TO ALL PARTS OF THIS POLICY

The Definitions found on Page 3 also apply to this Part.

1. **POLICY TERM, TERRITORY, USE**

This Policy applies only to occurrences, accidents and losses during the Policy Term shown on the Declarations Page. The territory includes the states; Property Protection Insurance applies only in the State of Michigan. The insured car must be used for the purpose stated in the application for this Policy.

2. **CONFORMITY WITH STATUTES**

If the law of any state requires a non-resident to maintain car insurance greater than the insurance provided by this Policy, our limits and the coverage afforded shall be as set forth in that law while the insured car is used in that state.

3. **TWO OR MORE CARS**

If more than one car is insured under this Policy, the terms apply separately to each. A car with a trailer attached is considered

A. one car as respects Limits of Liability in Part I, and

B. separate cars, including any deductibles, in Part V.

4. **NO DUPLICATION OR PYRAMIDING**

Under no circumstances will we be required to pyramid or duplicate any types, amounts or limits of motor vehicle coverages available from us or any other insurance company.

5. **OUR RIGHT OF RECOVERY**

In the event of any payment under this Policy, we are entitled to all rights of recovery of the insured person against any other person or organization. Any person receiving payment under this Policy shall hold in trust and/or reimburse us to the extent of our payment from the proceeds of any recovery. The insured person must help us exercise our rights. The insured person shall do nothing to prejudice our rights.

6. **TRANSFER OF POLICY**

This Policy may not be transferred without our written consent. If you die, coverage will be provided for:

A. The surviving spouse if a resident in the same household at the time of death. Coverage applies to the spouse as if shown on the Declarations Page; or

B. The legal representative of the deceased person as shown on the Declarations Page. This applies only with respect to the representative's legal responsibility to maintain or use the insured car.

Coverage will only be provided until the end of the policy period.

7. **SUIT AGAINST THE COMPANY**

We may not be sued unless there is full compliance with all terms of this Policy.

We may not be sued under the Liability Coverages:

a. Unless we agree an insured person is required to pay and we disagree on the amount of payment; or

b. Until the amount of payment has been finally determined following completion of judicial proceedings applicable to the loss.

Unless we consent, no one may make us a party to a suit to determine the liability of an insured person. This requirement does not apply if we have not responded to a written demand for payment within a reasonable period of time following receipt of the written demand so as to enable us to investigate the facts and circumstances of the loss.

8. **BANKRUPTCY**

We are not relieved of any obligation under this Policy because of the bankruptcy or insolvency of any insured person.

9. **EXCLUDED DRIVER**

WARNING: WHEN A NAMED EXCLUDED PERSON OPERATES A VEHICLE ALL LIABILITY COVERAGE IS VOID NO ONE IS INSURED. OWNERS OF THE VEHICLE AND OTHERS LEGALLY RESPONSIBLE FOR THE ACTS OF THE NAMED EXCLUDED PERSON REMAIN FULLY AND PERSONALLY LIABLE.

If an insured car is being operated by an individual named as an Excluded Driver, insurance under this Policy is null and void for Bodily Injury Liability Insurance Coverage, Property Damage Liability Insurance Coverage, Comprehensive Coverage, Collision Coverage, Uninsured Motorist Insurance Coverage, Underinsured Motorist Insurance Coverage, Car Rental and Travel Expense Coverage and Special Equipment Coverage.

10. **CANCELLATION**

This entire Policy may be cancelled upon written request of the Named Insured.

Coverage under this Policy for a car described on the Declarations Page and identified by a Vehicle Identification Number may be cancelled upon your request if an owner of that car, or the named insured. We will compute and keep or collect our pro-rata share of the premium for the period that the Policy or coverage has been in effect. We will refund to you any excess of premium for unexpired time.

Coverage under this Policy for any car identified on the Declarations Page, or the entire Policy, may be cancelled by us. We will mail or deliver 10 days written notice of cancellation to the Named Insured. This will be sent to the Named Insured's address last known to us or its authorized agent. Any unused premium will be returned to the Named Insured pro-rated for the unexpired time. We may collect any premiums due us prorated for the entire time the Policy was effective. For reasons other than failure to pay premium when due, we will mail or deliver 30 days written notice of cancellation.

If you have elected to use our Partial Payment Program, failure to pay any installment when due will result in cancellation.

Premium payments received in our office within 30 days after the cancellation of your Policy may, at our option, result in the reissue of your Policy with a lapse in coverage as reflected by the new effective dates on the Declarations Page. We will only pay for a loss or claim occuring within the policy effective dates.

Cancellation will not affect any claim that originated prior to the date of cancellation.

11. CANCELLATION BY THE COMPANY, LIMITED

After coverage under this Policy for a car identified on the Declarations Page has been effective for a period of 55 days; or if this Policy is designated as a renewal on that Declarations Page and that car had been insured by us for 55 days immediately preceding the renewal date; we shall issue a notice of cancellation when: (1) you, a resident of your household, or whomever customarily operates an insured car, has had their driver's license suspended or revoked during this policy term and the suspension or revocation has become final.

12. NONRENEWAL

We may decline to renew this Policy. If so, we will mail notice of nonrenewal to you at the address last known to us at least 20 days before the end of the policy term.

If we offer to renew this Policy, and you decline, it will automatically terminate at the end of the policy term. Payment of the required renewal premium must be received in our office before the due date to constitute acceptance of the offer to renew your policy. Payments for the renewal premium received in our office within 30 days after the due date will constitute an offer by you to renew the policy effective 12:01a.m. the day after the payment is received. The policy may, at our option, be renewed with new effective dates. We will only pay for a loss or claim occurring within the policy effective dates. A check or electronic funds transfer authorization which is not honored for any reason will not constitute payment or acceptance of our offer to renew and will not continue coverage beyond any date when such coverage will otherwise terminate for lack of payment.

13. CHANGES

This Policy and the Declarations Page include all agreements between the Named Insured and us. No change or waiver may be effected in this Policy except by endorsement issued by us. If a premium adjustment is necessary, we will make it as of the effective date of the change. We will collect any premium due us. However, if a Policy Change Endorsement results in an additional premium due us of $4.99 or less, we will waive that additional premium due. If a Policy Change Endorsement results in an overpayment of premium, we will refund the overpayment of premium except that we will not refund an overpayment of $4.99 or less unless requested to do so by you.

Coverage for changes will not apply prior to the date and hour shown on the Policy Change Endorsement form. When we broaden coverage during the policy term without charge, the Policy will automatically provide the broadened coverage.

14. DUTY TO REPORT POLICY CHANGES

If the information used to develop the policy premium changes, we may adjust your premium during the policy term. The named insured must inform us within 30 days of any changes related to the following:

a. your address;
b. where your car is principally garaged;
c. your car or how it is used, including driving distance to work annual mileage;
d. the operators who regularly drive your car, including newly licensed family members;
e. the ownership or registration of your car.

If you fail to inform us of these changes within 30 days, we may void coverage as provided under Condition 22 - Concealment Or Fraud.

If we adjust your premium during the policy term as a result of these or other changes in rating conditions, a refund or credit will be issued if the premium is decreased. A billing notice for the additional amount due will be sent if the premium is increased.

15. EFFECTIVE TIME

The policy period begins and ends at 12:01 A.M. on the date on the Declarations Page at the place where this Policy has been signed. A policy period specified as beginning March 1 shall first take effect February 29 if so requested in the application. Coverage shall not be provided for any loss occurring prior to the effective date shown on the policy application.

16. DECLARATIONS

By accepting this Policy you agree that:

A. the statements on the Declarations Page and in the application for this Policy are your own;

B. this Policy is issued in reliance upon the truth of those representations; and

C. this Policy, including the Declarations Page and endorsements attached at the time of issuance, including all agreements existing between you and us or any of its agents relating to this insurance.

17. PREMIUM

Premium deposit or payment shall be calculated on the basis of rating conditions existing at the beginning of each policy term, except as provided in Condition 13. They shall conform to approved rates and rules then on file with the State of Michigan.

The premium deposit or payment must properly conform to that which should have been charged. We and the Named Insured agree to make any necessary adjustments in the premium deposit or payment during the term of the Policy or the twelve months succeeding.

18. CONSTITUTIONALITY

If an appellate court of Michigan or the United States enters an unappealed judgment which declares the Code invalid, unenforceable or unconstitutional, in whole or in part, we shall:

A. have the right to recompute the premium payable for the Policy for the entire policy term on the basis of revised rates as approved by the Insurance Commissioner;

B. have no obligation to make any further payment pursuant to the coverages contained in the Policy which were required by the Code;

C. mail to you revised coverages to apply in the future in substitution for those coverages affected by the decision of the court at revised rates as approved by the Insurance Commissioner. We will mail notice of revisions in coverages and rates to you at least 10 days prior to their effective date. The right of cancellation and pro-rata refund will continue to apply.

19. NON-ASSESSABLE

This Policy is non-assessable. You are liable only for payment of the premium deposit and will not be liable for any assessment or contingent liability of any kind.

20. TRANSFER OF TITLE

If the title of a car described on the Declarations Page and identified by a specific Vehicle Identification Number is transferred to a person other than you or any resident relative, this Policy provides coverage only for you and a resident relative while it remains in force.

21. LOSS PAYABLE

We agree that payment for loss covered by this Policy and sustained by the vehicle described on the Declarations Page shall be made to the Named Insured and lienholder as interests may appear. Payment for loss may be made separately to each interested party. Upon our request (either before or after payment) the lienholder shall assign and transfer to us, to the extent of the payment we make to it, its right and interest in the indebtedness to which its lien or right pertains, including any instrument or security related thereto.

We agree that this endorsement shall not be invalidated as to the interest of the lienholder in the described vehicle by any act or neglect of any Named Insured or of any owner except:

A. when that vehicle is intentionally damaged, destroyed or concealed by or at the direction of any Named Insured or by any owner; or

B. when the vehicle is damaged, destroyed or concealed as a result of any other act which constitutes a breach of contract between any Named Insured or owner and the lienholder.

22. CONCEALMENT OR FRAUD

This entire Policy is void if any Insured person has intentionally concealed or misrepresented any material fact or circumstance relating to:

A. This insurance;

B. The Application for it;

C. Or any claim made under it.

SIGNATURE CLAUSE

In Witness Whereof, we, MEEMIC Insurance Company, have caused this Policy to be issued and to be signed by our President & Chief Executive Officer.

President & Chief Executive Officer

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street, St. Joseph, MI 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff,

v

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants.

Case No.: 2014-260-CK

Hon. John M. Donahue

Mark E. Kreter (P35475)
Robb S. Krueger (P66115)
Kreis, Enderle, Hudgins & Borsos, P.C.
Attorney for Plaintiff
PO Box 4010
Kalamazoo, MI 49003-4010
(269) 324-3000

FIRST AMENDED COMPLAINT

The Plaintiff, Meemic Insurance Company, by and through its attorneys, Kreis, Enderle, Hudgins & Borsos, P.C., for its First Amended Complaint, states:

Jurisdiction and Venue

1. Plaintiff, Meemic Insurance Company ("Meemic"), is a Michigan insurance entity conducting business in the County of Berrien, State of Michigan.

2. Defendant, Louise M. Fortson, is an individual residing and conducting business in the County of Berrien, State of Michigan.

3. Defendant, Richard A. Fortson, is an individual residing and conducting business in the County of Berrien, State of Michigan.

4. Justin Fortson is an individual residing and conducting business in the County of Berrien, State of Michigan.

5. Plaintiff seeks relief against Justin Fortson through his conservator, Richard A. Fortson, who conducts business as conservator in the County of Berrien, State of Michigan.

6. This action arises out of in part tortious behavior, which occurred in the County of Berrien, State of Michigan.

7. Plaintiff is seeking damages in an amount in excess of $25,000 and is seeking equitable and/or declaratory relief, which gives the Circuit Court for the County of Berrien, State of Michigan, subject matter jurisdiction over this matter.

General Allegations

8. Plaintiff restates the allegations set forth in paragraphs 1 through 7 as if fully set forth here herein.

9. On or about July 29, 2009, the parties entered into a policy for insurance coverage as set forth on the attached policy #PAP0632676 (the "Policy", **Exhibit A**).

10. The Policy included personal injury coverage for injuries incurred in the use of an automobile.

11. On or about September 23, 2009, Justin Fortson was involved in an automobile accident while riding on the hood of a motor vehicle and sustained bodily injuries, which were significant and required several weeks of hospitalization.

12. Subsequent to his hospitalization, Justin Fortson was prescribed long term physical and occupational therapy.

13. Upon information and belief, sometime after the 2009 accident, Defendant Richard Fortson was appointed as conservator for Justin Fortson and continues to serve in that capacity today.

14. As part of the Policy coverage and MCL 500.3107(1)(a), Defendants Louise M. Fortson and Richard A. Fortson ("Defendants") sought payment for attendant care services they would personally provide for their son, Justin Fortson, on a 24 hours per day/seven days per week (24/7) basis.

15. Attendant care requires that the patient receive constant in person monitoring of the patient.

16. Pursuant to paragraph 1, subpart A of the Policy, Defendants were required to cooperate and assist Meemic in any matter concerning a claim. Further under paragraph 1, subpart C, Defendants were required to provide written proofs of loss as requested by Meemic (**Exhibit A**).

17. On a monthly basis, Meemic requested Defendants to provide documentation of actual hours of time spent in the care of their son.

18. Defendants were specifically informed by Meemic on one or more occasions between 2009 and the present that they could not receive payment for a portion of time when Justin Fortson was outside of their direct supervision.

19. By September 21, 2010, work restrictions for Justin Fortson were lifted by his medical providers and he was permitted to work 15 hours per week.

20. On or about November 5, 2010, Justin Fortson attempted to complete his education, but attendant care was continued on a 24/7 basis into early 2011.

21. Again, after new medical reviews took place, in September of 2011, attendant care was extended into 2012.

22. By March of 2012, Meemic began making inquiries on the amount of monies being paid to Defendants for attendant care and, in April of 2012, Meemic again informed Defendants that it would no longer be making attendant care payments for work that was not actually performed.

23. In May of 2013, Meemic began a formal investigation of the Fortson case having received information that Justin Fortson was experiencing legal difficulties, that necessarily would have removed him from the direct supervision of his parents, including several arrests. As a result, Meemic undertook a comprehensive investigation of the alleged attendant care undertaken by Defendants.

24. During that investigation, it was determined that contrary to the applications for payment made by Defendants to Meemic for 24/7 attendant care between 2009 and the present, that Justin Fortson was left for extended periods of time without any other person in the home.

25. It was further determined that Justin Fortson was not even available to receive attendant care in his home during periods of this time for the reason that he was sentenced to and was serving jail time for one or more criminal cases, including the following:

a. One day in September 2012

b. Five days in December 2012

c. Seventy eight days between December 2012 and March 2013

d. Nine days in April 2013

e. One day in July of 2014

26. During each of the periods set forth above, Defendants applied for and received benefits for 24/7 attendant care, which they did not provide.

27. In addition to the time Justin Fortson spent in jail, there are numerous indications that he has been outside of the personal supervision and care of his parents, including trips made in his own vehicle, medical care visits, substance abuse inpatient care, court appearances, and time spent individually or with his girlfriend or other friends while not under his parents' direct care and supervision.

28. During each of the periods set forth above, Defendants continued to make claims for 24/7 attendant care in violation of MCL 500.3107(1)(a), the their Policy and contrary to the requirements set forth to them by Meemic.

Count I – Breach of Contract

29. Plaintiff restates the allegations set forth in paragraphs 1 through 28 as if fully set forth here herein.

30. Defendants failed to perform portions of the insurance contract with Defendants, specifically by failing to provide accurate information and accounting of serviced rendered and failure to report changes in the status of Justin Fortson.

31. Plaintiffs' fully performed the requirements of the insurance contract.

32. As a result of Defendants' breach of the contract, Plaintiff was injured in an amount in excess of Twenty-Five Thousand ($25,000) Dollars to be determined at trial.

WHEREFORE, Plaintiff Meemic requests that this Court enter a judgment in its favor and against each of the Defendants jointly and severally in an amount in excess of $25,000 to be determined at trial, combine the relief sought in this Count with such other relief sought in the remaining counts, award Plaintiff its costs and attorney's fees, and such other relief as the Court deems necessary or just.

Count II – Fraud

33. Plaintiff restates the allegations set forth in paragraphs 1 through 32 as if fully set forth here herein.

34. Defendants, on behalf of their son, represented that they had in fact, provided direct supervision and attendant care for Justin Fortson on a 24/7 basis between 2009 and the present.

35. At one or more of the times that they made the application for such payment, Defendants were aware that they had not provided 24/7 care and knew, in fact, that the statements made on their requests for payment to Meemic were untrue.

36. Defendants made such false statements for the purposes of obtaining payment through Meemic under the Policy.

37. Portions of the monies requested by and paid to Defendants were not, in fact, for the care, recovery, or rehabilitation of Justin Forston, but inured to the benefit of the Fortsons personally.

38. Meemic relied upon the statements of Defendants in providing coverage payments under the Policy.

39. Meemic was damaged in that it had to pay for attendant care which was not rendered on numerous occasions during the period between 2009 and the present.

40. Meemic's damages are in excess of $25,000.

41. Defendants's behavior in fraudulently providing documentation for the purposes of obtaining payments to which they were not entitled was willful wanton and intentionally done with the intent to harm Meemic, and is of a type which warrants an award of exemplary damages.

42. Meemic is further entitled to its attorney's fees and costs pursuant to MCL 500.314(2) in having to bring an action to recover the amounts paid for attendant care, which was not provided.

WHEREFORE, Plaintiff Meemic requests that this Court enter a judgment in its favor and against the Defendants jointly and severally in an amount in excess of $25,000 to be determined at trial, combine the relief sought in this Count with such other relief sought in the remaining counts, award Plaintiff its attorney's fees and costs, and such other relief as the Court deems necessary or just.

Count III – Action for Declaratory Relief

43. Plaintiff restates the allegations set forth in paragraphs 1 through 42 as if fully set forth here herein.

44. An actual controversy exists between Meemic and Defendants.

45. The actions of the Defendants in making false claims under the Policy are in direct violation of the Policy's terms and conditions, specifically paragraph 22, and void the Policy (**Exhibit A**).

46. As a result of the Defendants' actions, Meemic is entitled to terminate continuing of any kind under the Policy.

47. The Court must determine the following:

a. Whether the actions of Defendants void the Policy.

b. Other determinations, orders and judgments necessary to fully adjudicate the rights of the parties.

WHEREFORE, Plaintiff Meemic requests that a declaration or rights and award damages in whatever amount it is found to be entitled in excess of $25,000.00, plus interest, costs and No-Fault attorney fees.

Count III – Common Law and Statutory Conversion

48. Plaintiff restates the allegations set forth in paragraphs 1 through 47 as if fully set forth here herein.

49. The Defendants' actions in purposely providing false information with the intent of obtaining payment from Meemic for services that were not provided and receipt of such funds deprive Meemic of its personal property.

50. To the extent any of the Defendants were not actively involved in the defalcation and/or providing of false statements, but did contribute to it by facilitating the receipt, possession or use of such funds, said Defendants actively assisted in the conversion of Meemic's property.

51. Pursuant to MCL 600.2919a, a party who either converts property or assists others in converting property is subject to pay three times the actual damages determined at trial, along with attorney's fees and costs.

WHEREFORE, Plaintiff Meemic requests that the Court enter a money judgment against each of the Defendants jointly and severally in an amount in excess of $25,000 to be determined at trial, combine the relief sought in this Count with such other relief

sought in the remaining counts, and award Plaintiff its costs, attorney's fees, and such other relief as the Court deems necessary or just.

Count IV – An Accounting

52. Plaintiff restates the allegations set forth in paragraphs 1 through 51 as if fully set forth here herein.

53. To the extent that the Defendants have undertaken actions seeking payment for services they did not render, there will be necessary costs to compile records and have an accounting prepared of the payments made over the course of Justin Fortson's coverage.

54. It would be unjust to require Plaintiff to bear the costs of such an accounting.

55. An accounting is necessary to determine what funds, if any, were utilized for the attendant care of Justin Fortson between 2009 and the present.

WHEREFORE, Plaintiff Meemic requests that the Court order that the Defendants pay the actual costs of a third party to audit their and the Plaintiff's records for determination of what amounts the Defendants claimed which do not match either their own records or the Plaintiff's records regarding Justin Fortson's attendant care, enter a money judgment jointly and severally against each of the Defendants in an amount in excess of $25,000 to be determined at trial, combine the relief sought in this Count with such other relief sought in the remaining counts, and award Plaintiff its costs, attorney's fees, and such other relief as the Court deems necessary or just.

Count V – Unjust Enrichment/Restitution

56. Plaintiff restates the allegations set forth in paragraphs 1 through 55 as if fully set forth here herein.

57. Defendants received a benefit from the Plaintiff to which they were not entitled.

58. To allow Defendants to retain the benefit of payments made by Plaintiff to them based upon work, which did not occur, would be inequitable.

WHEREFORE, Plaintiff Meemic requests that the Court enter a money judgment jointly and severally against each of the Defendants in an amount in excess of $25,000 to be determined at trial, combine the relief sought in this Count with such other relief sought in the remaining counts, and award Plaintiff its costs, attorney's fees, and such other relief as the Court deems necessary or just.

Respectfully submitted,

KREIS, ENDERLE,
HUDGINS & BORSOS, P.C.

Dated: November 11, 2014

Robb S. Krueger (P66115)
Attorney for Plaintiff

1/7/15

STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
_____/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

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_____/

DEFENDANTS/COUNTER-PLAINTIFFS' ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT, AND COUNTER-COMPLAINT

Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, responds to Plaintiff's First Amended Complaint as follows:

Jurisdiction and Venue

1.) Admitted upon information and belief.

2.) Denied for the reason that said allegations are untrue. Defendant Louise M. Fortson is indeed an individual residing in Berrien County, but disagrees that she is "conducting business" in Berrien County.

3.) Denied for the reason that said allegations are untrue. Defendant Richard A. Fortson is indeed an individual residing in Berrien County, but disagrees that he is "conducting business" in Berrien County.

4.) Denied for the reason that said allegations are untrue. Defendant Justin Fortson. Fortson is indeed an individual residing in Berrien County, but disagrees that he is "conducting business" in Berrien County.

5.) Defendants deny that Richard A. Fortson conducts business as conservator in the County of Berrien, affirmatively indicating that Richard A. Fortson is the father of Justin Fortson who suffers from sequelae related to traumatic brain injury as a result of a September 18, 2009 accident involving a motor vehicle.

6.) Defendants deny tortious behavior on their part affirmatively averring that Plaintiff and Counter-Defendant Meemic Insurance Company is responsible and guilty of breach of contract and tortious behavior as more specifically set forth within New Matter and Affirmative Defenses and the Counter-Complaint filed with this Answer.

7.) Defendant does not contest jurisdiction with the Trial Court for the County of Berrien but denies that Plaintiff is entitled to relief as requested in the Complaint.

General Allegations

8.) Defendants herein reiterate its responses to paragraphs 1-7 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

9.) Admitted upon information and belief.

10.) No contest, except that the policy speaks for itself and provides for Personal Injury Protection benefits consistent with the Michigan Automobile No-Fault Act being MCLA 500.3101 *et seq.*

11.) Denied for the reason that said allegations are untrue. Justin Fortson was injured in an accident involving a motor vehicle on September 18, 2009 and indeed sustained significant and severe bodily injuries including traumatic brain injury from which he will never recover and for which he will require attendant care services for the rest of his life. All of these facts and more are well-known by Plaintiff, Meemic Insurance Company rendering this claim frivolous and rendering Plaintiff's termination of attendant care services and other personal injury protection benefits to Justin Fortson a deliberate and intentional violation of Michigan law and which knowingly will result in further personal injury to Justin Fortson, the incapacitated adult.

12.) No contest, except that Defendants affirmatively aver that Justin Fortson continues to require "long term physical and occupational therapy" as well as constant (24 hours per day, 7 days per week) attendant care services which have been wrongfully terminated by Plaintiff.

13.) No contest, and the Berrien County Probate Court file number is 2010-0172-CA N with Judge Thomas E. Nelson presiding.

14.) No contest, except to add that Plaintiff Meemic Insurance Company directed Defendants in the manner in which attendant care services would be paid by Plaintiff and Defendant acted in response to instructions given by representatives of Meemic Insurance Company.

15.) No contest, except that the phrase "constant in person monitoring of the patient" is ambiguous. Defendants agree that his doctors have prescribed Justin Fortson attendant care services on a 24 hour per day and 7 day per week basis.

16.) Generally admitted, although the policy speaks for itself and Defendants adopt the actual policy in its entirety and affirmatively aver that Plaintiff directed Defendants precisely in the manner in which they presented their proofs and otherwise cooperated with Meemic's requests.

17.) Defendants do not contest that Meemic requested, but Meemic also assisted and directed Defendants in the presentment of the forms that Plaintiff asked for, including the manner in which the forms were to be completed and submitted.

18.) Denied for the reason that said allegations are untrue.

19.) Denied for the reason that said allegations are untrue. Affirmatively, Defendants assert that Justin Fortson, indeed, did ask for permission to get a job and his doctors issued a prescription allowing him to get a job. However, he continued to require 24 hour and 7 day per week supervision and constant monitoring and the doctor knew it was unlikely that Justin would ever really be able to secure a job.

20.) Defendants aver lack of knowledge of specific dates, but admit that Justin Fortson requested that he be allowed to participate in classes to obtain his "GED" and failed at his attempt to do so.

21.) Admitted upon information and belief.

22.) Defendants aver lack of knowledge sufficient to form a belief with respect to Plaintiff's allegation that Plaintiff began making inquiries leaving Plaintiff to its strict proofs in support thereof and denies that Meemic informed Defendants of any intention to cease payments for attendant care and affirmatively avers that Defendants Richard and Louise Fortson did, indeed, actually perform attendant care services.

23.) Defendants aver lack of knowledge with respect to Meemic's actions leaving them to their strict proofs in support thereof and the relevance thereof and denies that Justin Fortson's legal difficulties "removed him from the direct supervision of his parents" and affirmatively avers that Justin's mental difficulties, emotional difficulties, resulting in legal difficulties, in fact, only increased and further burdened the task of supervising Justin Fortson.

24.) Denied for the reason that said allegations are untrue.

25.) Defendants do not contest that Justin Fortson served jail time on various dates and that Justin did not stay in his "home" during those periods of time; however, there were many aspects of attendant care that Richard and Louise continued to provide.

26.) Defendants submitted the forms as instructed by Plaintiff. Affirmatively, Defendants submit that they were not, in fact, instructed by Meemic Insurance Company that they should not submit requests for attendant care services for days that Justin was not present in their home.

27.) Defendants deny that Justin Fortson spent significant periods of time outside their immediate controlling supervision but admit that on occasion, Justin "escaped" from the home without his parents' knowledge and it has been difficult to avoid allowing Justin to spend time with friends and outside the immediate presence of his parents.

28.) Defendants do not contest that they continued to submit the attendant care services forms as directed by Plaintiff and deny that they submitted any documents contrary to instructions received by Meemic.

Count I – Breach of Contract

29.) Defendants herein reiterate its responses to paragraphs 1-28 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

30.) Denied for the reason that said allegations are untrue.

31.) Denied for the reason that said allegations are untrue. Affirmatively, Plaintiff is entirely on notice that Justin Fortson will forever require 24 hour per day and 7 day per week attendant care services and has suffered a permanent traumatic brain injury that renders him in constant need of attendant care services and as a result of terminating said benefits, Plaintiff, in fact, has violated the terms and conditions of the policy as well as the Michigan Automobile No-Fault Act and has intentionally and deliberately inflicted injury upon Justin Fortson, the incapacitated adult in a willful and blatant exercise of bad faith and negligent handling of Justin Fortson's claim for personal injury protection benefits resulting in tortious liability more further set forth within Defendants/Counter-Plaintiffs Counter-Complaint

32.) Denied for the reason that said allegations are untrue.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses

associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Count II - Fraud

33.) Defendants herein reiterate its responses to paragraphs 1-32 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

34.) No contest, although the term "direct supervision" is ambiguous and subject to interpretation and on that basis, Defendants leave Plaintiff to their strict proofs in support thereof.

35.) Denied for the reason that said allegations are untrue.

36.) Denied for the reason that said allegations are untrue.

37.) Denied for the reason that said allegations are untrue.

38.) Defendants aver lack of knowledge sufficient to form a belief with respect to the truth of the allegations contained therein, neither admitting nor denying same, but leaving Plaintiff to its strict proofs in support thereof.

39.) Denied for the reason that said allegations are untrue.

40.) Denied for the reason that said allegations are untrue.

41.) Denied for the reason that said allegations are untrue. Affirmatively, Defendants aver that, in fact, Plaintiff Meemic Insurance Company has and continues to refuse to pay attendant care services for Justin Fortson, an incapacitated individual, despite the fact that all medical confirms and Meemic is well aware of the fact the Justin Fortson suffers from traumatic brain injury and is in critical need of attendant care services in order to prevent Justin from falling into the same dangerous legal issues that have occurred in the past and Defendants are hereby willing to submit Justin Fortson to a head injury institute as recommended by Justin's doctors at Plaintiff's expense and affirmatively aver that Plaintiff's failure to agree to same constitutes bad faith and negligent handling of Justin's claim and entitlement to attendant care services thereby entitling Justin Fortson to damages including exemplary damages.

42.) Denied for the reason that said allegations are untrue.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses

associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Count III – Action for Declaratory Relief

43.) Defendants herein reiterate its responses to paragraphs 1-42 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

44.) Admitted.

45.) Denied for the reason that Defendants did not, in fact, make any false claims under the policy, but instead responded to and followed instructions of Meemic representatives and affirmatively avers that Plaintiff's Complaint is the first or instruction to Defendants specifically addressing the insurance policy terms and conditions.

46.) Denied for the reason that said allegations are untrue and Defendants/Counter-Plaintiffs affirmatively aver that Justin Fortson is an incapacitated adult entitled to attendant care services despite any actions alleged by any other party and Meemic Insurance Company's failure to provide personal injury protection benefits and to terminate personal injury protection benefits including attendant care services is a deliberate, willful violation of the law constituting tortious activities including bad faith and negligent handling of Justin Fortson's claim.

47.) Admitted.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Count III *[sic]* – Common Law and Statutory Conversion

48.) Defendants herein reiterate its responses to paragraphs 1-47 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

49.) Denied for the reason that said allegations are untrue.

50.) Denied for the reason that said allegations are untrue.

51.) Defendants deny the allegations contained therein and specifically deny the application of MCL 600.2919(A) to the facts and circumstances of the claims made in this litigation.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Count IV – An Accounting

52.) Defendants herein reiterate its responses to paragraphs 1-51 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

53.) Denied for the reason that said allegations are untrue.

54.) Denied for the reason that said allegations are untrue and for the reason that Plaintiff, in fact, is responsible for any misunderstanding between the parties and for the reason that Plaintiff is much more sophisticated and has issued direct instructions and guidance to Defendants regarding the presentment of claims for attendant care services.

55.) Denied for the reason that said allegations are untrue.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Count V – Unjust Enrichment/Restitution

56.) Defendants herein reiterate its responses to paragraphs 1-55 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

57.) Denied for the reason that said allegations are untrue.

58.) Denied for the reason that said allegations are untrue.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Dated this 17th day of December 2014.

CHASNIS, DOGGER & GRIERSON, P.C.

BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the Attorneys of Record herein at their respective addresses disclosed on the pleading on this 17th day of December, 2014

X US Mail Hand Delivered UPS Other
E-mail Fed Express FAX E-file

Signature: Kimberly Kaufman

NEW MATTER AND AFFIRMATIVE DEFENSES

Assuming the facts and circumstances so warrant upon completion of discovery proceedings, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, will rely on all or some of the following New Matter and Affirmative Defenses:

A. Meemic Insurance Company has failed to state a claim upon which relief can be granted as a matter of law.

B. Plaintiff's claims are barred or limited by the Michigan No-Fault Act, MCL 500.3101; MSA 24.13101 *et seq.*

C. Meemic Insurance Company may have failed to make every reasonable effort to mitigate, prevent, and/or reduce the alleged damaged and injuries.

D. Meemic Insurance Company's claim may be barred by the applicable statute of limitations.

E. Plaintiff, to the extent that it may have overpaid any personal injury protection benefits at any time, may be entitled to an off set from benefits overdue but is not entitled to terminate benefits clearly owed to Justin Fortson, an incapacitated person under the circumstances existing.

F. Terms of the policy may govern the outcome of this case depending upon facts and circumstances disclosed during discovery and Defendants intend on relying on the provisions of said policy.

G. Personal injury protection benefits owed by Plaintiff are past due pursuant to MCL 500.3142(1).

H. Meemic Insurance Company is in possession of reasonable and adequate proof of personal injury protection benefits required by Justin Fortson and have wrongfully denied and terminated benefits critically needed by Justin Fortson and the denial and termination causes further injury to Justin Fortson.

I. Meemic Insurance Company's actions in terminating or denying the Personal Injury Protection benefits which are known to be owed to Justin Fortson constitutes bad faith in negligent handling of the claim entitling these Defendants to exemplary damages, damages for intentional infliction of mental distress and fraudulent activity causing injury to Justin Fortson.

J. That Meemic Insurance Company has refused payment, has terminated benefits and continues to provide benefits owed to Justin Fortson, the incapacitated individual, despite having reasonable proof of the need for attendant care services related to injuries sustained in the motor vehicle accident referenced.

K. Defendant has complied with all instructions and encouragement provided by Meemic Insurance Company and its representatives in the handling and the processing of Defendants claims.

L. Defendants have complied with all of the applicable statutes and insurance policy provisions in handling of Defendants claim.

M. These Defendants reserve the right to file additional affirmative defenses as they become known through discovery.

WHEREFORE, Defendants, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson request that this Court and/or Jury return verdict and judgment of no cause for action with respect to Plaintiff's Complaint but instead to grant the relief prayed for in favor of Defendants and Counter-Plaintiffs as set forth in the Counter-Complaint. Defendants/Counter-Plaintiffs seek judgment for the monetary value of benefits wrongfully denied, for costs and expenses associated with defending Plaintiff's Complaint, and for pursuing benefits as provided for under Michigan's No-Fault Act; and further, that this Court enter an appropriate Order declaring the rights of the Defendants/Counter-Plaintiffs under the policy of insurance and Michigan's Automobile No-Fault Act.

Dated this 17th day of December 2014.

CHASNIS, DOGGER & GRIERSON, P.C.

Robert J. Chasnis

BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleading on this 17th day of December, 2014.

X U.S. Mail ___ Hand Delivered ___ UPS ___ Other
___ E-mail ___ Fed Express ___ Fax X E-file

Signature: Kimberly Kaufmann

DEFENDANTS' COUNTER-COMPLAINT FOR PERSONAL INJURY PROTECTION BENEFITS

NOW COME the above-entitled Defendants/Counter-Plaintiffs, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, by and through their attorneys, Chasnis, Dogger & Grierson, P.C., and for their Counter-Complaint against the Meemic Insurance Company stating as follows:

Common Allegations

1.) Counter-Plaintiff, Louise M. Fortson is a resident of the County of Berrien, State of Michigan.

2.) Counter-Plaintiff, Richard A. Fortson is a resident of the County of Berrien, State of Michigan.

3.) Counter-Plaintiff, Justin Fortson is a resident of the County of Berrien, State of Michigan, and has been declared an incapacitated adult by virtue of Berrien County Probate Court Order dated April 22, 2010 and is represented by his father Richard Fortson as conservator.

4.) Counter-Plaintiff, Meemic Insurance Company, is a corporation doing business pursuant to the laws of the State of Michigan and conducting business in the County of Berrien, State of Michigan.

5.) The amount in controversy exceeds $25,000.00 exclusive of interest and costs and is otherwise within the jurisdiction of this Court.

Count I – Breach of Contract

6.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-5 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

7.) That on September 18, 2009, Counter-Plaintiffs, had their personal automobile insurance policy issued by Plaintiff/Counter-Defendant Meemic Insurance Company consistent with the requirements of the Michigan Automobile No-Fault Act, being MCL 500.3101 *et seq.* and for which policy premiums were paid.

8.) That under the terms and conditions of the automobile insurance policy and Michigan's No-Fault Automobile Insurance Act, Counter-Defendant is obligated to pay personal injury protection benefits for injuries to Justin Fortson as a result of accidental injuries sustained on September 18, 2009.

9.) That on September 18, 2009, within Berrien County, State of Michigan, Justin Fortson, was accidently injured when he was thrown from the back of a motor vehicle.

10.) Justin Fortson, on September 18, 2009, suffered severe and accidental bodily injuries within the meaning of Plaintiff and Counter-Defendants' policy and the statutory provisions of Michigan's No-Fault Act.

11.) Justin Fortson's injuries included but are not limited to serious traumatic brain injury including an open head injury causing permanent brain damage and sequelae thereof requiring attendant care services 24 hours every day for the rest of his life.

12.) That as a result of the injuries to Justin Fortson, Justin will require reasonable and necessary expenses for care, recovery, and rehabilitation, and attendant care services within the meaning of Michigan's Automobile No-Fault Act, for the rest of his life.

13.) That Counter-Defendant has refused to provide personal injury protection benefits and has terminated benefits after initially paying same, and Counter-Defendant has indicated that it will continue to refuse to pay personal injury protection benefits including attendant care services in the future.

14.) That Plaintiff and Counter-Defendant, Meemic Insurance Company has received reasonable proof and substantial evidence confirming that Defendant and Counter-Plaintiff Justin Fortson is entitled to attendant care services but nonetheless refuses to make payment of attendant care services.

15.) That Plaintiff and Counter-Defendant Meemic Insurance Company has based its termination and refusal to pay upon its "investigation" and conclusion that prior attendant care services paid entitles Meemic Insurance Company to terminate and refuse to pay future attendant care services.

16.) That Counter-Defendant has unreasonably refused to pay and has unreasonably delayed making proper payments to or on behalf of Justin Fortson, an incapacitated individual contrary to MCL 500.3101 *et seq.*, MCL 500.3142, and MCL 500.3148, and continues to do so entitling Defendants and Counter-Plaintiffs to recover actual costs including actual attorney fees and interest.

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

Count II - Fraud

17.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-16 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

18.) Plaintiff and Counter-Defendant Meemic Insurance Company has assisted, instructed, guided, and caused Counter-Plaintiffs to present their claims for personal injury protection benefits in the manner in which they have done so.

19.) That Counter-Plaintiffs Fortson have relied upon representations made by and on behalf of Meemic Insurance Company and followed instructions in conjunction with application for benefits for Justin Fortson without question or resistance.

20.) That Counter-Defendant Meemic Insurance Company has repeatedly represented to Counter-Plaintiffs and, in fact, ratified and verified, through approval and payment of benefits, the manner in which claims have been presented.

21.) Counter-Plaintiffs actions in presenting claims are based upon demands and instruction of Counter-Defendant Meemic Insurance Company.

22.) The actions on the part of Counter-Defendant Meemic Insurance Company in criticizing and accusing the Counter-Plaintiffs of fraud, constitutes a fraud to the detriment of Counter-Plaintiffs.

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

Count III – Action for Declaratory Relief

23.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-22 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

24.) An actual controversy exists between Meemic Insurance Company and Counter-Plaintiffs Fortson.

25.) Plaintiff and Counter-Defendant Meemic Insurance Company refuses to pay personal injury protection benefits in direct violation of the insurance policy between the parties and in violation of Michigan No-Fault Automobile Insurance Law.

26.) Counter-Plaintiffs request this Court make the following determination:

a. The rights and obligations of the parties under the applicable insurance policy and under Michigan Automobile Insurance Law.

b. Other determinations, orders, and judgments necessary to fully adjudicate the rights of the parties.

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

Count IV – Common Law and Statutory Conversion

27.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-26 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

28.) Counter-Defendant Meemic Insurance Company's actions in purposely leading, enticing, and allowing Defendants and Counter-Plaintiffs to follow its recommended form and procedure for claiming Personal Injury Protection benefits followed by criticism of that approved, ratified, and authorized procedure, constitutes fraud and misrepresentation, and deprives Counter-Plaintiff of benefits to which they are entitled.

29.) Counter-Plaintiffs Fortson seek recovery under common law and under laws of conversion against Meemic Insurance Company including treble damages under MCL 600.2919(A).

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

Count V – Bad Faith/Negligent Handling of Claim

30.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-29 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

31.) Counter-Defendant Meemic Insurance Company is negligent in the manner in which it has received and processed Counter-Plaintiff's Claim for attendant care services.

32.) Counter-Plaintiffs Fortson have been damaged as a result of Counter-Defendant Meemic Insurance Company's negligence, bad faith in processing the claim presented by Counter-Plaintiffs.

33.) Counter-Defendant's negligence and bad faith in the handling of the claim constitutes a proximate cause of damages to Justin Fortson.

34.) That Justin Fortson has and will personally suffer damages as a result of Counter-Defendant Meemic Insurance Company's breach of duties owed including, but not limited to exacerbation of sequela of traumatic brain injury, distress, and mental anguish.

35.) Counter-Defendant Meemic Insurance Company's actions are willful, wanton, deliberate, intentional, and entitle Counter-Plaintiffs to exemplary damages.

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

Count VI – Claim for Attorney Fees and Economic Damages Related to Maintaining Conservator for Justin Fortson, Legally Incapacitated Adult

36.) The Counter-Plaintiffs incorporate by reference hereto paragraphs 1-35 above as if fully set forth herein word-for-word and paragraph-by-paragraph.

37.) That as a result of the traumatic brain injury and sequela thereof, suffered by Justin Fortson in the motor vehicle accident of September 18, 2009, Justin Fortson requires a legally appointed conservator.

38.) That extensive costs and expenses associated with maintaining a conservatorship estate in the Berrien County Probate Court have been incurred and not paid by Counter-Defendant.

39.) Counter-Plaintiffs seek recovery of the economic expenses including attorney fees associated with the maintenance of Richard Fortson, as conservator for Justin Fortson, an incapacitated adult.

WHEREFORE, Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, request an award of damages for Michigan Automobile No-Fault benefits, including attendant care services for whatever amount Justin Fortson or his providers are found to be entitled in excess of $25,000.00 plus interest, costs and no-fault attorney fees and/or other applicable sanctions, costs, or fees, and other determinations, orders and judgments, equitable or legal, necessary to fully adjudicate the rights of the parties hereto.

DEMAND FOR TRIAL BY JURY

NOW COME the above-entitled Defendants/Counter-Plaintiffs, Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, in his capacity as conservator for Justin Fortson, an incapacitated adult, by and through their attorneys, Chasnis, Dogger & Grierson, P.C., and hereby makes demand for Trial by Jury of all issues involved in this cause unless expressly waived in writing.

Dated this 17th day of December 2014.

CHASNIS, DOGGER & GRIERSON, P.C.

BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleading on this 17th day of December, 2014

X US Mail Hand Delivered UPS Other
Email Fed Ex FAX File

Signature: Kimberly Kaufman

4/9/15

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street * St. Joseph, MI * 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v

Case No.: 2014-260-CK

Hon. John M. Donahue

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants/Counter-Plaintiffs.

Mark E. Kreter (P35475)
Robb S. Krueger (P66115)
KREIS, ENDERLE, HUDGINS & BORSOS, P.C.
Attorney for Plaintiff/Counter-Def.
PO Box 4010
Kalamazoo, MI 49003-4010
(269) 324-3000

Robert J. Chasnis (P-36578)
CHASNIS, DOGGER & GRIERSON, P.C.
Attorneys for Def./Counter Plaintiffs
155 North Plymouth Road (48638)
P.O. Box 6220
Saginaw, MI 48608-6220
(989) 793-8300

PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

NOW COMES, Plaintiff/Counter-Defendant Meemic Insurance Company, by and through its attorneys, KREIS, ENDERLE, HUDGINS & BORSOS, P.C., and herein requests that this Court grant ***Plaintiff/Counter-Defendant Meemic Insurance Company's Motion For Summary Disposition Pursuant To MCR 2.116(C)(10)*** and in support states as follows:

1. Defendant/Counter-Plaintiff Justin Fortson ("Justin") was involved in an automobile accident on or around September 18, 2009, resulting in an extended hospitalization and serious injuries.

2. Defendant/Counter-Plaintiffs Louise M. Fortson ("Louise") and Richard A. Fortson ("Richard") (collectively, the "Fortsons") were the Named Insureds under Policy Number PAP0632676 (the "Policy") with Meemic Insurance Company ("Meemic").

3. From approximately October 16, 2009 through the date of the Complaint, the Fortsons, who are Justin's parents, submitted executed Attendant Care Services Statements to Meemic every month, seeking payment for No-Fault PIP benefits, including 24/7 attendant care.

4. During the time period that the Fortsons submitted the Attendant Care Services Statement, Justin was incarcerated for 233 days and in drug rehabilitation for another 78 days.

5. For no less than 311 days, the Fortsons sought payment and were in fact paid for 24/7 attendant care, even though ***Justin was not present in their home or under their supervision in any manner.***

6. Attendant care services are only compensable when services are actually "rendered," and payment for 24/7 attendant care related to supervision is not permitted when the supervised person is absent. See *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012).

7. Activities purportedly performed by the Fortsons when Justin was in jail or rehab, including talking with his attorneys and paying his bills, are services not for which the Fortsons could have sought payment for under the No-Fault Act and further are not services requiring 24/7 attention.

8. The Policy contains an express provision, allowing Meemic to void the Policy in its entirety when "***any insured person had intentionally concealed or misrepresented any material fact or circumstance relating to . . . any claim made under it.***"

9. In submitting the Attendant Care Service Statements when Justin was not under their supervision, the Fortsons committed fraud on Meemic.

KREIS ENDERLE
One West Michigan
Battle Creek, MI
49017

10. Meemic is permitted to void the Policy and cease making any future payments to the Fortsons based on the plain language of the Policy and the actions of the Fortsons.

11. Existing case law permits an insurer: to void a policy for uninsured motorist benefits based on fraudulently submitted claims; to void a policy after payments have already been made to a third party if there was fraud in the application for the insurance policy; and to refuse making payments under a policy based on fraudulently submitted claims, supporting Meemic's position that the Policy is void. See *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 533; 620 NW2d 840 (2001); *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012); In *Bahri v IDS Property Casualty Ins Co*, No. 316869, 2014 WL 5066518 (Mich Ct App Oct 9, 2014) (approved for publication Dec 9, 2014).

Wherefore, for the reasons set-forth above and as expanded upon in the attached Brief in Support, Plaintiff/Counter-Defendant respectfully asks this Court to grant this Motion and enter an order: (1) voiding the Policy; (2) terminating any future liability to the Fortsons to make payments for Justin's care; (3) requiring the Fortsons to reimburse Meemic for fraudulently submitted Service Statements; and (4) granting any other relief as is equitable, including attorney fees and costs.

Respectfully submitted,
KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

Dated: April 7, 2015

By: _____
Mark E. Kreger (P35475)
Robb S. Krueger (P66115)
Stephen J. Staple (P77692)
Attorneys for
Plaintiff/Counter-Defendant

KREIS ENDERLE
One West Michigan
Battle Creek, MI
49017

STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

KREIS ENDERLE HUDGINS & BORSOS P.C.
BY: MARK E. KRETER (P35475)
ROBB S. KRUEGER (P66115)
Attorney for Plaintiff/Counter-Defendant MEEMIC Insurance Company
1 Michigan Avenue, West
Battle Creek, MI 49017
(269) 966-3000 / mark.kreter@KreisEnderle.com

CHASNIS, DOGGER & GRIERSON, P.C.
BY: ROBERT J. CHASNIS (P36578)
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/

LAW OFFICE OF JOSEPH S. HARRISON P.C.
BY: JOSEPH S. HARRISON (P30709)
Co-Counsel for Defendants/Counter-Plaintiffs Fortsons
P.O. Box 6916
Saginaw, MI 48608
(989) 799-7609 / jsh@joeharrisonlaw.com

DEFENDANTS/COUNTER-PLAINTIFFS' RESPONSE TO MEEMIC INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND REQUEST FOR SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS/COUNTER-PLAINTIFFS PURSUANT TO MCR 2.116(I)(2)

NOW COME the above-entitled Defendants/Counter-Plaintiffs, LOUISE M. FORTSON, RICHARD A. FORTSON, and JUSTIN FORTSON through his Conservator, RICHARD A. FORTSON, by and through their attorneys, CHASNIS, DOGGER AND

GRIERSON, P.C., and in response to MEEMIC Insurance Company's Motion for Summary Disposition stating as follows:

1.) Defendants/Counter-Plaintiffs admit that Justin Fortson suffered severe traumatic brain injury on September 18, 2009 from an automobile accident.

2.) Defendants/Counter-Plaintiffs Fortsons admit that Mr. and Mrs. Fortson (Justin's parents) were named insureds on the MEEMIC Insurance Company policy.

3.) Generally admitted that Louise Fortson submitted attendant care services statements to MEEMIC Insurance Company precisely as she had been instructed by MEEMIC Insurance Company adjusters.

4.) Denied for the reason that said allegations are untrue. In fact, upon information and belief, Justin Fortson had been sentenced to jail and/or drug rehabilitation by the Courts for a total of 94 days.

5.) Denied for the reason that said allegations are untrue. Justin Fortson was incarcerated or ordered inpatient rehabilitation for 94 days, not 311 days as represented to this Court by MEEMIC Insurance Company; and further, for the reason that Justin Fortson, in fact, was being supervised by his parents as they continuously and on a daily basis monitored Justin's well-being and attended to his needs including taking of various medication primarily for preventing seizures.

6.) Defendants/Counter-Plaintiffs respond by affirmatively representing to this Court that Justin's parents were attending to and attempting to supervise Justin as much as possible; and furthermore, despite the citation to *Douglas v Allstate Insurance Company* 492 Mich 241, 259; 821 NW2d 472 (2012), MEEMIC Insurance Company has affirmed that attendant care services are payable pursuant to their policy and

practice under certain circumstances such that the provider need not be actually present so long as someone is supervising the individual. (See deposition testimony of Meredith Valko, MEEMIC representative attached to Brief in Support.)

7.) Defendants/Counter-Plaintiffs affirmatively respond by indicating that MEEMIC Insurance Company, through its adjusters, were well aware of the fact that Louise Fortson did not accurately understand the nature of attendant care services and the manner in which the forms were to be completed and also made payments to Richard Fortson as a provider, never having received any attendant care services forms from Richard Fortson. Contrary to MEEMIC Insurance Company's representation in this Motion and contrary to allegations set forth in MEEMIC's Complaint, MEEMIC Insurance Company made no attempts to correct the deficiencies and inaccuracies but instead encouraged and ratified the practices by Louise Fortson in the manner in which the forms were historically submitted.

8.) Defendants/Counter-Plaintiffs affirmatively assert that MEEMIC Insurance Company has improperly terminated benefits to Justin Fortson, an incapacitated individual. (See deposition testimony of Meredith Valko, MEEMIC representative attached to Brief in Support.)

9.) Denied for the reason that said allegations are untrue - MEEMIC Insurance Company has no evidence of any intent, willful or wanton misconduct, or misrepresentation, which would constitute fraud. (Verified by claims representative, Meredith Valko, at her deposition. See deposition testimony attached to Brief in Support.)

10.) Denied for the reason that said allegations are untrue.

11.) MEEMIC Insurance Company misplaces the cited law. Those cases pertaining to voiding a policy based on fraud made by their own insured for uninsured motorist benefits at the time of an application for the issuing of a policy has no affect on their obligation to pay **Personal Injury Protection Benefits** for the traumatic brain-injured Justin Fortson under the circumstances existing in this case.

WHEREFORE, Defendants/Counter-Plaintiffs respectfully request that this Court deny MEEMIC Insurance Company's requests, to find MEEMIC Insurance Company's claim frivolous based on the deposition testimony of MEEMIC's insurance adjusters, Cynthia Temple and Meredith Valko, to grant Summary Disposition in favor of Defendants/Counter-Plaintiffs, to award interest and attorney fees under Michigan's No-Fault Act, and hold that attendant care services benefits are due and owing.

Dated this 6th day of August 2015.

Respectfully submitted,

Dated: August 6, 2015

CHASNIS, DOGGER & GRIERSON, P.C.
BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs Fortsons

Dated: August 6, 2015

LAW OFFICE OF JOSEPH S. HARRISON P.C.
BY: JOSEPH S. HARRISON (P30709)
Co-Counsel for Defendants/Counter-Plaintiffs Fortsons

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the Attorneys of Record herein at their respective addresses disclosed on the pleading this 6th day of August 2015.

X US Mail __ Hand Delivered __ UPS __ Other
__ E-mail __ Fed Express __ FAX

Signature: Kimberly Kauffman
Kimberly Kauffman

LAW OFFICES
CHASNIS, DOGGER & GRIERSON, P.C.

JOHN A. CHASNIS
DAVID G. DOGGER
MARK GRIERSON
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BRIGHAM C. BELL

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SAGINAW, MICHIGAN 48608

TELEPHONE
(989) 793-8300

FACSIMILE
(989) 793-8777

August 6, 2015

9236

Clerk of the Trial Court
Berrien County Trial Court
811 Port Street
St. Joseph, MI 49085-1187

Via UPS Next Day Air

RE: Meemic Insurance Company v Louise M. Fortson, Richard A. Fortson, individually, and Richard A. Fortson, as Conservator for Justin Fortson
Case No: 2014-260-CK

Dear Clerk:

Enclosed herewith for filing in the above-entitled matter, please find:

1.) Defendants/Counter-Plaintiffs' Response to MEEMIC Insurance Company's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Request for Summary Disposition in Favor of Defendants/Counter-Plaintiffs Pursuant to MCR 2.116(I)(2) (with Proof of Service affixed);
2.) Brief in Support of Defendants/Counter-Plaintiffs' Response to MEEMIC Insurance Company's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Request for Summary Disposition in Favor of Defendants/Counter-Plaintiffs Pursuant to MCR 2.116(I)(2) (with Proof of Service affixed);
3.) Motion fee ($20.00).

Thank you and please do not hesitate to contact me with any questions or comments.

Sincerely,

ROBERT J. CHASNIS
bchasnis@cdglaw.com

RJC:kk
Enclosure(s)

cc: Hon. John M. Donahue (w/enc.; Via UPS Next Day Air with clerk's copy)
Mark E. Kreter/Robb S. Krueger, Attorneys at Law (w/enc.; Via UPS Next Day Air)
Joseph S. Harrison, Attorney at Law (w/enc.)

COPY

STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

KREIS ENDERLE HUDGINS & BORSOS P.C.
BY: MARK E. KRETER (P35475)
ROBB S. KRUEGER (P66115)
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/

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BRIEF IN SUPPORT OF DEFENDANTS/COUNTER-PLAINTIFFS' RESPONSE TO MEEMIC INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND REQUEST FOR SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS/COUNTER-PLAINTIFFS PURSUANT TO MCR 2.116(I)(2)

NOW COME the above-entitled Defendants/Counter-Plaintiffs, LOUISE M. FORTSON, RICHARD A. FORTSON, and JUSTIN FORTSON through his Conservator for RICHARD A. FORTSON, by and through their attorneys, CHASNIS, DOGGER AND

GRIERSON, P.C., and for their brief in response to MEEMIC Insurance Company's Motion for Summary Disposition states as follows:

INTRODUCTION

Justin Fortson did spend some time in jail and also spent about six weeks in drug rehabilitation during the time period that MEEMIC continued to pay attendant care services to Richard Fortson based on attendant care services forms that were completed by Justin's mother, Louise Fortson. Richard Fortson never submitted any attendant care services forms, yet he was paid by MEEMIC Insurance Company for caring for Justin 24 hours a day, seven days a week as a result of their son's brain injury. There was never any intent to deceive or commit a fraud on the insurance company by any of the Defendants (**Exhibit A**, pages 44, 55, 67-72). **Exhibit B** are copies of attendant care services forms submitted by Louise Fortson. No payments for attendant care services were made to Louise Fortson. All payments for attendant care services have been paid to Richard Fortson, even though Richard Fortson works at least 40 hours per week and sleeps about eight hours per day. This is customary for MEEMIC Insurance Company to handle attendant care services claims in this fashion. (**Exhibit A**, pages 29-31, 46-48, 76). As the Court can see, and as confirmed the claims adjuster for MEEMIC Insurance Company, there is no doubt that Louise Fortson did not understand how the attendant care services form works. The adjuster even acknowledged in her deposition that it is very clear from the file that Louise Fortson never attempted to describe the services provided, she just simply put "24" in every square on the form, dated it, and signed it. (**Exhibit A**, pages 29-30, 44, 67.) This is what Louise Fortson was told to do from the inception and MEEMIC Insurance Company kept paying without question and with no other instructions. In fact, there came a time

when Louise Fortson was faxing these forms to MEEMIC by simply changing the date of the form and submitting it again each month. MEEMIC even got ahead of themselves and were paying attendant care services for a month in advance – another indication that Louise Fortson simply did not know what she was doing. Louise Fortson has Lupus, she has had many major surgeries including hip replacements, knee surgeries, abdominal and intestinal surgeries, she has suffered from strokes, spinal defects, and takes a great deal of medication. She is a rather unsophisticated and uneducated lady who drove a school bus until she had to retire due to her physical ailments just prior to her son suffering the open head injury with life-threatening swelling of the brain and leaving him with a mentality of a 12 to 14 year old. Louise dropped out of school in the ninth grade. Her grades in school were poor.

Claims adjuster, Cynthia Temple, told Louise Fortson that all she had to do was put "24" in each box on the attendant care services form, sign it, date it, and fax it to her, which Louise did every month. There was never any explanation and no instruction sheet. Often times the number of days on the form did not match the number of days in the month. MEEMIC just made the adjustment. There was never any explanation and no instruction sheet. (Louise would not have understood the instruction sheet anyway.) It should also be noted by the Court that MEEMIC Insurance Company, under the Michigan Automobile No-Fault Act, offered to pay and Richard and Louise Fortson accepted payment of $11.00 per hour, 24 hours per day, seven days a week for attendant care services if Justin would be cared for by his parents in their home rather than pay an institution to care for their son. Counsel for Fortsons attended a visit to Hope Network in Grand Rapids with Justin Fortson and Louise Fortson approximately October 2009. Hope

Network was ready to take Justin as an inpatient on the recommendation of Neurologist Cynthia Pareigis at that time. There is no dispute that Justin has been ordered 24 hour per day attendant care services. He simply cannot be left alone at any time because he is a danger to himself and others as a result of brain damage. This is why Justin got into trouble with the law, which will be discussed later. It is also important to note that Richard Fortson has been appointed conservator for his son, Justin, by the Berrien County Probate Court upon a finding that Justin is a legally incapacitated individual. MEEMIC Insurance Company has paid 24 hour care to Richard Fortson even though the requests for payment were made by Louise Fortson. Richard Fortson has a 40 hour per week job and the insurance adjusters at MEEMIC Insurance Company acknowledge that that does not create a problem. They understand and know that Richard Fortson and Louise Fortson have to sleep and that Richard is away at his job 40 hours per week and that on occasion others would be assisting with the supervision. It is sufficient for MEEMIC to know that Justin needs 24 hour care and supervision for them to simply write a check to Richard Fortson based on Louise's form. (**Exhibit A**, pages 23, 29-30, 46-48.)

MEEMIC Insurance Company is asking this Court to terminate benefits to Justin Fortson. Clearly, Justin Fortson made no misrepresentation or defrauded MEEMIC Insurance Company. They, in fact, paid no attendant care services benefits to Justin Fortson. The "providers" of the attendant care services are Louise and Richard for the most part. The way MEEMIC set it up is that they would make the payments to the conservator, Richard Fortson, and Louise would send them the paperwork. If MEEMIC was paying an agency like Hope Network to take care of Justin, they would have been paying at least three times the amount they were paying Richard Fortson (confirmed by Meredith Valko at

her deposition). (**Exhibit A**, page 62-64). MEEMIC saved a lot of money by contracting with Louise Fortson at $11.00 per hour to keep Justin at home. Predictably, Mr. and Mrs. Fortson were not as well equipped to take care of their traumatic brain injured son as they had hoped. They have learned a lot over the last few years unfortunately for sure and that is discussed more in the factual portion of this summary.

FACTUAL SUMMARY

On September 18, 2009, Justin Fortson was sitting on the back of a friend's car. He and a group of other kids, generally ages 16 or 17, were goofing around on Highland Avenue in St. Joseph, Michigan. The kids started pushing the car and the driver of the car started the engine and starting driving with Justin on the trunk. Justin, while trying to hang on, fell off while the car went around a corner and Justin struck the side of his head on the pavement. Justin suffered an open head injury. He was on life support for an extended period of time with severe brain damage. (Attached as **Exhibit C** is a photo of Justin at the intensive care unit.) He has a portion of his skull removed above his ear on the right side of his head and he has a persistent tumor that continues to put pressure on his brain. He has permanent severe traumatic brain injury resulting in his need for constant supervision. His doctors have prescribed 24 hour care, seven days per week which is undisputed by MEEMIC Insurance Company. MEEMIC Insurance Company seeks to have their policy cancelled such that they would no longer be responsible for Personal Injury Protection benefits owed for the benefit of Justin Fortson, claiming that his parents have committed a fraud and intentionally tried to steal money from MEEMIC Insurance Company. It is simply untrue and MEEMIC knows it. MEEMIC insurance adjusters have testified that

they have no evidence of any intentional attempt to mislead or defraud the insurance company. (**Exhibit A**, pages 44, 51, 66-72.)

Louise Fortson is disabled as a result of her own medical issues. She has suffered strokes causing her mental and physical difficulties. She has defects in her spine. She has Lupus. She has had hip replacements and knee problems apparently related to serious arthritic problems. She has had surgeries related to intestinal issues. Louise will be present at the time of hearing on this Motion for Summary Disposition in Order for the Court to attempt to get an understanding of her ability to comprehend issues of insurance coverage and the nature of attendant care services and what the coverage is intended to cover. She left school in the ninth grade with failing grades. MEEMIC Insurance Company has never had any discussions or contact with Richard Fortson. None of the adjusters have ever met any of the Fortsons in person.

Since Justin returned home the hospital, Louise Fortson has been unable to sleep in her bed. She has a La-Z-Boy chair that she has placed in front of her son's bedroom door because Justin regularly awakes at night. He has dreams, he has nightmares, and he does not have complete control of his bladder or his bowels. His bed has to be changed due to both urinating and defecation in his bed on occasion. Even during the daytime Justin loses control of his bladder and his bowel requiring that Louise help clean him up. Justin suffers from seizures. Their neurologist, Dr. Ward, has reported that Justin suffers seizures on an average of approximately every seven minutes. These are largely undetectable, however, it is not unusual for him to have more than one major seizure where he loses consciousness and falls to the ground convulsing uncontrollably. He takes high doses of anti-seizure medication.

There is simply no question that Justin has severe cognitive deficits. Counsel for MEEMIC Insurance Company has attempted to minimize Justin's problems by referring to the bizarre postings on Facebook and the fact that Justin has been involved with alcohol and drugs. Even MEEMIC Insurance Company's adjuster, Meredith Valko, admitted that a traumatic brain injured person's susceptibility to trouble with the law including drugs and alcohol is "predictable". (**Exhibit A**, pages 27, 49.)

Justin Fortson has severe behavioral disorder from his traumatic brain injury including typical sequelae like impulsivity, poor judgment, lack of appreciation of the significance of certain issues like safety issues, and is easily influenced. His mentality has been compared to that of a 12 to 14 year old. He has difficulty tying his shoes. He is easily persuaded. He has very few friends although many people come to Justin and call him their friend. Justin has been in a lot of trouble because he is easily persuaded and thinks people are his friends when they are not. Mr. and Mrs. Fortson had to put an alarm on their house because Justin was sneaking out of the house to be with his "friends". He was escaping from the home, not because Mr. and Mrs. Fortson were not trying. Again, Richard Fortson had a 40 hour per week job and Louise's abilities are limited unfortunately by her own health conditions. They have come a long way toward being able to control Justin, partly because Justin is becoming more manageable with time. Even after they put the alarm on their house, Justin did, in fact, escape on occasion and they were forced to go back and get a second alarm on their house which virtually goes off if any door or window is opened in the house. This family's life has been turned upside down. Justin was befriended by a group of young men who stole things from Justin. He has had cell phones stolen and video game consoles stolen. He has had televisions stolen from him by his friends. Some of his

"friends" used Justin's parent's garage to make meth and Justin ended up being charged along with them for possession of meth amphetamine. A young lady befriended Justin and introduced him to heroin. Justin spent time in drug rehab. Justin has a sister with nursing background and a brother-in-law who is a paramedic who have tried to assist in controlling Justin and getting him to appreciate his need to reject these people who are not really his friends. Justin does not understand. The vulgarity and repulsive postings on Facebook is a product of the traumatic brain injury and MEEMIC Insurance Company and its lawyers should be ashamed to present these distasteful pieces of "evidence" to the Court as a basis for terminating a brain injured individual's benefits.

LAW
MCR 2.116 (C)(10)

The Michigan Supreme Court defined the legal standard for motions brought pursuant to MCR 2.116(C)(10) in *Smith v Global Life Ins Co*, 416 Mich 446, 454-455, 455 at fn.2 (1999) and in *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). The motion tests whether evidentiary support exists for the claims made or defenses raised by the non-moving party. In *Rozwood*, supra, the Supreme Court stated:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). 461 Mich at 119-120. (Citations omitted).

The evidence produced by both parties in order to set forth or rebut a motion for summary disposition is set forth in MCR 2.116(G)(6) which provides:

> (6) Affidavits, depositions, admissions and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

The moving party has the initial burden of supporting its position by evidence that is admissible if a trial of the case is required. *Smith*, supra, 460 Mich at 454-455 and *Rozwood*, supra, 461 Mich at 119-121. This claim may not be made by the mere allegations or denials of the moving party or its attorney. The moving party cannot support this claim by its pleadings. MCR 2.116(C)(4). The moving party must, by affidavit, or otherwise, support their motion and cannot rely on mere allegations of its attorney. In this motion, Defendant has submitted only the unsupported allegations of its attorney. For this reason, Defendant's motion must be denied as Defendant has not met its burden of proof.

Additionally, when reviewing motions brought under MCR 2116(C)(10), the Court must be careful not to substitute a summary hearing for a trial. *Partich v Muscat*, 84 Mich App 724 (1978). The Summary Disposition rule must be strictly construed by the Court. See, *Doe v Osceola Twp*, 84 Mich App 514 (1978). Further, the Court must not make determinations of fact. See, *Schram v Chambers*, 79 Mich App 248 (1977); and *Baker v City of Detroit*, 73 Mich App 67 (1976). When evidence before the Court is incomplete or disputed, the matter should not be decided summarily. See, *Oliver v St. Clair Metal Products Co*, 45 Mich App 242 (1973); and *Renfroe v Higgins Rack Coating & Mfg Co, Inc*, 17 Mich App 259 (1969). The Court must review the evidence presented in a light most favorable to the non-moving party and when reasonable minds might differ as to the outcome, the Court must deny the motion. See, *Rozwood*, supra; *Quinto*, supra, 451 Mich at

362-363; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618 (1995); and *Jackson Lib v Jackson Cty #1*, 146 Mich App 392 (1985).

The Court must give the benefit of any reasonable doubt to the non-moving party and grant a motion only if it is impossible for the claim to be supported at trial because of a deficiency that cannot be overcome. See, *Peterfish v Frantz*, 168 Mich App 43, 48-49 (1988); and *Struble v Lack Industries, Inc*, 157 Mich App 169, 172-73 (1986); *Huff*, supra; *Partrich*, supra; *Adas v Ames Color-Tile*, 160 Mich App 297, 300 (1987); *Bob v Holmes*, 78 Mich App 205 (1977); and *Rizzo v Kretschmer*, 389 Mich 363 (1973).

MICHIGAN NO-FAULT ACT

The Michigan No-Fault Act is a compulsory insurance system that requires most motorists operating motor vehicles in Michigan to purchase mandatory no-fault coverage or face fine or imprisonment. See, MCL 500.3101(1). No-fault coverage, unlike uninsured motorist coverage, is mandatory and required by the terms of the Michigan No-Fault Act. The Legislature has chosen to require every Michigan No-Fault Insurance policy to contain Personal Protection Insurance coverage. In *Rohlman v Hawkeye – Security Ins. Co*, 447 Mich 520, 524-525 (1993) the Michigan Supreme Court noted that when the provisions of an insurance contract are mandated by statute, the statute applies to control the rights and limitations of the coverage required by statute. The entitlement to Personal Protection Insurance benefits is statutory and not contractual. *Harris v ACIA*, 494 Mich 462, 472 (2013); MCL 500.3101(1), MCL 500.3107, and MCL 500.3114(5).

The Michigan No-Fault Insurance Act should be construed liberally as it is remedial in nature. *Putkamer v TransAmerica Ins Corp of Amer*, 454 Mich 626, 631 (1997). This rule of construction is intended to apply to payment of benefits to injured parties who were

intended to benefit from the adoption of the No-Fault Legislation. The Act should be broadly construed to effectuate coverage. *McMullen v Motors Ins Corp*, 203 Mich App 102, 107 (1993). The Act provides that an insurer is liable to pay benefits for accidental bodily injury arising from the operation, ownership or use of a motor vehicle as a motor vehicle. See, *Douglas v Allstate*, 492 Mich 241 (2012); and MCL 500.3105. Personal Protection Insurance is a mandatory coverage required by MCL 500.3101(1) and are provided regardless of fault. MCL 500.3107(1)(a) establishes medical benefits that an insurer must provide within the mandatorily required insurance coverage. It is Justin Fortson's medical benefits Plaintiff/Counter-Defendant wishes to avoid.

Section 3107(1)(a) requires:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> > (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

The Michigan Supreme Court has instructed that each portion of §3107(1)(a) must be considered separately and thus "care, recovery and rehabilitation" each must be applied independently. *Douglas v Allstate*, supra, 492 Mich at 259-260; and *Griffith v State Farm*, 471 Mich 521 (2005). The Court has held that expenses for "recovery" or "rehabilitation" are costs expended to bring an insured to a condition of health or ability to resume pre-injury life. *Douglas*, 492 Mich at 259-260. Expenses for "care" are to be more broadly construed "...to encompass anything that is reasonably necessary to the provision of a person's protection or charge." *Griffith*, supra, 471 Mich 534; and *Douglas v Allstate*, supra, 492 Mich at 260-261. "Care" is broader than "recovery and rehabilitation" and may

include expenses that may not restore a person to his/her pre-injury state. *Griffith*, supra, 471 Mich 535; and *Douglas v Allstate*, supra, 492 Mich at 260-261. In this case MEEMIC has not produced any admissible evidence challenging Justin Fortson's need for medical services. The only medical evidence existing supports Justin's need for continued treatment. Even MEEMIC's claims adjuster testified that she recognized Justin's continued need for medical treatment. (**Exhibit A**, pages 23-27, 30-40, 45, 48.)

THE BENEFITS AT ISSUE ARE MANDATORILY REQUIRED BY THE MICHIGAN NO-FAULT ACT

The Michigan No-Fault Act is a compulsory insurance system where the Legislature has required the mandatory purchase of specific benefits. The benefits Plaintiff/Counter-Defendant wishes to end are among the insurance coverages the Legislature chose to make mandatorily required through MCL 500.3101(1) and MCL 500.3107 of the No-Fault Act.

MCL 500.3112 provides that:

> Personal protection insurance benefits are payable to or for the benefit of an injured person...

In the instant case the benefits at issue were not paid to Justin Fortson, but were paid directly to Richard Fortson for the benefit of Justin Fortson. Plaintiff/Counter-Defendant does not argue or offer any proof that Justin Fortson was involved in the alleged fraudulent activities. The allegations of Plaintiff/Counter Defendant focus completely on the actions of Louise and Richard Fortson, but seek to punish Justin. It is the medical mandatory benefits required by the Michigan No-Fault Act that Plaintiff/Counter Defendant seeks to bar. MCL 500.3112 requires that Justin's medical benefits are payable to him. The statute does not provide or allow a claim against Mr. and Mrs. Fortson to extinguish or limit in any way other medical benefits due their son.

The Michigan Legislature has set forth specific provisions in the Michigan No-Fault Act to limit and/or disqualify mandated no-fault benefits. At no point in the Michigan No-Fault Insurance Act did the Legislature allow an innocent insured's Personal Protection Insurance benefits to be limited by alleged misrepresentation and fraudulent activity by another insured. Several of the limitations that the Legislature has chosen to place upon no-fault coverage are contained within MCL 500.3106 (Parked Vehicle and Worker's Compensation Exclusion) and MCL 500.3145 (the 1 year Statute of Limitations). MCL 500.3113 sets forth specifically activities that the Michigan Legislature has chosen to disqualify an injured person's right to Personal Protection Insurance benefits. Again, no portion of §3113 provides for an innocent insured to lose his/her Personal Protection Insurance benefits due to misconduct by a co-insured.

The Michigan Legislature provided in MCL 500.3112 a means that would allow an insurance company or any other interested person or organization to come to court and to answer doubts that may exist about the proper persons to receive payments and/or the proper apportionment amount of persons entitled to payment. The provision provides, in part:

> If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate.

Thus if there is question concerning a person's right to payment, any interested party could seek answer or protection in the Circuit Court. Plaintiff/Counter-Defendant may seek to test Mr. and Mrs. Fortson's right to receive payment under this provision. This

provision does not allow Plaintiff/Counter-Defendant to test Justin's medical benefits because of his parents' conduct.

The rules of statutory construction apply to the application of the Michigan No-Fault Insurance Act as it relates to Plaintiff/Counter-Defendant's motion. When interpreting a statute, the Court must first and foremost give affect to the intent of the Legislature. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 51 (2006); *Trye v Michigan Veteran's Facility*, 451 Mich 129, 135 (1996); *People v Hawkins*, 181 Mich App 393, 396 (1989); and *Joy Management Co v Detroit*, 176 Mich App 722, 730 (1989). The Court must ascertain the legislative intent that may be inferred from the statutory language. *Satelo v Grant Twp.*, 470 Mich 95, 100 (2004). The first criterion in determining intent is the specific language of the statute. *Saint George Greek Orthodox Church v Laupmani Assoc*, 204 Mich App 278, 282 (1994); and *Hawkins*, supra at 396. The Legislature is presumed to have intended the meaning it plainly expressed. *Trye*, supra; and *Fraiser v Model Coverall Service, Inc*, 182 Mich App 741, 744 (1990). Courts may not speculate with respect to the probable intent of the Legislature beyond the words expressed in the statute. *People v Breidenbach*, 489 Mich 1, 10 (2011); and *Mich Ed Assn'n v Secretary Of State (On Rehearing)*, 489 Mich 194, 218 (2011). If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted. *Koentz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002); *Trye*, supra; and *Nat'l Exposition Co v Detroit*, 169 Mich App 25, 29 (1988).

The Michigan Legislature set forth its intentions concerning limitation and disqualifications allowed with regard to an innocent insured's claim for Personal Protection Insurance benefits. The Legislature did not provide for the relief requested by the

Plaintiff/Counter-Defendant. The Court cannot assume that for some reason this was an oversight. Nowhere in the Act is there any suggestion that the Legislature intended to allow the termination of statutorily mandated no-fault benefits held by an innocent insured based upon the misconduct of another insured. The Insurance Companies' request for a termination of Justin Fortson's Personal Protection Insurance benefits should be denied.

THE CASES CITED BY PLAINTIFF/COUNTER-DEFENDANT DO NOT SUPPORT TERMINATION OF JUSTIN FORTSON'S NO-FAULT BENEFITS.

The cases cited by Plaintiff/Counter-Defendant do not support its claim that it should be allowed to cancel an innocent third-parties' No-Fault benefits because of the fraudulent conduct of another insured. For example, *Cohen v ACIA*, 463 Mich 525 (2001) allowed the voiding of an uninsured motorist claim because the coverage was not mandatory coverage. 463 Mich at 530. The Court specifically stated:

> ...mindful of the great protection that the Legislature and this Court have provided for the no-fault benefits required by statute, we need not decide today the full extent to which the disputed clause, if applicable, could void the policy. We need only decide whether it can void uninsured motorist coverage... Id.

The instant case does not involve non-mandatory uninsured motorist coverage and thus *Cohen* does not apply.

Similarly, *Bahri v IDS Property Casualty Ins. Co*, COA Docket No. 316869 (Decided 10/9/14) (approved for publication 12/9/14) (**Exhibit** E) does not apply in the instant case. *Bahri* did not involve an innocent insured, but rather involved fraud committed by the insured. The decision was based on the insured's fraudulent conduct not the fraudulent conduct of other persons. These facts are different than the facts of the instant case where Justin Fortson did not commit any fraudulent act and the

Plaintiff/Counter-Defendant seeks to deny Personal Insurance Benefits to an innocent party. *Bahri* does not apply in the instant case.

Plaintiff/Counter-Defendant cites *Titan v Hyten*, 491 Mich 547 (2012) as a case that supports its position. In *Titan*, the Court held that an excess insurer could avail itself of the equitable remedy of reformation to avoid liability under an insurance policy on the grounds of fraud, even where the fraud was easily ascertainable and the claimant was a third-party as long as the remedies are not prohibited by statute. Id at 550, 554, 558, 571. The Court made no finding that applied to no-fault insurance benefits that are mandated by statute. The Court noted:

> Insurance policies are contracts and, in the absence of an applicable statue, are 'subject to the same contract construction principles that apply to any other species of contract.' *Id.* at 461. As this Court noted in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525 n 3; 502 NW2d 310 (1993), quoting 12A Couch, Insurance, 2d (rev ed), §45:694, pp 331-332,
>
> > [the insurance] policy and the statutes related thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.
>
> Thus, when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute. See *Rohlman*, 442 Mich at 524-525 (holding that because personal injury protection benefits are mandated by MCL 500.3105, that statute governs issues regarding an award of those benefits). On the other hand, when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual and construed without reference to the statute. See *Rory*, 473 Mich at 465-466 (holding that because uninsured-motorist coverage is optional and not mandated by statute, 'the rights and limitations of such coverage are purely contractual and construed without reference to the no-fault act'). *Id.* at 554.

A case that did consider an insurer's attempt to void the Personal Protection Insurance benefits of an innocent third party was *State Farm Mut Automobile Co v QBE Ins Corp., et al*, COA Docket No's. 319709 & 319710 (Decided 2/19/15) unpublished (**Exhibit D**). In this case, the Court of Appeals held that *Titan*, supra, did not apply to allow an insurer to void Personal Protection Insurance benefits of an innocent third-party. Thus, the Court of Appeals denied the specific claim Plaintiff/Counter-Defendant has made against Justin Fortson's statutorily mandated Personal Protection Insurance benefits. This case should be applied in the instant case and Plaintiff/Counter-Defendant's Motion should be denied.

CONCLUSION

Attached and marked hereto as **Exhibit F** is a letter from Susan Rumford at Hope Network. Recently, Hope Network was contacted hoping that they would accept Justin Fortson in-patient based on the recommendations made by Dr. Cynthia Pareigis (**Exhibit G**) and based upon the circumstance that they would get paid when this litigation is finalized. Because of the fact that MEEMIC Insurance Company has alleged fraud and are seeking to terminate any future coverage, Hope Network has refused to accept Justin at their agency. Frankly, Louise and Richard Fortson are better equipped now to take care of Justin than they were back in 2009, and they, in fact, have been doing that without incident for quite a long time. Louise and Richard have learned to manage Justin in their home. They, in fact, are owed $96,360.00 for attendant care services dating from September 1, 2014 through the present. (For purposes of this Motion, calculation is made through August

30, 2015.) If credit is afforded for the 94 days that MEEMIC Insurance Company believes was an overpayment, balance owed is $71,544.00. There is no question that attendant care has actually been rendered by Mr. and Mrs. Fortson in their home. Meredith Valko testified that she knows of no other days other than those 94 days set forth in the Complaint where Justin was not present in their home with his parents. (**Exhibit A**, page 68.) These are the days that MEEMIC believes Justin was in jail or rehabilitation. Contrary to MEEMIC Insurance Company's lawyer's statement at page 18 of their brief that Louise was "lying", Meredith Valko, the adjuster for MEEMIC testified that she has no evidence that Louise nor Richard, nor Justin, intended to defraud, intended to steal, engage in willful and wanton activity, or otherwise committed a fraud. (**Exhibit A**, page 44, 51, 66-72.) She simply terminated Personal Injury Protection Benefits because Richard Fortson accepted the checks. In fact, Richard Fortson never sent a request to MEEMIC. His wife, Louise, directed the attendant care services forms based on the instructions given by Cynthia Temple and as had been certified, ratified, and accepted by MEEMIC Insurance Company since 2009! MEEMIC Insurance Company was well aware by the receipt of the forms that Louise was not well versed in how the forms were supposed to be prepared. They were deficient and incomplete but MEEMIC paid anyway. Louise Fortson simply did not know what attendant care services are and was told by the insurance company that they would pay her $11.00 an hour, 24 hours per day, seven days a week to take care of their son. MEEMIC Insurance Company was avoiding paying three to four times that much money to an agency like Hope Network. Hope Network instructed the Fortsons that Justin could not be kept there against his will and if he did not want to go there he could walk out any time. Justin told his mother, that if she dropped him off at Hope Network, he would kill himself.

Dr. Cynthia Pareigis put in her office notes that she was pretty sure that if Justin was placed in an agency like Hope Network that he would "elope". (**Exhibit H.**)

Dated this 6th day of August 2015.

Respectfully submitted,

Dated: August 6, 2015

CHASNIS, DOGGER & GRIERSON, P.C.
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Attorneys for Defendants/Counter-Plaintiffs Fortsons

Dated: August 6, 2015

LAW OFFICE OF JOSEPH S. HARRISON P.C.
BY: JOSEPH S. HARRISON (P30709)
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the Attorneys of Record herein at their respective addresses disclosed on the pleading this 6th day of August 2015.

X US Mail ___ Hand Delivered ___ UPS ___ Other
___ E-mail ___ Fed Express ___ FAX

Signature: Kimberly Kauffman
Kimberly Kauffman

MEEMIC INS. CO. v. FORTSON

MEREDITH VALKO

June 19, 2015

Prepared by

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

MEEMIC INSURANCE COMPANY,

Plaintiff,

v File No. 2014-260-CK

LOUISE M. FORTSON, RICHARD A. FORTSON, Individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON, HON. JOHN M. DONAHUE

Defendant.
/

DEPOSITION OF MEREDITH VALKO

Taken by the Defendants/Counter-Plaintiffs on the 19th day of June, 2015, at 1685 North Opdyke Road, Auburn Hills, Michigan, at 9:00 a.m.

APPEARANCES:

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Network Reporting Corporation
Firm Registration Number 8151
1-800-632-2720

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Auburn Hills, Michigan
Friday, June 19, 2015 - 9:35 a.m.

REPORTER: The Court Rules require me to state that Network Reporting has agreed to provide court reporting services to the Defendant's Attorney at an agreed-upon rate.

Do you solemnly swear or affirm that the testimony you're about to give will be the whole truth?

MS. VALKO: I do.

MEREDITH VALKO
having been called by the
Defendants/Counter-Plaintiffs and sworn:

EXAMINATION

BY MR. CHASNIS:

Q Meredith, would you state your full name for the record, please?
A Meredith Valko.
Q And what's your address here at Meemic?
A The work address --
Q Yeah.
A -- 1685 North Opdyke Road, Auburn Hills, Michigan, 48236.
Q And that's where we're here today; right?
A Correct.
Q And how many times have you had your deposition taken?
A Zero.
Q First time?

A Uh-huh (affirmative).
Q How long have you worked at Meemic?
A Four years.
Q I'm sure your lawyer talked about it, but a deposition is my one opportunity to talk to you as a representative of Meemic Insurance Company. And it may be that some of my questions -- probably will be that some of my questions won't be very artfully worded. So if I ask a bad question, tell me that it's a bad question, and I'll rephrase it. No problem. Okay?
A Okay.
Q If at any time you don't know the answer to one of my questions, just tell me that you don't know. There's nothing wrong with that. What we don't want is a guess. Okay? If you think you know the answer, and you want to give me that answer, and you're pretty sure about it, but it's not firsthand knowledge, you can tell me that. That's okay. All right?
A (Nodding head in affirmative)
Q Okay. If at any time you need a break, you just let me know. That's not a problem.
A Okay.
Q All right. It's not a test. I'm just taking advantage of my one opportunity to get a discovery deposition from you, so that I know when we show up for trial that, you know, at

least I have an opportunity to avoid any surprises, if I do a good enough job to ask you what's important.

A Okay.

Q From time to time, I might ask you a question that you want to answer in the affirmative, and you might nod your head, or you might say "uh-huh," and I might say, "Did you mean 'yes'?" I'm not picking on you. It's easier for me to read that when it comes back; "uh-huh" and "unh-unh" looks the same in words to me.

A All right.

Q So if I do that, I'm not picking on you. Okay?

A (Nodding head in affirmative)

Q What city do you live in?

A Ferndale, Michigan.

Q Are you married?

A No.

Q Do you have children?

A No.

Q What's your date of birth?

A September 16th, 1985.

Q And where'd you go to high school?

A Sterling Heights Stevenson.

Q And what year did you graduate?

A 2003.

Q Did you go to college?

A I did.

Q What college?

A Michigan State University.

Q And what did you study at MSU?

A International studies.

Q Did you graduate?

A I did.

Q What year?

A 2007.

Q And what degree did you earn?

A Interdisciplinary studies in social studies, international studies.

Q I'm just going to put interdisciplinary studies. Is that a bachelor of science degree?

A Yes.

Q And any other formal education following graduation from MSU?

A No.

Q After graduating from MSU, did you go to work?

A I did.

Q Where?

A Progressive Insurance.

Q Where was that located?

A Sterling Heights, Michigan.

Q What did you do at Progressive beginning -- now, would that

be 2007 yet?

A It was January 2008.

Q What did you do there beginning January 2008?

A I handled auto damage claims.

Q And what office out -- that was in Sterling Heights. Is there only one Progressive office there?

A In Sterling Heights, yes. There's multiple in Michigan.

Q Okay. Have you handled any -- have you ever handled any type of claim where I was an attorney on the file?

A No, I don't think so.

Q Don't remember any? Okay. How long did you work for Progressive?

A About three and a half years.

Q How long did you do auto damage claims at Progressive?

A Three and a half years.

Q So you were a claims representative handling auto property damage claims?

A Yes.

Q Were you an in-office or a field adjuster?

A I started out as both.

Q Okay. So you were given a car?

A Uh-huh (affirmative).

Q "Yes"?

A Yes.

Q Okay. And what area did it cover when you were a field

adjuster doing auto claims?

A Metro Detroit, west of Woodward from Port Huron down to Detroit.

Q Okay. And that job generally would entail sometimes looking at, photographing vehicles, accumulating estimates from those people who do that kind of stuff, and then you'd process the claim?

A Yes.

Q Culminating in issuing a check to an insured, if that's the proper thing to do?

A Yes.

Q Did you receive any training from Progressive for that job?

A Yes.

Q What type of training did you get?

A General insurance training as well as estimate writing training, and then Michigan specific training.

Q What would be involved in the general insurance training?

A It was a two-week class in Cleveland, Ohio that had new adjusters from all over the country, so they just went over basic components of auto insurance policies.

Q So you would study the policies, and understand the terms of the policy with respect to auto damage?

A Correct.

Q And you would educate yourself on how a claim should be presented, what documents you need to put in your file, so

that ultimately you can issue a check, and if someone audits it, they know you did your homework, and verify that the money was owed?
A Correct.
Q And along the way, you would have to have a decent understanding of what types of coverage the policy afforded; right?
A Correct.
Q And so you got to know that aspect of auto insurance policies; true?
A Yes.
Q And then you -- that was two weeks?
A Uh-huh (affirmative).
Q "Yes"?
A Yes.
Q And then you were trained in estimate writing?
A Correct. That was another two weeks.
Q A different two weeks?
A Yes.
Q Where was that class?
A Also in Cleveland.
Q And who taught that class?
A Oh, gosh, I don't remember: There was probably five or six different instructors.
Q Okay. So I would think that estimate writing would be the

same thing that a body shop guy might do. You'd look at the damage, and maybe try to figure out whether there's frame involvement, or whether you need to replace glass, if the fender needs to be replaced, and then you would have programs that you would plug some information in, and it would help you compute an estimate on what it should cost to repair; is that about right?
A Yes.
Q Okay. Anything else other than that for estimate writing for auto damage?
A No.
Q That's kind of generally what it was?
A Yes.
Q All right. And then Michigan specific training, what was that?
A That was done in the Plymouth office in Michigan.
Q That's a Progressive office?
A Correct. And that was to explain the no-fault law and how to -- how we specifically handle claims in Michigan.
Q Would that be restricted to auto damage claims?
A Yes.
Q Okay. By that time in your career, had you had exposure to other aspects of Michigan automobile no-fault law, such as personal injury protection, benefits, and third-party liability?

A A very brief overview.
Q Okay. Probably couldn't help to get -- to hear people talking about it, and maybe being exposed to a little bit, but by then, you hadn't had any training, real serious training on those aspects of no-fault law; true?
A True.
Q Okay. So let's see. Three and a half years, so that'd be through about the middle of 2011; is that right?
A Correct.
Q Yeah, 2011. So then what happened?
A I interviewed for a job at Meemic, and received that position.
Q Do you know when you started working at Meemic?
A June 6th, 2011.
Q And what position did you start at with Meemic?
A It was a personal injury associate.
Q In the office here on Opdyke?
A Correct.
Q So you've been here since 2011 June?
A Yes.
Q All right. And as a personal injury associate, what did you do?
A I handled very low level personal injury claims, mostly treat and release claims, and I assisted other injury reps in the office as well.

Q Before you started handling the low level claims and assisting other reps, did you go through any period of training?
A Brief training with the manager at the time.
Q Who was that?
A Sally Shiminsky.
Q And what did that brief training consist of?
A The more specific aspects of PIP coverage, as well as how to handle PIP claims.
Q So as a PI associate, would that be personal injury associate?
A Uh-huh (affirmative).
Q "Yes"?
A Yes.
Q And would that really be personal injury protection benefits?
A Yes.
Q Okay. So that'd be different from what we would refer to as "BI"?
A Correct.
Q Have you ever handled BI claims?
A Not in the State of Michigan.
Q Okay. And that tells me that you have somewhere other than the State of Michigan?
A Correct.

Q Let's go off on the BI claims. That's bodily injury; right?
A Yes.
Q When did you handle claims for bodily injury?
A I currently handle Wisconsin bodily injury claims. I have since September 2013.
Q Is that in addition to handling personal injury protection benefits claims?
A Yes.
Q Do you have an explanation for how it is that you might handle Wisconsin claims as opposed to Michigan claims?
A I don't understand your question.
Q Is there a reason why you would handle bodily injury claims only for Wisconsin?
A Wisconsin doesn't have the personal injury protection coverage. They only have med pay. That's handled by another adjuster in our office, so I am only doing the BI.
Q So you're saying those bodily injury claims that you have that are -- that deal with Wisconsin are med pay cases?
A Yes.
Q So really they're kind of like the PIP cases you're handling?
A Yeah, kind of.
Q And they're really not much like the BI claims in Michigan?
A No.
Q Okay. In Michigan, you have threshold injury?

A Right.
Q And it's -- there's a -- the law's a lot different than the personal injury protection. Well, the issues are different?
A Right.
Q Okay. So handling the Wisconsin BI claims is not that much different from the PIP claims in Michigan, or at least they have similarities?
A Correct.
Q Okay. So that would be why it would be -- Wisconsin BI claims would be a good fit for you, as opposed to a BI rep here?
A Yes.
Q Gotcha. All right. Then following your brief training with Sally Shiminsky on handling personal injury protection coverage files, did you have any other training through Meemic?
A No.
Q Have you had training for any other area of claims handling?
A No.
Q Okay. Now, you presented to me a copy of the Garan Lucow book that was published. It says "2015" on it. Was this something that comes to the office here, or is this something that you would have gotten by attending a seminar?
A We get those to our -- the office every year.
Q Okay. So you, as a claims rep, having -- handling PIP

cases, there's parts of this "Guide to Michigan Automobile No-Fault Law" that are helpful to you in handling claims?
A Yes.
Q And you would refer to this book to help you decide whether there's coverage under a PIP policy for a certain type of medical treatment?
A Yes.
Q There are probably some parts of this guide that you don't use, because they don't deal with PIP; right?
A Yes.
Q Okay. Any other guides or training manuals, or any other documents, or authorities that you would refer to in handling your PIP cases?
A No.
Q Okay. So as far as a formal training for personal injury protection benefits, you had just the brief training with Sally?
A Yes.
Q So you've got no medical background?
A No.
Q No medical training? Nursing training?
A No.
Q And you don't make decisions -- you don't make medical decisions on your PIP cases? You rely on medical records that you receive; true?

A True.
Q All right. I noticed your deposition because your name was in the personal injury protection file that I received. Do you know when you would have first had any contact with this claims file?
A I believe it was October 2013.
Q October 2nd; right? That's the first log note with your initials on it?
A I believe so, yes.
Q And have you -- are you familiar with this file?
A Yes.
Q You've reviewed the whole file?
A Yes.
Q Even though there was -- this is 1,000 -- I've been provided 1,360 pages, but then another stack today has been given. You've -- you're familiar with the entire file?
A Yes.
Q And have you seen the application on this file?
A Yes.
Q And you produced that today. That was not part of the disk file that I was produced previously. Do you -- can you tell me why?
A When the claim was first filed, we didn't have electronic files. Everything was a paper file.
Q Okay. So what your lawyer has told me today is that what he

did is he handed me a stack I think you probably produced?
A **(Nodding head in affirmative)**
Q "Yes"?
A **Yes.**
Q That is a copy of a paper file, and we now know that there may be some things, including this application, that were not transferred or scanned into the computer; right?
A **Correct.**
Q Okay. Do you know of anything other than this application that is not in the computer file?
A **Yes. There are medical records, any medical bills that we received before we got the imaging system that we use now.**
Q Okay. So anything up to a certain date would not be there. Is that what I'm hearing?
A **Yes.**
Q Do you know the date?
A **I don't.**
Q Okay. Would it be possible for you to compare the paper file that you produced today with the printout that I've got, and come up with that date, or is that -- and it probably depends on whether everything's in the right order; right?
A **Yes.**
Q Is there a good chance that that paper file is not in the same order as what I've got here out of the computer?

A **Yes.**
Q Okay. I don't want to do that to you. All right. So you inherited this file, didn't you?
A **Yes.**
Q And prior to October 2nd, 2013, the file was being handled by Cynthia Temple?
A **Yes.**
Q Was there anybody else that worked on the file prior to your receiving it?
A **Yes.**
Q Who?
A **Erin Baylis.**
Q Was Erin Baylis actual the claim -- actually the claim rep on it when you took over?
A **Yes.**
Q Okay. Do you know when -- did Erin Baylis take it over from Cynthia?
A **Yes.**
Q Do you know when that occurred?
A **I don't.**
Q Okay. Off the top of your head you don't? It's in the file; right?
A **Yeah, it would be in the file.**
Q All right. Now, Mr. Gottshall just told us that he was first contacted in his capacity as a special investigation

unit representative for Meemic on May 31st, 2013. That's before you had anything to do with this file; right?
A **Yes.**
Q And so the surveillance that had been ordered was ordered before -- five months before you ever saw this file; true?
A **True.**
Q Did you ever receive any reports from Mr. Gottshall about the surveillance that was performed on this file?
A **The surveillance that was performed in May?**
Q Any surveillance on this file?
A **Or any surveillance? Yes, I have.**
Q Okay. And what did Mr. Gottshall report to you about his surveillance?
A **I received the report from Data Surveys, who actually completed the surveillance.**
Q Okay. At Ray's request?
A **Correct.**
Q And so Data Services -- or Data Surveys, is that what it is? --
A **I think so.**
Q -- yeah -- Data Surveys sent you the report, because your name was on the file now?
A **Yes.**
Q You didn't order any of it, but it came to you because your name and that claim number is Meredith's now; true?

A **True.**
Q Okay. And what did you do with the information from Data Surveys?
A **I reviewed it against the file, and I reviewed it with my manager.**
Q And what was the result of that review with your manager?
A **With the most recent surveillance?**
Q Yes.
A **We decided, based on the criminal report for Justin Fortson, to terminate benefits for attendant care.**
Q And what's the reasoning behind terminating benefits?
A **Benefits were submitted for time when care was not being performed by Justin's parents.**
Q Have you reviewed the Complaint in this case?
A **Yes.**
Q And do you know that the Complaint sets forth the days that Justin was not supervised by his parents?
A **Yes.**
Q And have you determined that those are the number of days that Justin was not with his parents, but that you paid them to be with Justin?
A **Yes.**
Q And do you believe that to be an accurate number as the days that you know of that he was not with his parents?
A **I believe so, yes.**

Q Do you know of any other days, other than those days set forth in the Complaint, where Justin was not supervised by his parents?
A No.
Q So other than those set forth in the Complaint, you don't know whether the parents provided any supervision?
A No.
Q You don't know? You just don't know?
A No, I don't know.
Q Do you have any reason to believe that Justin Fortson does not need attendant care services?
A That's the difficult question. I mean, I guess I don't really understand what you mean by the question.
Q With respect to Justin -- part of your job as a PIP adjuster is to determine whether or not an individual is injured, and whether the treatment that has been ordered is reasonable and necessary and compensable under the policy; right?
A Right.
Q Or under Michigan law; right?
A Right.
Q You understand from your training and your experience that the law has a provision under the Act that orders certain insurance companies to have to pay personal injury protection benefits, without regard to the policy; true?
A True.

Q In this case -- and you reviewed the whole policy -- the whole claim file -- there are orders for continued attendant care services, 24 hours a day, 7 days a week; right?
A Correct.
Q And do you know what doctors have issued those prescriptions?
A Not off the top of my head.
Q If I told you a Cynthia Peragis, does that ring a bell?
A Yes, it does.
Q And do you know if Cynthia Peragis continues to order 24/7?
A I believe she does.
Q And in the file, does -- do you have recommendations that -- from Dr. Peragis that state that she would prefer to have Justin in a head-injured institution?
A I don't know.
Q You don't know?
A Off the top of my head, no.
Q And are you familiar with Dr. Ward's records in the file?
A No.
Q Okay. Have you seen any records from Dr. Ward, the neurologist, that treats Mr. Fortson?
A I don't remember.
Q Okay. Is there anything in your file that suggests that Justin Fortson does not need 24-hour supervision?
A Yes.

Q What?
A Surveillance reports.
Q Okay. And the surveillance reports from Data Surveys?
A Yes.
Q Anything else?
A No.
Q Who made the decision based on the Data Survey reports to the effect that Justin does not need 24-hour supervision?
A I did, after reviewing the surveillance with my manager.
Q Okay. Based on the surveillance by Data Systems, you made the determination to terminate benefits on this claim?
A Yes.
Q And you're not a doctor?
A No.
Q And you have no medical training?
A No.
Q And do you know if the Data Surveys people have any medical training?
A I don't know.
Q What it is -- what is it about their report that you rely on to make your determination to terminate the benefits to this brain-injured man?
A Justin's criminal report showed multiple times where he was not being supervised by his parents. The surveillance report shows multiple times where he was not being

supervised by his parents as well.
Q If Justin Fortson were in a head-injured institution today, would you pay benefits?
A Yes.
Q Do you have a head-injury institution that you know of that Justin can go to today?
A We have multiple ones. We don't tell people where to treat.
Q I've asked Hope Network to take Justin, and they refused because Meemic Insurance Company won't pay the benefits. Did you know that?
A I did not.
Q And if I gave you contact information for the director of admissions at Hope Network, would you contact that person, and see if they would accept Justin?
MR. KRUEGER: I'm going to object on the basis that it's not part of this case. The policy's being terminated as a result of fraud, so Meemic's continuing obligations under the policy aren't -- don't require them to contact the people, until the judge decides --
MR. CHASNIS: I'm going to object to your --
MR. KRUEGER: -- what the policy requires.
MR. CHASNIS: -- I'm going to object to your testifying and instructing, completely contrary to the Court Rule.
Q So there's nothing in your file that says that Justin's

condition has changed; true?
A True.
Q Do you know what his symptoms are?
A I know that he has seizures.
Q Anything else?
A No.
Q Do you know that he urinates in his pants during the day, and urinates in his bed?
A No.
Q Do you know that he defecates in his pants during the day, and defecates in his bed?
A No.
Q Do you know that he has a piece of his skull missing?
A No.
Q Do you know that he has a tumor that -- there being monitored, because it grows and puts pressure on his brain?
A No.
Q Do you know that Justin -- do you know what medication he takes?
A Not off the top of my head.
Q Have you ever talked to Louise Fortson?
A Yes.
Q Have you ever talked to Louise Fortson about Justin's condition?
A No.

Q Have you handled any other PIP cases involving head-injured people? Head-injured people?
A Yes.
Q And are you familiar with terminology including impulsivity, poor judgment, things like that?
A Yes.
Q Do you know if Justin suffers from deficits involving impulsivity and poor judgment?
A I don't know.
Q Do you have any experience, knowledge, or understanding about the propensities of brain-injured people to abuse alcohol and drugs?
A Yes.
Q What do you know about that?
A I have some insureds that have issues with it.
Q So this isn't the only case where a head-injured person ended up abusing drugs?
A Yes.
Q And I take it you're not suggesting that his involvement with drugs or alcohol constitutes a basis for terminating his benefits?
A No.
Q Okay. So if I understand it, you're strictly basing your decision, Meredith Valko's decision, to terminate benefits, on the fact that attendant care services were requested for

time periods when Justin was not under the supervision of mom and dad?
A Yes.
Q Who submitted the application in this case?
A The application for benefits?
Q Yes.
A I believe it was Louise.
Q And who did you pay attendant care services in this case?
A Richard Fortson.
Q Did Richard Fortson ever submit any attendant care services requests to you?
A I believe his name is on all of the calendars. I can't say who actually filled them out.
Q You're not familiar with them enough to tell me who filled them out?
A No, I'm not.
Q If I told you every one of them has a date and signature for Louise, do you have any reason to dispute that?
A I don't know.
Q You don't know?
A I don't know.
Q Have you ever talked to Richard Fortson?
A No.
Q Do you know anything about Louise Fortson's background?
A No.

Q If I told you that she had suffered from strokes, lupus, and other serious medical conditions, would that all be news to you?
A Yes.
Q Have you ever talked to Cynthia Temple about these people?
A No.
Q Have you ever met Justin?
A No.
Q Have you ever met Louise?
A No.
Q You've only talked to her on the phone?
A Yes.
Q There was a time when Louise would -- was submitting attendant care services form -- forms that had the wrong dates on them. In fact, she put 24 on 30 days a week on February on occasion. Did you ever see that?
A No.
Q Did you ever have any problem with the form that she was submitting the attendant care services with?
A No.
Q Did you ever have any problem with the form in which she was submitting her request for mileage reimbursement?
A No.
Q Did you ever have any issue with the form in which Louise requested replacement services?

A **No.**
Q Are you familiar with the forms that she submitted?
A **Yes.**
Q You understand that on the attendant care services form, typically she would just change the date at the bottom, and submit the same thing with the number 24 on every date? She would submit that over and over again to Meemic?
A **Yes.**
Q And every adjuster on the file approved payment, based on that method of her submitting the form?
A **Yes.**
Q And Cynthia Temple told me -- and perhaps you'll agree; perhaps you won't -- that she didn't need any more description than that, because she knew this was a pretty serious brain injury?
A **I can't speak to how she handled the file.**
Q Was it good enough for you because you knew it was a brain injury?
A **Yes.**
Q You don't dispute that this man had a pretty serious severe traumatic brain injury with significant residual effects; true?
A **True.**
Q Have you terminated Justin's benefits because Justin Fortson made any misrepresentations or fraud to Meemic?

A **No.**
Q Are you terminating -- have you terminated Justin's benefits because Richard Fortson made misrepresentations or fraud to you?
A **Yes.**
Q Where -- when did he do that?
A **He was the one that was paid for the attendant care.**
Q But he never submitted a request, did he?
A **Not to my knowledge.**
Q And you never interviewed him, did you?
A **No.**
Q Do you know of anybody at Meemic that has ever talked to Richard Fortson?
A **No.**
Q You understand Richard Fortson isn't entitled to PIP benefits, from your training; right?
A **Yes.**
Q And you understand Louise Fortson's not entitled to any PIP benefits, from her -- from your training; right?
A **Yes.**
Q They are simply providers of services that Justin is entitled to receive under the policy and under the law; accurate?
A **Correct.**
Q And they have essentially given you a report requesting that

you pay them attendant services for the person that you owe them to; right?
A **Correct.**
Q Have you ever reviewed any probate documents where the court has declared Justin Fortson an incapacitated individual?
A **Yes.**
Q Okay. So you know that a judge in a court has ruled that Justin is incompetent?
A **Yes.**
Q Is that one of the reasons why we know that Justin never perpetrated a fraud or intentionally misrepresented anything to Meemic?
A **Yes.**
MR. KRUEGER: Objection; calls for a legal conclusion.
Q In your experience and in your practice, do you regularly employ case workers to assist you with getting treatment to people entitled to PIP benefits?
A **Like, a nurse case manager?**
Q Yes.
A **Yes.**
Q Have you, since you've been working on this file, employed a case manager to assist with getting Justin the benefits he needs?
A **No.**

Q Why not?
A **There was very little treatment. Most of the claim, when I took it on, was for attendant care.**
Q Did you ever attempt to see if there was anything else that you could do to assist Justin so that he might not need full-time attendant care services?
A **No.**
Q Why not?
A **I really don't know.**
Q Okay. But wouldn't that be part of your job? I mean, as a claims representative, if there's somehow that Justin could get some treatment or services that would get him off of 24/7 attendant care services, that'd be something that you'd consider part of your job; right?
A **Yes.**
Q And wouldn't that be one thing that you would hope that a nurse case manager would help you with?
A **Yes.**
Q Do you have some case management nurses that you regularly employ for that purpose?
A **Yes.**
Q Do you have some kind of a document with a list or a reference --
A **No.**
Q -- that you would look to?

A **No.**
Q Could you give me names of some case -- nurse case managers that you regularly use?
A **I usually just refer them to a company. The two companies I use most are IndeQuest and Ridgemoor Case Management.**
Q In fact, Ridgemoor worked on this case at one time, didn't they?
A **I don't know.**
Q Okay. If there is reports in the claims file -- if I told you there were claims file reports from Ridgemoor with case managers making recommendations, that's one aspect of the claims file you're not familiar with; is that a true statement?
A **True.**
Q Is there anything in your file, any document that would support your claim that Richard Fortson perpetrated a fraud on Meemic Insurance Company?
A **The pay logs show that he received all the checks and cashed all the checks.**
Q Okay. So that would be a document generated by Meemic?
A **Yes.**
Q Is there anything from Richard Fortson that you can tell me about in your file that Mr. Fortson prepared and submitted requesting payment to himself?
A **Not to my knowledge.**

Q Okay. So just so we're clear, there are attendant care services requesting payment from Louise Fortson in the file? We know that she signed something?
A **Yes.**
Q Yes. All right. So just so I understand, your decision to terminate benefits is -- to Justin is based on the request for payment made by Louise Fortson and received by Richard Fortson?
A **Correct.**
Q Do you have other cases where you've terminated benefits to a person entitled to benefits because a provider misrepresented or perpetrated a fraud on Meemic?
MR. KRUEGER: Objection; relevance. You can answer, if you know.
A **Not to my knowledge.**
Q Okay. Have you ever heard of any case anywhere where the person entitled to benefits is going to be -- is not going to get them because a provider of services perpetrated a fraud on the insurance company?
MR. KRUEGER: Same objection.
A **No.**
Q You can answer.
A **No.**
Q Do you know how it came to be that Richard and Louise Fortson would be the attendant care providers for their

son --
A **I don't --**
Q -- as opposed to going to Hope Network?
A **-- I don't know.**
Q In your log notes, there are -- there is an entry -- and I can't tell you the date; we could find it if we have to; I just want to know if you're familiar with it -- there is an entry that confirms that I attended a meeting at Hope Network to enroll him there prior to -- well, strike that. There is an entry where your notes confirm that Justin, his lawyer, and Mrs. Fortson went to Hope Network with the idea that he was going to be admitted. And because Meemic had agreed to pay $11 an hour if they would keep him at home, a separate agreement was signed. Do you know anything about that?
A **I don't.**
Q In the file, is there an agreement signed by the Fortsons that -- where they agreed contractually to accept $11 an hour for attendant care services in lieu of Meemic's having to pay an institution to take care of their son?
A **I don't know.**
Q You don't know? Are you familiar with Dr. Peragis' records where she indicates that she recommended that he be admitted to Hope Network?
A **I'm not familiar with those.**

Q Are you familiar with any notes from Dr. Peragis that confirmed she believed that if Justin were put in a home, she is certain that he would reject it, and that he would elope?
A **I'm not familiar with that.**
Q Okay. So you haven't reviewed that part of the file?
A **No.**
Q Is there any part of the file that you're familiar with that makes a recommendation that you obtain an independent medical examination?
A **Not that I'm familiar with.**
Q Have you ever considered obtaining an independent medical examination on this case?
A **I haven't, no.**
Q Do you see any need for an independent medical examination on this case?
A **It's a possibility.**
Q Why?
A **To address ongoing attendant care, to see if he really does need 24/7 attendant care.**
Q Okay. You know, in your position, you're able to request that anytime you want; right?
A **Correct.**
Q And you get regular reports from your attorneys about this litigation; right?

A **Yes.**
Q And you understand that I've even offered to have Justin delivered to an independent medical examiner, if Meemic wants that?
A **Yes.**
Q Before you would order that, you'd probably make sure you got all the medical, and review it, to make sure you're not wasting money probably; right?
A **Yes.**
Q Okay. As I understand it, Cynthia Temple was the first claims rep on this file; true?
A **True.**
Q And then Erin Baylis had it for a period of time before you got it?
A **Correct.**
Q And you got it October 2nd, 2013, and you've had it ever since?
A **Yes.**
Q And you're making all the decisions on the file?
A **Since I received it, yes.**
Q Okay. Sometimes I know you consult with a manager, that kind of thing?
A **Uh-huh (affirmative).**
Q But you're the -- you're the one that issues letters, and makes decisions?

A **Yes.**
Q And you're the one that terminated coverage?
A **Yes.**
Q All right. Do you know if there are any medical expenses that have been denied on this file?
A **I don't know.**

MR. KRUEGER: Counsel, just for clarity, are you talking about subsequent to the termination, or prior to that, or anytime?

MR. CHASNIS: Anytime. Because I reviewed the file, and it looks to me like all medical has been paid.

MR. KRUEGER: I think up to the date of termination, that's accurate. And that clarifies the question. I think she can answer that.

MR. CHASNIS: All right.

Q Let's start with that.
A **Yeah, up to the termination, everything has been paid.**
Q Do you know if you've received requests for payment subsequent to the termination?
A **I don't know.**
Q If you had, would you pay them?
A **Probably not.**
Q For the same reason; that is, the attendant care services were paid for times that he wasn't being supervised; right?
A **Correct.**

Q Do you know that, in fact, somebody is supervising Justin now?
A **I don't know that.**
Q Are you assuming that nobody is?
A **No.**
Q Okay. If somebody has provided supervision to Justin from the time of termination and up to the present day, but for the fraud, Meemic would owe the benefits; right?
A **Yes.**
Q So let me see if got this right: We know Justin Fortson at least has a prescription for 24/7 supervision; right?
A **Yes.**
Q And we don't know of any reason to think that his medical condition has changed, so he probably still needs supervision; right?
A **Yes.**
Q And we're not paying it, because there was a request for attendant care services when he was in jail and in rehab?
A **Yes.**
Q Are there any times, other than jail or rehab, that you know about where he wasn't being supervised -- that you shouldn't be paying attendant care services, because he wasn't supervised?
A **Not to my knowledge.**
Q Okay. So as I understand it, your file -- well, let me ask

it this way: Does your file contain reasonable proof of incurring expenses for attendant care services after your date of termination?
A **I believe there is some.**
Q Some, but not for the days that he wasn't at home? Not for the days he was in jail or rehab?
A **Wait. I'm sorry. I don't understand.**
Q There are some days after the date of termination that attendant care services are due?
A **Yes.**
Q Do you know what dates are due and owed?
A **Not off the top of my head, no.**
Q Okay. How would you figure that out?
A **By reviewing the file.**
Q And what would you review, and what -- how would you compute what's owed?
A **Based on what we've paid in the past, with the hourly rate, I -- is that -- I mean, is that what you're --**
Q I guess let's do it this way: The file contains reasonable proof that attendant care services are owed, but we don't know what dates they're owed for; right?
A **Yes.**
Q It's your opinion that they're not owed for those dates that are set forth in the Complaint; right?
A **Right.**

Q We don't know -- well, let me put it this way: The balance would be owed; true?
A Yes.
Q If benefits are due more than 30 days, you owe interest on them; true?
A Yes.
Q If benefits are owed and the claimant needs to hire an attorney, file suit, and pursue recovery, attorney fees are recoverable from the insurance company, aren't they?
A I believe so.
Q Under the law?
A (Nodding head in affirmative)
Q "Yes"?
A Yes.
Q Okay. Has there been any surveillance subsequent to what was produced on DVD?
A No.
Q Other than receiving the Data Surveys reports, did you have any personal involvement with their work?
A No.
Q You never talked to them?
A No.
Q Okay. Did you ever receive any recommendations or opinions from Ray Gottshall about whether benefits should be paid or not?

A No.
Q In fact, on occasions, in the log, Mr. Gottshall reported -- and I'll give you a date, January 24, 2014, "Received" -- this is Ray's entry -- "Received the surveillance report, and still no evidence that son is left alone or unattended." So as of January 24, 2014, he was still searching, but he reported to you that he was coming up with nothing; right?
A Correct.
Q So at that point, you guys were looking for something to support the claim that he was being left unattended; right?
A We were just completing the surveillance at that point. We didn't -- we weren't looking for anything specific.
Q What prompted the surveillance?
A It was initiated before I took over the file. I believe it was prompted based on treatment notes.
Q Treatment notes?
A Uh-huh (affirmative).
Q Medical records?
A Yes.
Q So in the medical records, there would have been some kind of a mention that maybe he was in jail, or trouble with the law, so that prompted an investigation?
A I believe so, yes.
Q Okay. Did Meemic ever do any investigation to see if Louise understood that she's not supposed to request attendant care

services for days that her son was in jail or rehab?
A No.
Q How about Richard Fortson? Was any investigation ever conducted to see if Richard understood that he's not supposed to continue to submit these attendant care services forms?
A No.
Q Do you have any reason to believe that Louise Fortson intended to defraud Meemic Insurance Company?
A No.
Q You don't know anything about her, do you?
A No.
Q You don't know anything about her education, her intelligence, anything like that, do you?
A No.
Q Have you looked at the manner in which she completed these attendant care services form?
A What do you mean?
Q Well, what I mean is, that the form has the name and address at the top, but then in the description form -- you're familiar with the form; right? --
A Yes.
Q -- in the description, she never gave a description of what they did, did she?
A No.

Q Ever? She didn't, did she?
A No.
Q And I think, if it's the same way with the insurance companies that I work for, that form is supposed to be completed by putting a description of what you've done -- feed them, observe them, help medicate them -- for attendant care services. What are you doing? You're supposed to put that in the description form; right?
A Yes.
Q And then usually there will be a code that you put on every day of the calendar below that says, "L, we did laundry," or "Food, we fed them," you put a "F" down in there; right?
A Yes.
Q And that's typically what would happen in attendant care services cases; true?
A True.
Q In most of your other cases, do you have a description, and then in the calendar, they'll have some kind of reference that tells you what they did, and how many hours they did it that day?
A Yes.
Q Okay. In this case, I believe -- and you can confirm or tell me I'm wrong -- that the reason it was okay to accept these forms with just the number 24, is because you knew this guy's got a pretty serious brain injury, and he can't

be left alone; right?
A **Yes.**
Q So that form was acceptable?
A **Yes.**
Q It was an easy file, because you didn't have to dispute the validity of the severity of the injury; true?
A **True.**
Q On this case, did you kind of let slide some of the requirements that you might look more closely at in other files because of the severity of the injury?
A **I don't know if I'd use the words "let slide." Usually -- -- I mean, usually if we have a scrip for 24-hour care for supervision, that's -- there's not a lot that they're doing specifically during the day. It's just being with them.**
Q Right. Now, is it common in cases that you would write a check for 24-hour a day attendant care services to one individual?
A **Yes.**
Q But you know that one individual has to sleep sometimes; right?
A **Yes.**
Q So isn't it kind of recognized that even though you're writing a check to one person, that person isn't providing 24-hour care services?

A **Yes.**
Q And you know that?
A **Yes.**
Q But as a matter of practice, it's convenient, and you wouldn't have the time to do that on every file to find out how many hours, and, "What hours, Richard, were you sleeping?"; right?
A **Yes.**
Q So you know that when you write that check every month to Richard Fortson, that actually some of those times, Richard has to be sleeping?
A **Correct.**
Q And that doesn't create a problem; right?
A **Right.**
Q Also, in this particular case, Richard was working a 40-hour job; right?
A **Yes.**
Q And that wasn't a problem; right?
A **No.**
Q You knew that somebody else had to be there during the times that Richard wasn't?
A **Correct.**
Q Correct. And you never checked into, did an investigation, to see who that individual was; right?
A **Right.**

Q You had enough reasonable proof to pay every month for 24 hours, just based on the scrips that you had from the records and the severity of the injury, didn't you?
A **Yes.**
Q Did it matter who was providing the 24-hour care supervision when you wrote those checks just to Richard Fortson?
A **Not usually, no.**
Q It didn't?
A **No.**
Q You just assumed somebody was, because you knew he needed it?
A **Right.**
Q Do you recall ever reading any neuropsychological evaluations?
A **I'm sure I have read some, yes.**
Q Do you remember reading them, or do you know who prepared them?
A **I don't know who prepared them, no, but I do remember reading them.**
Q Do you remember records of Dr. Schnell?
A **The name does sound familiar, yes.**
Q Do you know what Dr. Schnell reported?
A **I don't know.**
Q Do you have any doubt that Richard Fortson's use of alcohol and drugs is related to his traumatic brain injury and the

deficits related that -- to that?
MR. KRUEGER: Counsel, I think you said "Richard" Fortson.
MR. HARRISON: You mean, Justin Fortson?
MR. CHASNIS: Oh, "Richard"? Justin. Sorry. It wasn't Freudian. I promise.
MR. HARRISON: Cancel that question.
MR. CHASNIS: Yeah.
Q Do you have any doubt that Justin's use of alcohol and his susceptibility to drugs is related to the sequella from traumatic brain injury?
A **I can't say that it is or isn't. I don't really know.**
Q Would you agree with me if I said it was predictable?
A **Yes.**
Q Do you know of any documentation from Meemic to the Fortsons that would give them instructions or assistance in how they should be completing their attendant care services forms?
A **I don't know.**
Q How about with respect to replacement services forms?
A **I don't know of anything specifically related to that.**
Q How about with respect to mileage requests?
A **No forms, no.**
Q Nothing that would assist them, and tell them how to do it?
A **No.**
Q Is it typical in your practice, when you have a new file,

when a claimant needs to complete an application or any of these forms, to coach them through it over the phone?
A I do discuss it with them, yes, explain the benefits and how to complete the forms.
Q Okay. And you would tell them, because you need -- if they don't do it right, it's going to make your job harder; right?
A Exactly.
Q So when they're -- if somebody calls you up, and says, "Geez, I got this envelope from, you know, your department that says, 'We know you're in an accident, here's some forms, complete them, and this is a claim number'," and they got a letter that says "Meredith Valko," on it, they send that to you, and it's either not completed, or half completed, or they didn't give you the doctors' names, so that you don't know where to send your authorizations to get the records, there's stuff missing, you have to assist them; right?
A Yes.
Q And you do that on a regular basis?
A Yes.
Q And is it safe to assume that Cynthia Temple would have done that with Louise Fortson in this case?
A I would assume so, yes.
Q And Cynthia Temple would have been the one most likely that

would have given Louise any coaching on how to complete these forms; true?
A True.
Q If there were any -- now, you never talked to Louise -- or I'm sorry -- you did talk to Louise; right?
A Yes.
Q But you never talked to Louise about submitting these forms and how to complete them, did you?
A No.
Q And you never told Louise that, "Hey, you better not be submitting attendant care services requests, if you're not providing the services," did you?
A No.
Q You never told her, "Don't require mileage that didn't occur," did you?
A No.
Q You didn't think you had to; right?
A Right.
Q All right. Do you know of anybody that ever told Louise or Richard Fortson that they cannot receive attendant care services for days that Richard doesn't stay in their house?
A I don't know.
MR. HARRISON: You mean, Justin?
Q Justin? I'm sorry. All right. You knew what I meant?
A Yeah.

Q All right. So you don't know of anybody at Meemic that would have talked to any of the Fortsons and cautioned them about not submitting a form for expenses that were not incurred?
A I don't know.
Q Okay. And you don't have any information about their intent, whether they intended to steal money, or defraud the insurance company?
A I don't know.
Q And you don't know of anybody at Meemic that does know, do you?
A No.
Q Do you have any personal injury protection cases where you pay fees to attorneys and/or conservators for serving in that capacity for a person that needs a conservator as a result of injuries sustained in a motor vehicle accident?
A As -- what? -- a guardian?
Q Yes.
A Yes.
Q Guardian or conservatorship; right?
A Yup.
Q And you recognize that the law requires Meemic to pay those expenses, because they're necessary because of injuries sustained in the motor vehicle accident; true?
A Yes.

Q Do you know if any payment was ever made for fees related to conservatorship in a -- for Justin Fortson?
A No.
Q But you already told me that you know Justin Fortson has a conservator in this case?
A Yes.
Q Is it your job to contact those people that set up the conservatorship, and tell them that they have that benefit available?
A I never have before. Usually they just come to me after the fact.
Q Sure. Looking for money; right?
A Yup.
Q Yup. The lawyers that do the work setting up the conservatorship want to be paid, and if they're smart enough and interested enough, they contact you. You recognize an obligation to pay for it?
A Correct.
Q All right. And based on what you have in the file, if you received a reasonable bill for fees for setting up the conservatorship, and but for the termination, you'd pay them, if they weren't more than a year old on this case, wouldn't you?
A Correct.
Q Okay. On any other PIP case that you've ever handled,

have -- has it been relevant, or of interest, or important to you to check into the background of the providers of the services owed to the injured person?
A **No.**
Q If you had information to know -- information to the effect that Louise Fortson in this case had her own mental issues, had her own disabilities, and had her own deficits, would that be important to you in whether or not you terminate the benefits in this case?
A **No.**
Q Wouldn't be important?
A **No.**
Q Doesn't matter to you?
A **No.**
Q You'd still terminate it, because payments were made for times that Justin wasn't supervised?
A **Yes.**
Q In your position, did you have any other options, other than terminating benefits?
A **No.**
Q In other PIP cases, haven't you in the past, if you've overpaid benefits, simply taken an offset against future benefits owed?
A **Yes.**
Q And so you could have done that here; right?

A **I could have, yes.**
Q Why didn't you?
A **Because there was an element of fraud that there usually isn't in overpayments.**
Q And the fraud is that -- is what? Where's the fraud?
A **That they were providing benefits -- or they were submitting for benefits that weren't actually incurred.**
Q So when you say "they were submitting for benefits," that means, you received the attendant care services form from Louise Fortson; right?
A **Yes.**
Q And anything other than receiving that attendant care services form from Louise Fortson that you say supports fraud?
A **(Nonverbal response)**
Q Anything else, other than that form?
A **No.**
Q And you have no other information to base your termination on that would indicate an intent by the -- by the -- by Louise?
A **No.**
Q And it's not important to you to know anything more about Louise, and her mentality, anything like that?
A **No.**
Q Okay. And, again, you don't think Justin committed a fraud

here; right?
A **No.**
Q Do you have any reason to believe that Justin Fortson hasn't been supervised by his parents for every day, other than those days set forth in the Complaint?
A **No.**
Q In your file, do you remember seeing a description of symptoms by Justin Fortson, including impulsivity?
A **I don't remember, no, but it might be in there.**
Q Okay. And how about headaches?
A **Yes, I do remember that.**
Q That he has a tumor?
A **I don't remember anything about a tumor.**
Q He has cognitive deficits?
A **Yes.**
Q What are cognitive deficits, by the way?
A **I believe it's processing and mental deficits.**
Q Yeah, processing information, understanding risk; right?
A **Yes.**
Q Includes safety features; right?
A **Yes.**
Q You know from your experience that traumatic brain injured people like Justin are unsafe, if left alone; right?
A **Yes.**
Q You shouldn't let them cook on a stove; right?

A **Right.**
Q He shouldn't be doing things like driving a car; right?
A **Right.**
Q You know in your file that, in fact, he had been driving a car; right?
A **Yes.**
Q And clearly, he didn't have an awareness that he shouldn't be doing that; right?
A **Right.**
Q He did a lot of things that people who aren't brain-injured might not do; right?
A **Yes.**
Q That's documented in your file?
A **Yes.**
Q How about outburst and anger? Do you remember from the neuropsychological reports that you reviewed that he showed episodes of outburst and anger?
A **Yes.**
Q Once in a doctor's office; remember that?
A **No, I don't.**
Q Do you remember notes in your file -- I think they were put there by Cynthia Temple -- to the effect that Louise Fortson hasn't slept in her bed since the day Justin was injured, and she sleeps in a La-Z-Boy right in front of the bedroom -- his bedroom door to keep him from getting out at

night? Remember anything like that?
A No, I don't.
Q You don't remember reviewing anything like that?
A No.
Q Do you have any idea what Mr. and Mrs. Fortson spent their money on that they got from Meemic?
A I have no idea.
Q Do you know anything about them installing an alarm in their house to try and keep Justin from getting out?
A No, I don't.
Q In fact, they did it twice, after the first one didn't work. He got around their alarm, and they went and bought another alarm, and paid that money to an alarm company to try and keep Justin in. Do you know anything about that?
A Nope.
Q That's all news to you?
A Uh-huh (affirmative).
Q Does it make any difference to you in your determination?
A No.
Q There is a neuropsychological evaluation that was performed by Dr. Schnell, and it has a whole page -- really difficult to read -- and on the margin, it talks about Louise Fortson's health, and her stroke, and her lupus, and all her physical conditions, and all the surgeries she had. Do you remember seeing that page?

A No.
Q Now, you've based your termination on information that you got from Data Surveys to the effect that you confirmed that there were days that he was not in the house. Now, you got that from Data Surveys; right?
A Yes.
Q So you don't know firsthand that he wasn't in the house, but you know he wasn't because of the research that your contractor came up with?
A Yes.
Q If you paid 24-hour supervision to Richard Fortson -- and you did -- for times that Louise Fortson was in the hospital getting treatment, would that be an improper payment, if Justin was there and supervised?
A Yes.
Q Why?
A Because Justin wasn't supervised by anybody.
Q How do you know that?
A I guess I don't.
Q But, you see, what I mean is that Louise was in the hospital and had surgery on occasion, so she couldn't have been there during the times that she had treatment. But Meemic did pay for supervision for Justin at his home, and paid it to Richard, like you did every other time, and they had brothers and sisters and other relatives come into the house

when Louise wasn't there. Is there something wrong with that?
A No.
Q That would be okay?
A Yeah.
Q Why?
A Because somebody was actually supervising Justin.
Q Okay. But it wasn't Louise; right?
A Right.
Q And Louise was in the hospital; right?
A Right.
Q But she submitted the claim, and she signed it and dated it; right?
A (Nodding head in affirmative)
Q "Yes"?
A Yes.
Q And that's okay?
A Yes.
Q And it was proper to pay Richard Fortson the attendant care services for those 24 hours; right?
A Yes.
Q I think I know the answer to this question, but the surveillance video and the photographs, those don't contribute to your decision to terminate? It's the jail and rehab; right?

A Yes.
Q Okay. So -- and let me get this straight: You're not claiming that Justin doesn't need attendant care services. You're claiming that he didn't get it for times you were requested to pay for?
A Yes.
Q And that's the bottom line in this case?
A Yes.
Q In this case, Meemic agreed to pay the parents $11 an hour, 24 hours a day; true?
A I believe so, yes.
Q On other cases, do you have situations where you pay directly to unskilled providers an amount of money per hour?
A Yes.
Q And what rate of pay do you typically pay unskilled providers of attendant care services?
A Depends on the area where they live.
Q Okay. Is it different sometimes?
A Uh-huh (affirmative).
Q And --
MR. HARRISON: Is that a "yes"?
A Yes.
Q "Yes"? Where does the $11 an hour come from?
A I really can't say, because I wasn't the one that negotiated that rate.

Q Okay. So that was a rate that was negotiated between Richard and -- or probably between Louise and Cynthia Temple; right?
A I would assume so, yes.
Q Okay. In your experience, would it have been the person, the claims rep assigned to the file at the time?
A Yes.
Q Okay. And as a claims rep, do you have the ability to enter into negotiations for an hourly rate?
A Yes.
Q And what is your range of authority for attendant care services for unskilled?
A It's typically between 10 and $12 an hour.
Q Okay. So that's right in the middle of what your authority to pay is?
A Yes.
Q Is that at the present time?
A Yes.
Q Do you know what it would have been back in 2009?
A I would assume that it would be similar. I wasn't working here at that time, so I don't really know for sure.
Q Oh, yeah. Okay. Does that change from time to time?
A Not really. Like I said, it's mostly based on the area of the state that they live.
Q Okay. Are you familiar with any case law that addresses the

appropriate hourly rate to be paid by a personal injury protection provider to unskilled attendant care providers?
A No.
Q Okay. And do you have cases where brain injured persons are put in an institution or a house where they go live, and that Meemic has to pay for?
A Yes.
Q Typically what would you pay a place like Hope Network to take care of someone like Justin 24/7?
A It varies. It depends on -- I mean, I don't know their rates off the top of my head.
Q Do you have an idea?
A It's much more than the family attendant care. I know that.
Q So if I'm -- if I -- if Fortsons got about $8,800 a month, that would roughly be a number, I think, that would be -- that it would get to. If you took 11 times 24 times, let's say, 30, it'd be around 8900 bucks. Does that sound about right to you?
A Yes, it does.
Q Hope Network could get easily three times that; right?
A Yes.
Q And so Meemic Insurance company saved a lot of money by having Mr. and Mrs. Fortson keep Justin in their home as opposed to having him go to Hope, didn't they?
A Yes.

Q Do you try to do that on occasion, if you can?
A No.
Q Why?
A Because I don't like to dictate where they go for treatment. If the family wants to do it, they can. If they would like to use an agency, they can.
Q Okay. If the family's willing to do it, that's okay with you?
A Yes.
Q All right. Have you had problems in the past on other cases where doctors want the patient to go an inpatient place, and the patient doesn't want to go?
A Yes.
Q How do you deal with that?
A We really don't have anything that we can do. It's basically up to the patient and their doctor's decision, even if they differ.
Q Have you had cases where patients will be placed, and then they leave?
A Yes.
Q Even though the doctor doesn't want them to leave; right?
A Yes.
Q And that's the nature of these places. You can't keep them there, if they don't want to stay; right?
A Right.

Q If I told you that that was the case with Justin, would you be surprised?
A No.
Q It would fit, wouldn't it?
A Yes.
Q Do you know that Justin threatened his mother to commit suicide, if she took him to Hope and left him there?
A I did not know that.
Q Would that make any difference?
A No.
Q Just a couple more questions Meredith. Thank you.
A Uh-huh (affirmative).
Q I'm looking at the Complaint, the original Complaint that was filed in this case, and paragraph number 16 says, "That Mr. and Mrs. Fortson were specifically informed by Meemic on one or more occasions between 2009 and the present that they could not receive payment for a portion of time when Defendant Justin Fortson was outside of their direct supervision." Now, you've already answered that you're not aware of anybody from Meemic ever telling them that; right?
A Right.
Q Paragraph 17 says that, "By September 21, 2010, work restrictions for Justin Fortson were lifted by his medical providers, and he was permitted to work 15 hours a week." Do you know anything about that?

A I don't.
Q You don't remember seeing that note in the file, anything like that?
A No, I don't.
Q You don't know what doctor provided that?
A No, I don't.
Q Okay. The next paragraph says that, "Justin Fortin attempted to complete his education." Do you know anything about that?
A I do not.
Q Okay. Paragraph number 20 says, "By March of 2012, Meemic began making inquiries on the amount of monies being paid to Mr. and Mrs. Fortson for attendant care, and in April of 2012, Meemic again informed Defendant Louise Fortson that it would no longer be making attendant care payments for work that was not actually performed." Do you know anything about that?
A I believe that was sent to her because she was submitting attendant care forms before the dates were incurred.
Q Yeah, that's another thing I wanted to ask you about. For a long time, Meemic was paying attendant care services in advance, weren't you?
A I believe so, yes.
Q And was that a mistake?
A Yes.

Q And it was because Louise was submitting them too soon; right?
A I believe so. I really can't say why.
Q Well, there's a letter sent to her, telling her that she can't do that. Do you know of anybody ever contacting and talking to Louise personally about that?
A I don't know.
Q Have you ever looked closely at the attendant care services, and actually compared them to each other?
A No, I haven't.
Q If I told you that there were some of the forms where she just changed the date, made a photocopy and changed the date, and submitted it, do you know anything about that?
A I don't.
Q You haven't looked at them that closely?
A No.
Q Would that be an indication to you, if you received those, that she didn't really know what she was doing?
A Yes, it would.
Q In fact, if she's submitting those attendant care services in advance, she didn't know what she was doing, did she?
A No.
Q She didn't appreciate what those forms were saying or what they meant, did she?
A No.

Q And that's something that you never caught in your work on the file; true?
A True.
Q Okay. And to the best of your knowledge, there's nobody else here at Meemic that ever really caught that?
A Right.
Q But there's no doubt in your mind that Louise Fortson didn't really have an appreciation for what those forms were representing?
A Right.
Q Other than the dates set forth at paragraph 23 -- and I count it to be 94 days -- other than those days, are you aware of any other days that Justin was not at home supervised by his parents?
A Not to my knowledge.
Q Okay. And then not to anybody else's knowledge here at Meemic; right?
A No.
Q That was a bad question. And your answer was, "No." It was --
A It should have been "Yes."
Q It should have been "Yes." Okay. Thank you. All right. Do you have any knowledge about any times that Justin Fortson was left extensive period -- or for -- I'm sorry -- for extended periods of time without any other person in his

home?
A No, I don't.
(Counsel reviews document)
Q There is a paragraph that says, "Mr. and Mrs. Fortson's behavior in fraudulently providing documentation for the purposes of obtaining payments to which they were not entitled was willful, wanton, and intentionally with the intent to harm Meemic, and is of a type which warrants an award of exemplary damages." Can you tell me about any documents, other than the attendant care services, that might fit that description?
A No.
Q Can you tell me about any other evidence whatsoever, documentary or other, that would indicate that what they did was willful and wanton?
A No.
Q How about intentionally done?
A No.
Q Do you know if they had any intent to harm Meemic?
A I don't know.
Q Is there anybody else at Meemic that would know better than you?
A No.
Q You're the best person to talk to; right?
A Yes.

Q Do you have any evidence that would support the statement that, "The Defendants purposefully provided false information to Meemic"?
A No.
MR. CHASNIS: Do you have anything else, Bill?
MR. HARRISON: (Shaking head negatively)
Q All right. The Notice -- and I've talked to your lawyer about this -- it's my understanding I have now been provided with the original, complete claims file, a copy of it; right?
A Yes.
Q All right. I probably have most of a duplicate copy, but to the best of your knowledge, I have everything now; right?
A Yes.
Q Except for anything that's privileged or redacted because your attorneys have declared confidentiality. Okay?
A Correct.
MR. KRUEGER: Counsel, just to deal with that, one issue I have, I -- she made a whole copy for you. She didn't make one for me. Either I could take it and Bates stamp it and send it to you, or you could take it and Bates stamp it and send it to me, so that we both, when we say we have the whole file, are dealing with the same thing.
MR. CHASNIS: What's your preference?
MR. KRUEGER: It's up to you. I'll leave it to

you, since we're producing them.
MR. CHASNIS: Then I'm going to have you take it.
MR. KRUEGER: Okay.
MR. CHASNIS: But I would like a copy of the application. If you just want to make -- did she -- did you pull that out of there? Is this --
MR. HARRISON: I did.
MR. CHASNIS: Oh, you did?
THE WITNESS: Yeah.
MR. CHASNIS: He pulled it out of there.
MR. KRUEGER: If that's the only document pulled out of there, we can make a copy of that, and then --
MR. CHASNIS: Okay. Perfect.
MR. HARRISON: That was the only one.
MR. CHASNIS: Thank you.
Q All right. And so that includes the payment logs; right?
A Yes.
Q And the only training manual, you've provided a copy for me; right?
A Yes.
Q That's the only training manual that would -- that we can think of, and we talked about all of that.
MR. HARRISON: That's why I had them mark it, just to --
MR. CHASNIS: Nope, we'll refer to this as the

"Garan Lucow Miller 2015 Guide to Michigan Automobile No-Fault Law."
MR. HARRISON: Fair enough.
MR. CHASNIS: Thank you.
Q Do you have any other internal policies or procedural documents that would have to do with how you handle the PIP claims, and specifically attendant care services requests?
A No, we don't.
Q Okay. So you just got that information from your training, your education, and experience obviously; right?
A Correct.
Q Okay. And I think we've talked about the attendant care services form, and that has a form for description that she didn't use, and I think I've talked about the fact that the form is given to them, they fill it out. Sometimes they'll get some coaching?
A Yes.
Q On any of your cases, do you ever see a reason for or a value in your bringing -- being proactive to get a different conservator appointed for the person entitled to the benefits?
A No.
Q You never had any experience with that?
A No.
Q Is that something that you think that would be part of your

job to make sure the person, who's entitled to the benefits, has a proper conservator or guardian to make sure they get what they need?
A Yes.
Q Okay. And in a case where a person entitled to benefits is not getting benefits that you think he needs, or a case worker tells you he needs, or a doctor tells you he needs, would it be appropriate for you to be proactive to change the conservator for that person?
A Yes.
Q If a provider does something wrong, do you feel that you can use that against the person entitled to the benefits?
A No.
Q Well, isn't that what's happened here?
A Yes.
Q Well, do you think that this claim has been handled properly in terminating Justin's benefits?
A Yes.
Q Do you think you'd have any other obligation to help Justin?
A No.
Q Okay.
MR. CHASNIS: Anything else?
MR. HARRISON: (Shaking head negatively)
MR. CHASNIS: I have nothing further.
MR. KRUEGER: Ms. Valko, I just have a couple

clarification questions.
THE WITNESS: Okay.
EXAMINATION
BY MR. KRUEGER:
Q When you say that you don't have evidence that Justin is not entitled to attendant care benefits -- and I think you testified to that effect -- you mean, that you have not seen anything in the medical files which would indicate that he does not need attendant care benefits; is that accurate?
A Yes.
Q Okay. What do you base your decision on whether to grant attendant care benefits on?
A Based on the scrip provided by his treating doctor.
Q Are you aware of what information the doctor was given in order to issue that prescription?
A No.
Q Are you aware of what Mrs. Fortson or Justin told the doctor?
A No.
Q So there could be information that would come out in an independent medical examination which may alter your opinion as to whether or not attendant care benefits should be given in this particular case?
A Yes.
Q And also if we talked to Dr. Peragis, and discovered from

information that tended to indicate that Justin was not forthright with the doctor, that that could also change your opinion?
MR. CHASNIS: That's Dr. Peragis, you're talking about; right?
MR. KRUEGER: Dr. Peragis, yes. I believe that's who issued the prescription.
MR. CHASNIS: Yes, Cynthia Peragis.
Q You also testified that aside from the incidents named in the Complaint, which, I believe, were the jail time served by Justin Fortson, and, I believe, also some medical drug rehab, rehabilitation, that you were unaware of other times that he was not given proper attendant care; is that accurate?
A Yes.
Q If there was information showing that Justin was out driving with his friends, and not under the care of his mother or father, would that fall within a category which you would give attendant care benefits for?
A No.
Q If it was found that Justin was out by himself at a store or some other location without anyone around, would that be something that you paid attendant care benefits for?
A No.
Q Would the fact that Justin's parents would allow him to go

out with friends in a car or otherwise be an indication that they did not intend to provide attendant care?
MR. CHASNIS: Objection; speculative.
Q Would that affect your decision if you knew that they were allowing him to go out with friends, and not actually watching him on a 24-hour basis?
A Affect my decision to terminate benefits?
Q Yes.
A No.
Q Okay. Would you award or give attendant care benefits if Louise Fortson was in the home with Justin, but sleeping and not actually paying attention to him?
A Yes.
Q Would it make a difference to you if you found out that Louise Fortson was receiving disability benefits, and indicating to the State of Michigan that she's unable to work at all?
A No.
Q When it comes to attendant care, what specifically does an attendant care provider have to do with the person who receives the benefits? Is it something more than just being in the room with them?
A It depends on the case. It can be as much as bathing and grooming, or as little as supervisor and being actually with the person.

Q If you found out that there were drugs in the home of Justin Fortson that his parents were aware of, would that alter your decision on whether or not to award attendant care benefits?
A No.
Q Okay.
MR. KRUEGER: No further questions.
EXAMINATION
BY MR. CHASNIS:
Q Well, you didn't need an independent medical examination to come to your conclusion to terminate -- that benefits should be terminated, did you?
A No.
Q As a matter of fact, based on everything in the file, an IME isn't going to help you at all here, is it?
A I can't say.
Q You have no reason to believe it would. Wouldn't it be speculative to think that a doctor might say Justin's okay, he's recovered, or he doesn't need attendant care services?
A Yes.
Q All indication in the file is just the opposite; true?
A Yes.
Q So I think what we're saying is it's possible that you could get an IME, and that might give you some more reasons to terminate benefits?

A Yes.
Q Okay. Now, you've known all along that anytime you want, you can get an IME on Justin; right?
A Yes.
Q And you've chose not to; true?
A Yes.
Q Do you know about any specific instances of Justin driving with his friends?
A **I believe the surveillance showed him with his friends. I'm not positive that he was driving or not. I know that he has received several DUI's where he was driving.**
Q We know there are instances where he was riding in a car with somebody else; right?
A **Yes; yes.**
Q And that wouldn't be something that would cause you to terminate attendant care services?
A **No.**
Q Right. If Justin went for a ride to the store or took his bicycle a couple blocks down to an ATM while dad -- mom and dad are there or standing on the porch, that wouldn't be something that you would think that he's not getting supervision, would you?
A **No.**
Q If Justin's sister, who is a nurse, came and picked him up and took him someplace, and he was gone with his sister,

would that cause you to not want to pay 24/7 to Richard Fortson?
A **No.**
Q If other relatives on occasion would take Justin, even overnight, would that cause you to not to want pay Richard Fortson the attendant care services?
A **No.**
Q Why?
A **Because he's still being supervised by a family member.**
Q Right. And he could still be supervised by Richard and/or Louise by telephone; right?
A **Yes.**
Q Okay. And so if you had information that he was not under their roof, but they had regular contact with him, whether it be by telephone, or it be by contacting somebody he's with, that would be okay; right? You wouldn't think that's violating the attendant care services agreement; right?
A **Right.**
Q So it's kind of a gray area, isn't it?
A **Yes.**
Q So you have to make a judgment call, don't you, on when they've really requested benefits that they didn't earn. It's a judgment call that you have to make sometimes; right?
A **Yes.**
Q And you know that that judgment call has to be made in a

gray area; right?
A **Yes.**
Q And I think what we've talked about it, is in that gray area, there are some times when technically he's not there being supervised that you don't have any problem with paying the attendant care services, because he really is being supervised, even if he's not in the same room?
A **Yes.**
Q Okay. And that's just reasonable; right?
A **Yes.**
Q Okay.

MR. CHASNIS: I have nothing further. Thank you very much, Meredith. I appreciate it.

MR. KRUEGER: No further questions.

(Deposition concluded at 11:06 a.m.)

-0-0-0-

Notice of Termination

NOTICE OF TERMINATION OR DECLINATION OF INSURANCE
(Michigan)

NAME AND ADDRESS OF INSURANCE COMPANY	MEEMIC Insurance Company 1685 N Opdyke Rd Auburn Hills	MI	48326	
NAME AND ADDRESS OF INSURED	LOUISE M FORTSON RICHARD A FORTSON 819 HIGHLAND SAINT JOSEPH	MI	49085-2511	

KIND OF POLICY: Personal Automobile

POLICY/APPLICATION/BINDER NO.: PAP0632676

EFFECTIVE DATE OF NOTICE: 07/29/2010 (DATE) 12:01 AM (HOUR-STANDARD TIME AT THE ADDRESS OF THE INSURED)

DATE OF MAILING: 6/14/2010

NAME AND ADDRESS OF AGENT/BROKER:
Hagen Agency
PO Box 787
Niles MI 49120

POLICY EFFECTIVE OR INCEPTION DATE: 01/29/2010

(Applicable item marked "X")

Termination of Insurance

[X] This is to notify you that for the reason(s) stated in the "Important Notices" section the insurance provided in the above indicated policy will be terminated at and from the hour and date stated above. This notification is in compliance with law and the provisions in your policy relating to the termination of insurance.
Also see the "Important Notices" section for information on Your Right to a Hearing and for other information that may apply.

Declination of Insurance

[ ] Your application for the kind of insurance mentioned above has been declined. The reason(s) for this declination of insurance are stated in the "Important Notices" section.
Also see the "Important Notices" section for information on Your Right to a Hearing and for other information that may apply.

Premium Adjustment

[X] Unearned premium will be returned in accordance with Michigan law and the terms of the policy.
[ ] Enclosed is $_____, being the amount of unearned premium for the unexpired term of the policy.
[ ] A bill for the premium earned to the time of cancellation will be forwarded in due course.
[ ] Other:_____

Important Notices

Specific Reason(s) for termination or declination of insurance: Driving record of Justin A Fortson. Please contact your MEEMIC Agent Hagen Agency at (800) 528-9165 to discuss your insurance options.

[X] **Your Right to a Hearing:** If you have any reason to believe that we have improperly denied you of your insurance, or charged an incorrect premium for that insurance, you are entitled to have your complaint resolved through one of the procedures described in this notice and to a review by the Michigan Insurance Bureau if we fail to resolve the dispute.

We will provide you, upon request and payment of a reasonable copying charge, with information pertinent to the denial of insurance or to the premium charged.

We will attempt to resolve any dispute promptly and informally, while protecting both your interests and ours. You have the right to participate in any process for resolving the complaint either by telephone discussion, by mail or by a private informal managerial level conference. If conference is by telephone, we will identify all persons listening to the telephone conference by name and title. We will either provide toll free telephone service or pay all telephone charges associated with such telephone conferences. If you wish to have a private conference by telephone, please call us collect at the following number, unless the number indicated is toll free: 1-866-4-MEEMIC

If we fail to provide a process for resolving the complaint and proposed resolution within 30 days after your request, or if you disagree with the proposed resolution after processing your complaint, you are entitled to a determination of the matter by the Commissioner of Insurance.

If you wish to review any complaint with us, please contact us at the address shown above. This should be done before contacting the Michigan Insurance Bureau.

If after conferring with us you feel the dispute has not been satisfactorily resolved, you may contact the Michigan Insurance Bureau, P.O. Box 30220, Lansing, Michigan 48909.

You also have the right to appoint another person to act in your behalf throughout the appeal process.

[X] **WARNING: IF THIS NOTICE PERTAINS TO AUTOMOBILE LIABILITY INSURANCE, ACCORDING TO MICHIGAN LAW, YOU MUST NOT OPERATE OR PERMIT THE OPERATION OF ANY MOTOR VEHICLE TO WHICH THIS "NOTICE" APPLIES, OR OPERATE ANY OTHER VEHICLE, UNLESS THE VEHICLE IS INSURED AS REQUIRED BY THE LAW.**

[ ] **Replacement of Your Home Insurance:** If the policy being terminated is one that insures your home and you wish to replace such insurance you should attempt to obtain such insurance in the voluntary insurance market by contacting your agent or another insurance company. If such insurance is unobtainable in the voluntary market, you may be able to obtain insurance through the Michigan Basic Property Insurance Association, 200 Renaissance Center, Suite 1500, P.O. Box 86, Detroit, Michigan, 48243 (Phone Number: 313/877-7400). Either consult your agent or contact the Association directly for information or applying for insurance through the Association.

[X] **Replacement of Your Auto Insurance:** If the policy being terminated is one that insures your automobile(s) you should obtain replacement insurance in the voluntary market for at least that portion of your insurance necessary to satisfy Michigan Financial Responsibility requirements by contacting your agent or another insurance company directly. If insurance is unobtainable, you may be eligible for insurance through the Michigan Automobile Insurance Placement Facility, P.O. Box 33617, Detroit, Michigan 48232-5617 (Phone Number: 734/464-1100). Either consult your agent or contact the Facility for information on applying for insurance through the Facility.

[X] **Consumer Report:** In compliance with the Fair Credit Reporting Act (Public Law 91-508) and the Consumer Credit Reform Act of 1996, you are hereby informed that the action taken above is being taken wholly or partly because of information contained in a consumer report from the following consumer reporting agency:
(Name) Explore Information Services (Phone Number) (888) 866-0236
(Address) 2900 Lone Oak Pky Suite 140, Eagan, Minnesota 55121
Please see additional information for a disclosure of your rights under this federal law.

NOTICE OF TERMINATION OR DECLINATION OF INSURANCE
(Michigan)

NAME AND ADDRESS OF INSURANCE COMPANY	MEEMIC Insurance Company 1685 N Opdyke Rd Auburn Hills	MI	48326	
NAME AND ADDRESS OF INSURED	LOUISE M FORTSON RICHARD A FORTSON 819 HIGHLAND SAINT JOSEPH	MI	49085-2511	

KIND OF POLICY:
Personal Automobile

POLICY/APPLICATION/BINDER NO.: PAPG632676

EFFECTIVE DATE OF NOTICE:
07/29/2010 (DATE) 12:01 AM (HOUR-STANDARD TIME AT THE ADDRESS OF THE INSURED)

DATE OF MAILING: 6/14/2010

NAME AND ADDRESS OF AGENT/BROKER:
Hagen Agency
PO Box 787
Niles MI 49120

POLICY EFFECTIVE OR INCEPTION DATE:
01/29/2010

Additional information regarding your rights under the Consumer Credit Reform Act

Pursuant to the Consumer Credit Reform Act of 1996, effective September 30, 1997, you are informed that:

The consumer reporting agency identified on this form did not make any decisions regarding the stated insurance policy. Therefore, the consumer reporting agency would not be able to provide you with the specific reasons why the insurance company is taking the present action.

You have the right to obtain within 60 days of the receipt of this notice a free copy of your consumer report from the consumer reporting agency which has been identified on this form.

You have the right to dispute inaccurate information by contacting the consumer reporting agency directly. Once you have directly notified the consumer reporting agency of your dispute, the agency must, within a reasonable period of time reinvestigate and record the current status of the disputed information. If after reinvestigation, such information is found to be inaccurate or unverifiable, such information must be promptly deleted from your records. If the reinvestigation does not resolve the dispute, you may file a brief statement setting forth the nature of the dispute with the consumer reporting agency. Your filed statement will then be included or summarized in any subsequent consumer report containing the information in question.

For complete information regarding the Federal Consumer Credit Protection Law please refer to The Code of the Laws of the United States of America, Title 15, Chapter 41, Subchapter III, (15 U.S.C. §1681 et seq.).

Sharon Motala
AUTHORIZED REPRESENTATIVE

8/18/15

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street * St. Joseph, MI * 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants/Counter-Plaintiffs.

Case No.: 2014-260-CK

Hon. John M. Donahue

DUPLICATE ORIGINAL

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PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S REPLY BRIEF

I. INTRODUCTION:

Defendants/Counter-Plaintiffs Response to Meemic Insurance Company's Motion for Summary Disposition (the "Response Brief") is factually misleading and legally unpersuasive. Ignoring undisputed facts, the arguments advanced in the Response are bereft of legal support. From approximately October 16, 2009, through the date of the Complaint, Louise M. Fortson ("Louise") submitted sworn statements to Plaintiff Counter-Defendant Meemic Insurance Company ("Meemic") that she and Richard A. Fortson ("Richard") (collectively, the "Fortsons") were providing 24/7 attendant care to Defendant/Counter-Plaintiff Justin Fortson ("Justin") ***every single day***. For an absolute *minimum* period of 311 days, and likely far more as set-forth below, however, Justin was either incarcerated or in drug rehabilitation making 24/7 attendant care a ***factual impossibility***. Moreover, when not incarcerated or in drug rehab, Justin was regularly outside the supervision of any family member, including regular furloughs to purchase controlled substances.

Meemic now, therefore, must file its Reply Brief to address the misstatements of law and facts present in the Response Brief. While the Response Brief is replete with misstatements of law and fact, for purposes of this Reply Brief, the focus will be on the following:

1. Best efforts were not made to monitor Justin; instead, he was frequently left in the "care" of non-family members with established drug histories.
2. Far from "unsophisticated" as portrayed in the Response Brief, Louise previously testified **under oath** that she knew exactly what she was doing when filling out the statements provided to Meemic.

3. Under no circumstance does the Michigan No-Fault Act mandate payment of attendant care benefits for services not actually rendered. *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012).

4. Meemic's decision to void the policy can be predicated on "any insured's" fraudulent conduct, rendering immaterial Justin's purported lack of participation in the fraud. *Stoops v Farm Bureau Ins Co*, Docket No. 260454, 2006 WL 751404 (Mich Ct App 2006) (attached as Exhibit A).

5. The Michigan Supreme Court recognized in *Titan Insurance Company v Hyten*, 491 Mich 547; 817 NW2d 562 (2012)[1] a fundamental difference between fraud in the application for insurance and fraudulently submitted claims under a policy, rendering the unpublished decision from *State Farm Mutual Automobile Insurance Company v Michigan Municipal Risk Management Authority*, Docket No. 319709, 2015 WL 728652 (Mich Ct App 2015) inapposite. Further, other unpublished decisions have reached contrary conclusions then that rendered in *State Farm*. See *Frost v Progressive Mich Ins Co*, Docket No 316157, 2014 WL 4723810 (Mich Ct App 2014), vacated (pending decision in yet decided case) 860 NW2d 636 (2015); *Myers v Transp Servs Inc*, Docket Nos. 300043, 303405, 2013 WL 5338553 (Mich Ct App 2013) (attached as Exhibit B).

Moreover, and even more fundamentally, the Fortsons do not meet their burden under MCR 2.116(C)(10), relying instead on unsupported and unsubstantiated statements of fact. As will be unequivocally set-forth herein, Meemic is entitled to have an order entered in its favor as to all issues.

[1] Meemic acknowledges that *Titan* does not involve statutory PIP benefits (but rather statutory liability limits for bodily injury). One reference to such in Meemic's Motion for Summary Disposition ("Moreover, the benefits sought were statutory PIP benefits") was unintentional and is withdrawn.

II. LAW & ARGUMENT

A. Even When Not Incarcerated or In Drug Rehab, the Fortsons Were Not Providing 24/7 Attendant Care to Justin.

Meemic is portrayed in the Response as advancing "distasteful" evidence to support its effort to terminate benefits potentially otherwise payable to the Fortsons. See Response, p 8. By comparison, the Fortsons are presented as putting forth their best efforts to monitor Justin. See Response, pp 6-8. Both assertions are factually inaccurate. The burden of Justin's care was also not foisted on the Fortsons, as stated by Louise under oath, "**we just said that we would rather take care of him ourselves, and Meemic kind of set the rate**" (See Exhibit C – Deposition Transcript of Louise Fortson, p 53). Inviting rather than rejecting the responsibility, the Fortsons failed to provide the claimed attendant care. To reiterate, Louise claimed under oath that Justin was never allowed out of the supervision of her, Richard or other family members and, further, that he never drove. *Id.* at 7. **Contrary to these claims, it is apparent that Justin was allowed to be alone on repeat occasions with his friends, to leave the house unattended and to become involved in serious drug use.** Even more unbelievably, the Fortsons have invited the very people who created or participated in Justin's drug use to live with them in their home.

As just one example of the Fortsons' abject failure to provide attendant care, in 2011 Justin estimated that he purchased **$68,000 worth of heroin**, leaving the Fortsons' home on a near daily basis (See Exhibit D – St. Joseph Police Report, p 3). Figures were not provided for the years subsequent to 2011, but testimony obtained during discovery from third parties completely contradicts the claim that the Fortsons were providing constant attendant care in the best interest of Justin. At least two of Justin's former girlfriends testified that Justin was

regularly left in their care **despite the fact that both have criminal records and are drug abusers**. These girlfriends, and their sordid histories, were not unknown to the Fortsons.

Heather Mckie ("Heather"), one of Justin's girlfriends, lived with the Fortsons for portions of the last three years when she was not in jail for drug related offenses (See Exhibit E – Deposition Transcript of Heather Mckie, p 5). Heather had, in fact, **returned** to the Fortsons home as of July 2015. *Id.* Rachel Ratz ("Rachel"), another of Justin's girlfriends, averred that **multiple times** between 2011 and 2014, Louise would drop Justin off at her apartment for hours at time (See Exhibit F – Deposition Transcript of Rachel Ratz, p 9). **Even more egregious, Justin would occasionally drive by himself to Stevensville to visit her in a Dodge Neon that belonged to him**. *Id.* at 35. Neither of Justin's parents, nor other family members, were present for these visits. Activities engaged in by Rachel and Justin included periods where she and Justin would drive away together doing heroin in her car. *Id.* at 14. The Fortsons' lack of care or attention was not simply the result of Justin sneaking out of their home; it was readily apparent that Justin was actually using these drugs in the Fortsons' home. Rachel could recall multiple occasions where she would come to the Fortsons and Justin had already used heroin. *Id.* at 15.

While the Fortsons' claim to be trying to protect Justin from such behavior, they are actually perpetuating it. For example, after Rachel served time in jail for drug-related offenses, the Fortson family welcomed her back, even allowing her to regularly visit Justin, including at least one overnight visit. *Id.* at 26. The Fortsons' failure was complete. Richard admitted for the two years proceeding his EUO that Justin was out of the house on almost a daily basis (See Exhibit G – Deposition Transcript of Richard Fortson, pp 10-11). Justin's absence from the home was so prevalent that on one occasion **he was actually kidnapped by drug dealers and**

held for ransom while driving the car his parents were buying for him (See Exhibit C, pp 27-28). Yet, without interruption, sworn statements were continually and unceasingly submitted to Meemic, indicating that 24/7 attendant care was provided. The magnitude of the Fortsons' actions cannot be understated: they defrauded Meemic out of hundreds of thousands of dollars.

B. Louise Testified Under Oath That She Knew Exactly What She Was Doing When Filling Out The Statements Provided To Meemic; Therefore, Arguments That She is An "Unsophisticated" Individual Are Without Merit.

The Response Brief also adopts the incredulous position that Louise simply did not know better and that Louise lacked the mental capacity to understand the forms provided by Meemic. See Response, p 3. Such an argument is disingenuous and contradicted in total by statements made under oath by Louise:

Q. Well, let me ask this, though. When you put down 24, that's what you've put down on each of these dates?
A. Uh-huh.

Q. You're representing that you're providing 24-hour, around the clock, care to Justin?
A. Uh-huh.

Q. Yes?
A. Yes.

Q. And you're doing that truthfully and honestly?
A. Uh-huh.

Q. Correct?
A. Yes.

Q. And that would have been situations where you and your husband had to provide that care, that you were with Justin --
A. Yes.

Q. -- or your husband Richard was with Justin?
A. Yes.

Q. Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?
A. No, because either I would be there or Richard would be there.

Q. Okay.
A. Richard's always home after 3:00, and I can go to the store or Justin can go with me or he can go with me in the morning or I can wait until Richard gets home or whatever.

Q. So one of the two of you is always with Justin?
A. Always.

Q. 365 days a year?
A. We're always there.

Q. And that's why you're billing Meemic for that?
A. Yes.

(See Exhibit C, pp 36-37).

Consequently, under oath, Louise stated she completed the forms provided by Meemic because either she or Richard was always watching Justin. Both the statement about "always" being with Justin and the argument that she did not understand her actions are patently false. In fact, assertions about Louise's now claimed lack of competence are directly contradicted by her own husband:

Q. Does she have any problems with her mind . . . .
A. Yes. When she has some of her medicine before she goes to sleep, she can be a little disoriented at that time, but she appears to me that she's pretty sound mind.

Q. Okay. And so you've seen her today before the EUO?
A. Yes.

Q. Did she appear of sound mind to you today?
A. Yes.

* * *

Q. Who deals with Meemic, you or your wife?
A. Mainly my wife.

Q. And she's competent enough to do that?
A. I believe so, yes.

(See Exhibit G, pp 8, 15-16). Nothing in the Response Brief provides support for any claimed limitations suffered by Louise.

C. Attendant Care Benefits Are Not Mandated Under the Michigan No-Fault Act Unless Qualifying Services Are Actually Rendered.

Arguments concerning the Fortsons' entitlement to attendant care benefits, even during periods when Justin was not in their care, are without merit. With the proposition that attendant care benefits are provided for under the No-Fault Act, Meemic has no argument; however, **entitlement to those benefits is not mandatory**. For the over 310 days that Justin was either in jail or in rehab, the Fortsons were not entitled to receive attendant care benefits. Additionally, when Justin was with his girlfriend, alone or with other parties, the Fortsons continued to claim reimbursement for attendant care benefits they did not provide. It is axiomatic that one cannot render 24/7 care to another when the person being "cared" for is incarcerated, in drug rehabilitation, or purchasing large amounts of controlled substances. Types of services that qualify as attendant care, including supervision, cannot be performed when the individual is not present to supervise.

Largely unaddressed in the Response Brief is the Michigan Supreme Court case of *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012), which holding is binding on this Court. Based on objective evidence, there is no genuine issue of material fact that PIP benefits were not payable for the time period of either Justin's rehabilitation or imprisonment, or times he was otherwise outside of the Fortsons' care. See *Douglas*, 492 Mich at 272. The fact that Justin was proscribed 24/7 attendant care is irrelevant for purposes of the inquiry of whether

the Fortsons were entitled to receive compensation. *Id.* Rather, the relevant inquiry is the actual amount of time that the Fortsons' cared for Justin. When the Fortsons were pressed to explain what types of "attendant care" they provided Justin while he was not under their direct supervision, Richard stated they "talk to the lawyers" and Louise indicated they paid Justin's bills. Services listed by Richard and Louise are activities of daily life not compensable under the No-Fault Act. Meemic's payments to the Fortsons, based on the Fortsons' fraudulent conduct, were not required and should be fully reimbursed.

D. Meemic's Decision to Void the Policy Can Be Predicated On "Any Insured's" Fraudulent Conduct, Rendering Immaterial Justin's Purported Lack of Participation in the Fraud.

Fraud, in this instance, is manifest. Louise and/or Richard submitted executed statements on a continuous and uninterrupted basis, seeking payment for 24/7 care, even when they knew that they were not providing 24/7 care. Based on the Fortson's unassailable fraud, Meemic is permitted to terminate the Policy and cease making any payments in the future to the Fortsons. Notwithstanding the foregoing, in the Response Brief, the Fortsons advance the argument that Justin's status as a purported beneficiary of Meemic's policy, and the lack of cognitive awareness of his parents' fraud, prevents his benefits from being terminated. This proposition is not only bereft of legal support, it contradicts the express language of the policy, providing that any intentional concealment or misrepresentation of fact made by "any insured person" voids the policy. Justin's participation and knowledge, or lack thereof, is immaterial.

The argument advanced by the Fortsons was expressly rejected by the court in *Stoops v Farm Bureau Ins Co*, Docket No. 260454, 2006 WL 751404 (Mich Ct App 2006) (attached as Exhibit A). In *Stoops*, the court analyzed the fraudulent claims made for attendant care services, wherein the plaintiff insured alleged that *without her knowledge*, her husband

manufactured evidence, specifically receipts. At trial, summary disposition was granted for the insurer based on the overwhelming evidence showing that plaintiff's claim had been made fraudulently. On appeal, the appellate court clarified the law on the issue of whose fraudulent conduct might void a policy:

> **the material question in this case is whether any "insured" under defendant's business auto insurance policy, either Kristen Stoops or Joseph Stoops, "at any time, intentionally conceal[ed] or misrepresent[ed] a material fact concerning ... [a] claim" under the policy.**

"Any" insured had, and as a result, the policy was enforced as written.

The holding emerging from *Stoops* completely devastates the argument advanced in the Response Brief concerning Justin's lack of knowledge. If Meemic can present evidence that **any insured**, including Louise or Richard, intentionally misrepresented or concealed information when they made a claim, then the policy provisions voiding further coverage will be implicated. Without dispute, the Fortsons intentionally misrepresented or concealed information when they sought attendant care benefits for Justin, including without limitation, seeking benefits for time periods when Justin was incarcerated or in drug rehab. Supporting Meemic's position even more is the relevant standard of proof. The standard of proof for the determination of a fraudulent insurance claim is merely by the preponderance of the evidence, which standard has easily been met. No genuine issue of material fact exists regarding any element of the Fortsons' fraud nor the language of Meemic's policy.

E. The Unpublished Decision In *State Farm Mutual Automobile Insurance Company v Michigan Municipal Risk Management Authority* Is Factually Dissimilar; Moreover, Other Recent Unpublished Decisions Have Reached Contrary Holdings.

In *State Farm Mutual Automobile Insurance Company v Michigan Municipal Risk Management Authority*, Docket No. 319709, 2015 WL 728652, *7 (Mich Ct App 2015),

defendant insurer attempted to avoid liability for statutory PIP benefits based on fraud in the *application* for insurance. In rejecting this argument, the court held that under the so-called "innocent third party rule," an insurance policy may not be rescinded, despite fraud in the *application* for said policy, once an innocent third party has a claim under the policy. *Id.* Consequently, the holding from *State Farm*, which is unpublished, must be limited to the factual scenario presented – **fraud in the *application* for insurance**. Unlike in *State Farm*, the fraud in this case was not in the *application* for insurance, but was in the *continuing submission of fraudulent claims* under the policy. The holding from *State Farm*, therefore, is inapplicable.

In *Titan Insurance Company v Hyten*, 491 Mich 547, 567; 817 NW2d 562 (2012), the Michigan Supreme Court specifically indicated that there is a difference in assessing risk (*i.e.*, in evaluating an application) and later uncovering fraud:

> We agree with the Court of Appeals that MCL 500.3220(a) shows an intent to allow insurers only a limited period during which to reassess the risk after the formation of a policy and when the risk is deemed unacceptable to "cancel" the policy. **We disagree that when an insurer elects *not* to reassess the risk and later uncovers fraud, it is somehow precluded from pursuing traditional legal and equitable remedies in response.**
>
> **Risk assessment and the uncovering of fraud are distinct insurance processes and are not logically interrelated** in a manner that would reasonably suggest that any statute addressing one of these processes necessarily addresses the other.

State Farm and similar cases address solely fraud in the application. Limiting an insurer's ability to void a policy for failing to timely discover fraud in the application makes logical sense. An insurance company arguably has the ability to determine fraud in the application at the time of the application. **In comparison, when Meemic agreed to insure the Fortsons under a policy of insurance there was no possible manner in which Meemic could have predicted the Fortsons would have engaged in wide-ranging and on-going fraud.** Stated differently,

Meemic cannot predict the future. Having distinguished *State Farm*, the holding from *Titan* should instead apply, that is

> an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud . . . even when the fraud was easily ascertainable and the claimant is a third party.

Hyten, 491 Mich at 571. Additionally, at least two unpublished decisions have held that the holding from *Titan* applies to statutory PIP benefits. See *Frost v Progressive Mich Ins Co*, Docket No 316157, 2014 WL 4723810 (Mich Ct App 2014), vacated (pending decision in yet decided case) 860 NW2d 636 (2015) (holding "accordingly, the [PIP] claim by [an innocent third party] did not bar Progressive from rescinding the policy in this case"); *Myers v Transp Servs Inc*, Docket Nos. 300043, 303405, 2013 WL 5338553 (Mich Ct App 2013) (holding that an insurer may rescind a policy for fraud even when benefits claimed are statutory PIP benefits).

III. CONCLUSION:

Attendant care, particularly 24/7 attendant care, is only compensable when said care is actually being rendered. Neither Louise nor Richard could have provided attendant care while Justin was in jail or drug rehab, alone or with his friends, much less on a 24/7 basis; however, Louise continued to submit executed statements to Meemic requesting payments. Louise asserted that Justin was barely out of her sight, and even went so far as to lie about Justin's incarceration. Neither Richard nor Louise informed Meemic of Justin's whereabouts, which, in addition to jail and drug rehab, also included multiple excursions to purchase controlled substances. Contrary the description provided in the Response Brief, Louise also admitted under oath that she understood the forms being submitted to Meemic.

Plain language in the Policy permits Meemic to void the Policy when the Fortsons' submit a fraudulent claim, which the Fortsons did repeatedly. Case law does not change the

outcome. Case law cited in the Response Brief is factually dissimilar. Specifically, the fact scenario involved fraudulent claims in the application for insurance, rather than in the submission of claims. Reimbursement for payments made by Meemic is also manifest – supervision requires someone to supervise. Consequently, Plaintiff/Counter-Defendant respectfully asks this Court to grant this Motion.

Respectfully submitted,

KREIS, ENDERLE, HUDGINS
& BORSOS, P.C.

Dated: August 13, 2015

By: P77692 w/ permission
Mark E. Kreier (P35475)
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Stephen J. Staple (P77692)
Attorneys for Plaintiff/Counter-Defendant

8/17/15

STATE OF MICHIGAN

IN THE 2nd JUDICIAL CIRCUIT COURT FOR THE COUNTY OF BERRIEN

MEEMIC INSURANCE COMPANY

Plaintiff, Case No. 14-000260-CK

vs.

LOUISE M. FORTSON and RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as conservator for JUSTIN FORTSON,

Defendants.

_______________________________________/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE JOHN M. DONAHUE

St. Joseph, Michigan - Monday, August 17, 2015

APPEARANCES:

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WITNESSES:

None

EXHIBITS:		IDENTIFIED	RECEIVED
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St. Joseph, Michigan
Monday, August 17, 2015 - 2:44 p.m.

THE COURT: All right. Counsel, you may state your appearances for the record, please.

MR. KRETER: Mark Kreter, appearing on behalf of Meemic.

THE COURT: All right.

MR. HARRISON: Joseph Harrison, your Honor, on behalf of the Fortsons.

MR. CHASNIS: And Robert Chasnis, your Honor, on behalf of the Fortsons.

THE COURT: All right. How did you wish to proceed?

MR. KRETER: Well, your Honor, I've got prepared a presentation. However, if the Court has read our reply brief, I think that outlines the sum and substance of our case, and frankly it comes down to this is a motion that's not about Justin's injuries or the care that Justin is supposed to receive; it's about his parents charging for care that they never provided. Under the policy --

THE COURT: How much has been paid fraudulently?

MR. KRETER: Probably close to $100,000 with the days that we can specifically say he was not in the home.

THE COURT: In the home.

MR. KRETER: But there are obviously a lot of

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other times based upon all the deposition testimony and the fact that he bought $68,000 worth of heroin in 2011, which will indicate he wasn't in the home. We think that is significant as far as it comes down to fraud. The Defendants have stated that Louise Fortson wasn't competent. I took her deposition. My questions were simple. They were crystal clear. I asked was she with -- she or her husband, were they with Justin 24/7, and they said yes, that the only time they weren't with Justin was when he went down to the McDonalds or they could see him, or Subway, which is just down the street.

I said, "Are you answering these truthfully and honestly?" and she said, "Yes." Her husband testified in his deposition -- at least he testified he was in jail for a short period of time, but he said that his wife was competent to testify that day. The Defendants have not submitted any documented evidence supported by affidavit or deposition testimony that she was not competent, nor that Richard Fortson wasn't competent. They knew what they were doing. If they had a question, they in fact called their attorney, Mr. Chasnis when Justin went into rehab and said, "Can we still collect?" and apparently, her answer came back, "Yes, you can still collect." That was her answer in deposition, so she actually had a question. She didn't call Meemic. She called her attorney.

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This is a case where Meemic, shame on them for not following up with their insured. I mean, frankly, Meemic is the type of insurance company people want. Meemic, in good faith, were paying the benefits to the Fortsons. It wasn't until almost five years later they discovered that something was amiss, conducted surveillance, and it led to where we're at today. Fraud by one insured. Both Fortsons are insured on the policy. It's a basis to void the policy. We think under the circumstances the fraud is crystal clear and this policy should be voided. Thank you.

THE COURT: Mr. Kreter, the Court is of the opinion that even if I were to agree with what you have to say in regard to the underlying facts and the arguable fraud, and the days when Justin was not in the home, I am of the opinion that the innocent third party rule still prevails in this case, so as to not void this policy in regard to providing benefits to him. And agree with me or not on that, I feel pretty solid on that based on some very, very recent rulings that I've just recently read, although in all fairness I think that this question -- although there has been a signal from the Supreme Court that the third party -- innocent third party rule is probably going to be maintained in regard to these types of cases, I will give you the fact that that has not come down yet.

All indications seem to be, and the authorities

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seem to believe based on some cases that have come down and vacated Court of Appeals opinions that it is most likely that the third party -- innocent third party rule in these types of cases is going to prevail, but I will grant you that the proof is not yet completely in the pudding. So my question really comes down to if I were to rule in your favor in part, whether it would be -- it doesn't make a lot of sense to me to find that the Fortsons are no longer eligible for any replacement services under this policy because if the innocent third party rule is still in place, somebody else would step into their shoes and Meemic is still out, arguably, the same amount of money, possibly more because it would be a non-family member.

So I would be more inclined to entertain the option of ordering that the Fortsons be adjudicated against in regard to a duty to restitution, so to speak, of the monies paid for those days when there is no factual dispute whatsoever, but that Justin was not in the home due to being in rehabilitation or jail, or whatever those days are that we have where it seems pretty solid that something was amiss. Now, I haven't heard from the other side yet, but I'm nonetheless giving you an indication of the leaning of the Court, like it or not.

MR. KRETER: Your Honor, in fact, as I was preparing today, I had thought about there's two parts of

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this case, whether the policy is void or whether we're going to get restitution. If the Court would grant us some form of restitution, meaning we need a second hearing as to the full extent of damages, also we do have mediation scheduled for Wednesday, so it would be my suggestion to get to a specific number, we set a hearing, if you decide to rule that way, maybe two weeks down the road or whenever you're available to determine the specific amount of damages.

MR. CHASNIS: Well, if I may, your Honor?

THE COURT: Your name again?

MR. CHASNIS: Robert Chasnis. Judge, I've talked to Mr. Kreter a number of times about this case and it's always been our position that we understand -- first of all, let me correct one thing on the record. I never advised my client that they can charge for attendant care services when they weren't receiving them. I don't think you think I did, but you're telling me that the client told you that.

MR. KRETER: That's what the client said in her EUO, so -- but the point was that she asked the question to her attorney. I don't know what the advice was, per se.

MR. CHASNIS: You can appreciate how uncomfortable it makes me feel and why I want the record to say Bob Chasnis stood up and argued that that's not the case. In any event, we don't dispute that they cannot charge for, are not entitled to attendant care services when they weren't in

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the house. Frankly, I've got clients -- Mrs. Fortson is here. It wouldn't take long for you to figure out that she's not all there, and if you read Meredith Volko's (ph) deposition, she knows that Mrs. Fortson didn't know what she was doing when she submitted her claim for these benefits. She acknowledges that. The insurance company acknowledges that, so we're agreeable and we may not need a hearing to figure out what days he was in jail and/or rehab, come up with that number, and they're entitled to a reimbursement of that.

There has been no attendant care services paid since I think either September 1st or September 30th, 2014, so there's one year that no attendant care services have been paid. That's easy to figure out if he received supervision. I've got probation records. I went down and talked to Abby Donahue on my way up here, and figured out the number of days that -- that Meemic thinks he was in jail, but in fact, he was on tether, so probably Mr. Kreter and I can figure out the number of days.

THE COURT: Let me ask you this: I'm guessing that these people probably don't have the money to pay Meemic back, but an argument could be made that they could pay them back in kind. Does this gentleman still need attendant care services if he's in the house?

MR. CHASNIS: Yes.

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day rule or something.

MR. KRETER: I think we're on the same page as to the order. Whether we get the specific language down, I'm not sure. If we don't, if we don't resolve it, we'll submit something under the seven-day rule.

THE COURT: Okay.

MR. CHASNIS: Sounds good.

THE COURT: All right. Anything else today?

MR. KRETER: Nothing, your Honor. Thank you. We appreciate it.

THE COURT: Okay. You're welcome.

MR. CHASNIS: Thank you, your Honor.

THE COURT: Thank you.

MR. CHASNIS: Your Honor, may I submit though to the Court the complete copies of the depositions of Heather McKee (ph) and Rachel Rants (ph)? Those were submitted partially with the reply brief, and I have a full copy of those for the Court just to make sure that it's complete.

(At 2:58 p.m., EX#1 identified)

THE COURT: All right. Any objection?

MR. KRETER: No objection, your Honor.

THE COURT: All right. They are received. Thank you, gentlemen.

(At 2:59 p.m., EX#1 received)

MR. KRETER: Thank you.

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MR. CHASNIS: Thank you, Judge.

MR. HARRISON: Thank you, Judge.

(At 2:59 p.m., proceedings concluded)

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TRANSCRIBER'S CERTIFICATE

I do hereby certify that the foregoing transcript was prepared by me from a video tape supplied by the Berrien County Circuit Court, and that said transcript is true and correct to best of my ability to prepare.

I further certify that I am not related to or employed by any party to this cause or their respective counsel.

Janice Fulkerson
CER - 8980

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street * St. Joseph, MI * 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v

Case No.: 2014-260-CK

Hon. John M. Donahue

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants/Counter-Plaintiffs.

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PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

I. INTRODUCTION

"In general, a factual dispute exists when there is conflicting evidence concerning *what* happened, *when* something happened, *where* something happened, *how* something happened,

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who was involved, or some other similar factual inquiry." *Attorney General v PowerPick Club*, 287 Mich App 13, 27; 783 NW2d 525 (2010) (emphasis in original). The "proper role for the jury is to decide what the facts are – *not* what the facts mean." *Id.* (emphasis in the original). What, when, where, how, and who is undisputed in the present litigation. Not only are material facts undisputed, but they can be established *entirely* on the actions and statements of the complicit parties.

Defendant/Counter-Plaintiffs Louise M. Fortson ("**Louise**") and/or Richard A. Fortson ("**Richard**") (collectively, the "**Fortsons**") *admittedly* submitted Attendant Care Service Statements to Plaintiff/Counter-Defendant Meemic Insurance Company ("**Meemic**") every month, seeking payment for 24/7 attendant care purportedly rendered on behalf of Defendant/Counter-Plaintiff Justin Fortson ("**Justin**"). Louise *admittedly* testified that Justin was always under the direct and constant supervision of either her or Richard. Louise *admittedly* testified that she understood that when she submitted the Attendant Care Service Statements to Meemic, those statements were a representation that either her or Richard were actually rendering 24/7 attendant care to Justin. However, during the time period that the Fortsons submitted the Attendant Care Services Statement, Justin was *admittedly* incarcerated and/or in drug rehabilitation. Meemic *admittedly* made payment to the Fortsons based on the submitted Attendant Care Service Statements – even for time periods when Justin was in jail or rehab.

Consequently, there are no material facts to determine or in dispute – only the *legal meaning* of those undisputed facts. The legal meaning of the undisputed facts in this case is that Meemic is entitled to rescind Meemic Policy Number PAP0632676 (the "**Policy**"). Plain language within the Policy permits Meemic to void the entire Policy under circumstances where

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an insured person misrepresents any material fact or circumstance relating to a claim made under the Policy.

Despite the plain language in the Policy, long-standing Michigan case law recognized the so-called "innocent third party rule." Under the innocent third party rule and irrespective of language within a policy of insurance: "[o]nce an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is estopped from asserting fraud to rescind the insurance contract." *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170-71; 505 NW2d 895 (1993). Were the innocent third party still applicable, then the legal meaning of the undisputed facts might be different – moreover, an additional material fact would be determination of who qualifies as an "innocent third party." However, the innocent third party rule has been abrogated. Under the decision in *Bazzi v Sentinel Ins Co*, ____ Mich App _____; ____ NW2d ____ (2016), "**the judicially created innocent third-party rule has not survived.**"[1] Removing the application of the innocent third party rule removes the only defense in this case.[2]

Facts are undisputed. The *legal meaning* of those facts are undisputed. Taken together, Meemic is entitled to void the Policy. This Court should grant Meemic's ***Renewed Motion For Summary Disposition Pursuant To MCR 2.116(C)(10)*** (the "**Motion**").

[1] Westlaw citation available *Bazzi v Sentinel Ins Co*, No 320518, 2016 WL 3263905 (Mich Ct App June 14, 2016).

[2] Meemic is aware of the decision in *Southeast Michigan Surgical Hospital v Allstate Insurance Company*, ____ Mich App ____; _____ NW2d _____ (2016), wherein a request was made for a special conflict panel under MCR 7.215(J)(2). The request was made for the purpose of reviewing the decision in *Bazzi*. However, at the time of filing this Motion no conflict panel had been ordered. Irrespective of whether a conflict panel is actually convened, *Bazzi* remains binding and controlling precedent under MCR 7.215(J)(1) until the decision is reversed by the Michigan Supreme Court or the special conflict panel.

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II. UNDISPUTED MATERIAL FACTS

Meemic identify those facts material to the issue at hand. To give the Fortsons ever reasonable opportunity to defeat the Motion, Meemic will only identify material facts ***confirmed entirely by the Fortsons'*** own statements or actions.

A. Attendant Care Services Statements Were Submitted Continuously

Verification of care provided required that the Fortsons complete an Attendant Care Services Statement each month (the "**Services Statement**") (See **Exhibit A** – Attendant Care Services Statement). On the Services Statements, executed by either Louise or Richard, the Fortsons indicated that they provided Justin with 24/7 attendant care. *Id.* Service Statements were submitted each month, without interruption.

B. Louise Testified – Under Oath – That Justin Was Always With Her or Richard

Q. Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?

A. No, because either I would be there or Richard would be there.

* * *

Q. So one or two of you is always with Justin?

A. Always.

(See **Exhibit B** - Examination Under Oath Transcript of Louise Fortson, p 37).

C. Louise Testified – Under Oath – That She Understood the Purpose of the Service Statements

Q. Well, let me ask this, though. When you put down 24, that's what you've put down on each of these dates?

A. Uh-huh.

Q. You're representing that you're providing 24-hour, around the clock, care to Justin?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And you're doing that truthfully and honestly?

A. Uh-huh.

Q. Correct?

A. Yes.

Q. And that would have been situations where you and your husband had to provide that care, that you were with Justin –

A. Yes.

Q. -- or your husband Richard was with Justin?

A. Yes.

Q. Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?

A. No, because either I would be there or Richard would be there.

Q. Okay.

A. Richard's always home after 3:00, and I can go to the store or Justin can go with me or he can go with me in the morning or I can wait until Richard gets home or whatever.

Q. So one of the two of you is always with Justin?

A. Always.

Q. 365 days a year?

A. We're always there.

Q. And that's why you're billing Meemic for that?

A. Yes.

See **Exhibit B**, pp 36-37. Richard further testified that Louise was competent and understood her actions:

Q. Who deals with Meemic, you or your wife?

A. Mainly my wife.

Q. And she's competent enough to do that?

A. I believe so, yes.

(See **Exhibit C** – Examination Under Oath Transcript of Richard Fortson, pp 14-15).

D. For Certain Time Periods When the Fortsons Submitted Service Statements Justin Was Either Incarcerated or in Drug Rehabilitation.

Justin was in jail the following dates: 1) one day in September 2012; 2) five days in December 2012; 3) 78 days from December 2012 through March 2013; 4) nine days in April 2013; 5) 139 days from August 2013 through December 2013; and 6) one day in July of 2014 (See **Exhibit D** – Berrien County Records). Similarly, Justin was in an in-patient treatment facility at Best Drug Rehabilitation from August 13, 2014 through September 29, 2014. (See **Exhibit E** – Best Drug Rehabilitation Daily Logs). Justin spent *at least* one additional month at a separate rehab facility known as A Forever Recovery. See **Exhibit B**, p 31.

E. Undisputed Material Facts.

There is no dispute that:

(1) the Fortsons' continuously submitted Service Statements from the date of the accident until approximately the date of the Complaint;

(2) Louise represented under oath that Justin was *always* in either the direct presence or her or Richard;

(3) Louise understood what the purpose of the Service Statements was;

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(4) Louise submitted the Service Statements to Meemic to represent to Meemic that either her or Richard were providing 24/7 attendant care; AND

(5) Justin was either incarcerated or in jail for *hundreds* of days when the Fortsons' represented to Meemic that they were provided *24/7* attendant care.

The foregoing are the only facts material to resolution of this case and are established beyond dispute and **established directly from the statements and actions of the Fortsons.**

III. ROLE OF COURT AND JURY IN DECIDING MOTION FOR SUMMARY DISPOSITION

In *Attorney General v PowerPick Club*, 287 Mich App 13, 18; 783 NW2d 515 (2010), the court took pains to illustrate what constitutes a dispute sufficient to create a genuine issue of material fact. Facts in *PowerPick* are not relevant to the present action, but are nonetheless relevant in highlighting that no factual dispute exists – only a determination of the *legal meaning* of those undisputed facts. In *PowerPick*, an out-of-state company operated a professional lottery club in Michigan, taking a certain percentage of payments made in order to increase individual bettor's odds of winning. *Id.* at 19. After reviewing the company's operations, the Attorney General filed suit alleging that the company was violating anti-gambling statutes and causing a public nuisance. *Id.* at 23. In the lower court proceedings, the Attorney General argued in a motion for summary disposition that "there was no dispute as to the facts and that the only matter to be decided was what legal conclusions could be drawn from the facts." *Id.* at 24. The lower court denied the motion, finding a number of factual issues sufficient to require trial. *Id.*

On appeal, the lower court was reversed. Reversing the lower court was required because "PowerPick is clearly confused about what constitutes a factual dispute and about the proper role of a jury." *Id.* at 27. A factual dispute exists "when there is conflicting evidence concerning what happened, when something happened, where something happened, how something

happened, who was involved, or some other similar factual inquiry." *Id.* As applied, a jury question would have been appropriate *"if there had been conflicting evidence concerning how defendant's business actually operated."* *Id.* (emphasis added). However, no conflicting evidence was presented – rather, all evidence was taken directly from *PowerPoint*:

> The Attorney General correctly argues that what is at issue here is the *legal meaning of the undisputed facts.* **The critical facts in this case consist of PowerPick's own description of its business operations in its player handbook, on its website, in its newsletters, in the deposition testimony of its owners and employees, and in the various other documents presented to the circuit court**. The operations described in these materials and documents are somewhat complicated, but there is **no dispute concerning what these materials and documents actually say or mean**. The **only question presented for resolution was whether PowerPick's operations—as described in the uncontroverted materials and documents presented to the circuit court—fell within the scope of the statutes cited by the Attorney General. This was a purely legal question, not a factual one.**

Id. at 28 (emphasis added). Having failed to establish a factual dispute, the underlying *legal* question could be resolved in the Attorney General's favor. *Id.*

As applied, the holding from *PowerPoint* sets-forth this Court's role in resolving the Motion. Much like the company in *PowerPoint*, in this instance, the "critical facts" consist of the ***Fortsons'*** own description of their actions and documents memorializing those actions. There is ***no dispute*** as to what the Fortsons' testified to or what the Fortsons submitted to Meemic. The issue preventing this Court from granting the Motion is resolution of the legal meaning of the undisputed facts.

IV. LEGAL MEANING OF UNDISPUTED FACTS

Resolving the legal meaning of the undisputed facts requires a determination on four legal issues:

A. Whether Attendant Care Benefits Are Mandated Even When Qualifying Services Are Not *Actually* Rendered?

Establishing when attendant care benefits are payable under the No-Fault act is critical to any decision on the Motion. If in fact, attendant care benefits are payable even when Justin was incarcerated or in drug rehabilitation, then the Motion must fail at the outset. The Motion would necessarily have to fail because the Fortsons' actions would have not been fraudulent – instead, the Fortsons would have been seeking payment for lawfully reimbursable attendant care benefits. By comparison, if attendant care benefits are only payable under certain well-defined circumstances, then the Motion can survive this potentially outcome preclusive issue.

Fortunately for this Court Michigan law is both manifest and well-established. In *Douglas v Allstate Ins Co*, 492 Mich 241, 266-67; 821 NW2d 472 (2012), not only did the Michigan Supreme Court delineate the *types* of services that qualified as attendant care, but the court also held that payment is only required for services "**actually rendered**." ***24/7*** attendant care cannot be "actually rendered" when the injured party is incarcerated or in drug rehabilitation. Services still need be "actually rendered" even in the event that a prescription **is written for a specified time period of care**. *Id.* at 272. There is no automatic pay provision.

The legal conclusion from the undisputed material facts, therefore, is that at a minimum, for the time periods when Justin was either in rehab or in jail, the Fortsons were not entitled to compensation for attendant care benefits. Qualifying services cannot be actually rendered when the person receiving the service is incarcerated or in drug rehabilitation.

B. Whether Submitting The Service Statements To Meemic, Seeking Reimbursement For 24/7 Attendant Care When The Fortsons' Knew That Justin Was In Jail Or Drug Rehabilitation, Constitutes Fraud?

The elements of fraud and/or misrepresentation are well-established in Michigan requiring proof that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he knew that it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made the representation with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Mitchell v Dahlberg, 215 Mich App 718; 547 NW2d 74 (1996). To be material, the representation need not "relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact." *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999). As to knowledge of the falsity, between contracting parties, it is sufficient that the material representation is false in fact and that the party to whom it is made relies on it to his or her damage with that loss inuring to the benefit of the party making the representation. See *US Fid & Guar Co v Black,* 412 Mich 99, 119; 313 NW2d 77 (1981).

The legal conclusion from the undisputed material facts is that the Fortsons committed fraud. Whether or not the Fortsons actually rendered 24/7 attendant care is a material representation. The on-going relationship between Meemic and the Fortsons is premised entirely on payment of 24/7 attendant care benefits by Meemic to the Fortsons. Payments, which are only made following the representation that 24/7 attendant care was rendered.

Representations made to Meemic that 24/7 attendant care was actually rendered were also undeniably false. When the Fortsons represented that they were providing 24/7 attendant care they knew such representation was false. Moreover, as parties to the insurance contract with Meemic, it is sufficient that the representations were false in fact. Fraudulently documented

Service Statements were further submitted to Meemic with the intent that Meemic would pay the Fortsons. Meemic relied on the Service Statements and its reliance was detrimental. The Fortsons committed fraud. **To reiterate, Louise confirmed the above in her own statements made under oath.**

C. Whether The Policy Permits Meemic To Void The Policy Based On A Misrepresentation By The Fortsons To Meemic As To Material Fact?

When language in an insurance policy is clear, "'courts are bound by the specific language set-forth in the agreement.'" *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995), quoting *Cottril v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2 179 (1960). Language in the Policy is clear:

> **22. CONCEALMENT OR FRAUD**
>
> ***This entire Policy is void** if any insured person had intentionally concealed or misrepresented any material fact or circumstance relating to:*
>
> **A.** This insurance;
>
> **B.** The Application for it;
>
> **C.** Or *any claim made under it."*

Insured persons under the Policy include both Richard and Louise. Richard and/or Louise not only committed fraud in submitting certain Service Statements, but concealed from Meemic the fact that Justin was not under their direct supervision. The legal conclusion from the undisputed material facts is that Meemic is permitted to void the Policy under the plain language of the Policy.

D. Whether The So-Called "Innocent Third Party Rule" Prevents Meemic From Voiding The Policy, Even If Otherwise Permitted Under The Plain Language Of The Policy?

The last legal question remaining is whether despite the Policy language and the

Fortsons' brazen fraud, the so-called innocent third party rule remains as an impediment to voiding the Policy. Resolution of this legal question is straightforward. The holding from *Bazzi v Sentinel Insurance*, ____ Mich App ____; _____ NW2d ____ (2016) has left no doubt that an insurer can rescind a policy in all contexts when fraud is committed, irrespective of whether an innocent third party has made a claim: "**the judicially created innocent third-party rule has not survived the Supreme Court's decision in *Titan*.**" The fact that *Bazzi* factually involved fraud in the application for insurance and the present litigation involves fraud in the submission of claims is not relevant. Rather, *Bazzi* establishes that the innocent third party rule does not survive in any context. Consequently, the legal conclusion from the undisputed material facts is that maintaining the innocent third party rule as a defense is no longer viable. Justin's putative status as an innocent third party is not relevant. Meemic can rescind the Policy.

V. CONCLUSION

This Court previously denied Meemic from rescinding the Policy, for the sole reason that the so-called innocent third party rule protected Justin. Following *Bazzi*, the innocent third party rule no longer provides a defense in this matter. This Court also remained concerned about whether a factual dispute exists. No factual dispute remains. Based on the ***Fortsons'*** own statements and actions, the critical facts in this case have been established and are not in dispute. Having resolved the legal question and established that material facts cannot be disputed, one conclusion emerges: **Meemic can void the Policy.** The Motion must be granted.

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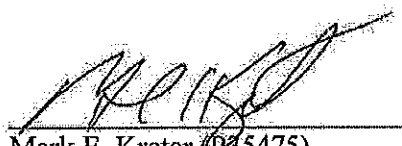
Respectfully submitted,

KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

Dated: August 19, 2016.

By: 

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STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

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DEFENDANTS/COUNTER-PLAINTIFFS' RESPONSE TO MEEMIC INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10), BRIEF IN SUPPORT, AND REQUEST FOR SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS/COUNTER-PLAINTIFFS PURSUANT TO MCR 2.116(I)(2)

NOW COME the above-entitled Defendants/Counter-Plaintiffs, LOUISE M. FORTSON, RICHARD A. FORTSON, and JUSTIN FORTSON through his Conservator for RICHARD A. FORTSON, by and through their attorneys, CHASNIS, DOGGER AND

GRIERSON, P.C., and the Law Office of Joseph S. Harrison, P.C. and for their brief in response to MEEMIC Insurance Company's Motion for Summary Disposition states as follows:

INTRODUCTION

Justin Fortson did spend some time in jail and also spent about six weeks in drug rehabilitation during the time period that MEEMIC continued to pay attendant care services to Richard Fortson based on attendant care services forms that were completed by Justin's mother, Louise Fortson. Richard Fortson never submitted any attendant care services forms, yet he was paid by MEEMIC Insurance Company for caring for Justin 24 hours a day, seven days a week as a result of their son's brain injury. There was never any intent to deceive or commit a fraud on the insurance company by any of the Defendants (**Exhibit A**, pages 44, 55, 67-72). **Exhibit B** are copies of attendant care services forms submitted by Louise Fortson. No payments for attendant care services were made to Louise Fortson. All payments for attendant care services have been paid to Richard Fortson, even though Richard Fortson works at least 40 hours per week and sleeps about eight hours per day. This is customary for MEEMIC Insurance Company to handle attendant care services claims in this fashion. (**Exhibit A**, pages 29-31, 46-48, 76). As the Court can see, and as confirmed the claims adjuster for MEEMIC Insurance Company, there is no doubt that Louise Fortson did not understand how the attendant care services form works. The adjuster even acknowledged in her deposition that it is very clear from the file that Louise Fortson never attempted to describe the services provided, she just simply put "24" in every square on the form, dated it, and signed it. (**Exhibit A**, pages 29-30, 44, 67.) This is what Louise Fortson was told to do from the inception and MEEMIC Insurance Company

kept paying without question and with no other instructions. In fact, there came a time when Louise Fortson was faxing these forms to MEEMIC by simply changing the date of the form and submitting it again each month. MEEMIC even got ahead of themselves and were paying attendant care services for a month in advance – another indication that Louise Fortson simply did not know what she was doing. Louise Fortson has Lupus, she has had many major surgeries including hip replacements, knee surgeries, abdominal and intestinal surgeries, she has suffered from strokes, spinal defects, and takes a great deal of medication. She is a rather unsophisticated and uneducated lady who drove a school bus until she had to retire due to her physical ailments just prior to her son suffering the open head injury with life-threatening swelling of the brain and leaving him with a mentality of a 12 to 14 year old. Louise dropped out of school in the ninth grade. Her grades in school were poor.

Claims adjuster, Cynthia Temple, told Louise Fortson that all she had to do was put "24" in each box on the attendant care services form, sign it, date it, and fax it to her, which Louise did every month. There was never any explanation and no instruction sheet. Often times the number of days on the form did not match the number of days in the month. MEEMIC just made the adjustment. There was never any explanation and no instruction sheet. (Louise would not have understood the instruction sheet anyway.) It should also be noted by the Court that MEEMIC Insurance Company, under the Michigan Automobile No-Fault Act, offered to pay and Richard and Louise Fortson accepted payment of $11.00 per hour, 24 hours per day, seven days a week for attendant care services if Justin would be cared for by his parents in their home rather than pay an institution to care for their son. Counsel for Fortsons attended a visit to Hope Network in

Grand Rapids with Justin Fortson and Louise Fortson approximately October 2009. Hope Network was ready to take Justin as an inpatient on the recommendation of Neurologist Cynthia Pareigis at that time. There is no dispute that Justin has been ordered 24 hour per day attendant care services. He simply cannot be left alone at any time because he is a danger to himself and others as a result of brain damage. This is why Justin got into trouble with the law, which will be discussed later. It is also important to note that Richard Fortson has been appointed conservator for his son, Justin, by the Berrien County Probate Court upon a finding that Justin is a legally incapacitated individual. MEEMIC Insurance Company has paid 24 hour care to Richard Fortson even though the requests for payment were made by Louise Fortson. Richard Fortson has a 40 hour per week job and the insurance adjusters at MEEMIC Insurance Company acknowledge that that does not create a problem. They understand and know that Richard Fortson and Louise Fortson have to sleep and that Richard is away at his job 40 hours per week and that on occasion others would be assisting with the supervision. It is sufficient for MEEMIC to know that Justin needs 24 hour care and supervision for them to simply write a check to Richard Fortson based on Louise's form. (**Exhibit A**, pages 23, 29-30, 46-48.)

MEEMIC Insurance Company is asking this Court to terminate benefits to Justin Fortson. Clearly, Justin Fortson made no misrepresentation or defrauded MEEMIC Insurance Company. They, in fact, paid no attendant care services benefits to Justin Fortson. The "providers" of the attendant care services are Louise and Richard for the most part. The way MEEMIC set it up is that they would make the payments to the conservator, Richard Fortson, and Louise would send them the paperwork. If MEEMIC was paying an agency like Hope Network to take care of Justin, they would have been paying at least

three times the amount they were paying Richard Fortson (confirmed by Meredith Valko at her deposition). (**Exhibit A**, page 62-64). MEEMIC saved a lot of money by contracting with Louise Fortson at $11.00 per hour to keep Justin at home. Predictably, Mr. and Mrs. Fortson were not as well equipped to take care of their traumatic brain injured son as they had hoped. They have learned a lot over the last few years unfortunately for sure and that is discussed more in the factual portion of this summary.

FACTUAL SUMMARY

On September 18, 2009, Justin Fortson was sitting on the back of a friend's car. He and a group of other kids, generally ages 16 or 17, were goofing around on Highland Avenue in St. Joseph, Michigan. The kids started pushing the car and the driver of the car started the engine and starting driving with Justin on the trunk. Justin, while trying to hang on, fell off while the car went around a corner and Justin struck the side of his head on the pavement. Justin suffered an open head injury. He was on life support for an extended period of time with severe brain damage. (Attached as **Exhibit C** is a photo of Justin at the intensive care unit.) He has a portion of his skull removed above his ear on the right side of his head and he has a persistent tumor that continues to put pressure on his brain. He has permanent severe traumatic brain injury resulting in his need for constant supervision. His doctors have prescribed 24 hour care, seven days per week which is undisputed by MEEMIC Insurance Company. MEEMIC Insurance Company seeks to have their policy cancelled such that they would no longer be responsible for Personal Injury Protection benefits owed for the benefit of Justin Fortson, claiming that his parents have committed a fraud and intentionally tried to steal money from MEEMIC Insurance Company. It is simply untrue and MEEMIC knows it. MEEMIC insurance adjusters have testified that

they have no evidence of any intentional attempt to mislead or defraud the insurance company. (**Exhibit A**, pages 44, 51, 66-72.)

Louise Fortson is disabled as a result of her own medical issues. She has suffered strokes causing her mental and physical difficulties. She has defects in her spine. She has Lupus. She has had hip replacements and knee problems apparently related to serious arthritic problems. She has had surgeries related to intestinal issues. Louise will be present at the time of hearing on this Motion for Summary Disposition in Order for the Court to attempt to get an understanding of her ability to comprehend issues of insurance coverage and the nature of attendant care services and what the coverage is intended to cover. She left school in the ninth grade with failing grades. MEEMIC Insurance Company has never had any discussions or contact with Richard Fortson. None of the adjusters have ever met any of the Fortsons in person.

Since Justin returned home the hospital, Louise Fortson has been unable to sleep in her bed. She has a La-Z-Boy chair that she has placed in front of her son's bedroom door because Justin regularly awakes at night. He has dreams, he has nightmares, and he does not have complete control of his bladder or his bowels. His bed has to be changed due to both urinating and defecation in his bed on occasion. Even during the daytime Justin loses control of his bladder and his bowel requiring that Louise help clean him up. Justin suffers from seizures. Their neurologist, Dr. Ward, has reported that Justin suffers seizures on an average of approximately every seven minutes. These are largely undetectable, however, it is not unusual for him to have more than one major seizure where he loses consciousness and falls to the ground convulsing uncontrollably. He takes high doses of anti-seizure medication.

There is simply no question that Justin has severe cognitive deficits. Counsel for MEEMIC Insurance Company has attempted to minimize Justin's problems by referring to the bizarre postings on Facebook and the fact that Justin has been involved with alcohol and drugs. Even MEEMIC Insurance Company's adjuster, Meredith Valko, admitted that a traumatic brain injured person's susceptibility to trouble with the law including drugs and alcohol is "predictable". (**Exhibit A**, pages 27, 49.) In this case MEEMIC has not produced any admissible evidence challenging Justin Fortson's need for medical services. The only medical evidence that exists supports Justin's need for continued treatment. Even MEEMIC's claims adjuster testified that she recognized Justin's continued need for medical treatment. **(Exhibit A**, pages 23-27, 30-40, 45, 48.)

Justin Fortson has severe behavioral disorder from his traumatic brain injury including typical sequelae like impulsivity, poor judgment, lack of appreciation of the significance of certain issues like safety issues, and is easily influenced. His mentality has been compared to that of a 12 to 14 year old. He has difficulty tying his shoes. He is easily persuaded. He has very few friends although many people come to Justin and call him their friend. Justin has been in a lot of trouble because he is easily persuaded and thinks people are his friends when they are not. Mr. and Mrs. Fortson had to put an alarm on their house because Justin would sneak out of the house to be with his "friends". He was escaping from the home, not because Mr. and Mrs. Fortson were not trying. Again, Richard Fortson had a 40 hour per week job and Louise's abilities are limited unfortunately by her own health conditions. They have come a long way toward being able to control Justin, partly because Justin is becoming more manageable with time. Even after they put the alarm on their house, Justin did, in fact, escape on occasion and they were forced to go back and get a

second alarm on their house which virtually goes off if any door or window is opened in the house. This family's life has been turned upside down. Justin was befriended by a group of young men who stole things from Justin. He has had cell phones stolen and video game consoles stolen. He has had televisions stolen from him by his friends. Some of his "friends" used Justin's parent's garage to make meth and Justin ended up being charged along with them for possession of meth amphetamine. A young lady befriended Justin and introduced him to heroin. Justin spent time in drug rehab. Justin has a sister with nursing background and a brother-in-law who is a paramedic who have tried to assist in controlling Justin and getting him to appreciate his need to reject these people who are not really his friends. Justin does not understand. The vulgarity and repulsive postings on Facebook is a product of the traumatic brain injury and MEEMIC Insurance Company and its lawyers should be ashamed to present these distasteful pieces of "evidence" to the Court as a basis for terminating a brain injured individual's benefits.

LAW
MCR 2.116 (C)(10)

The Michigan Supreme Court defined the legal standard for motions brought pursuant to MCR 2.116(C)(10) in *Smith v Global Life Ins Co*, 416 Mich 446, 454-455, 455 at fn.2 (1999) and in *Maiden v Rozwood*, 461 Mich 109, 120-121 (1999). The motion tests whether evidentiary support exists for the claims made or defenses raised by the non-moving party. In *Rozwood*, supra, the Supreme Court stated:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence

> fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). 461 Mich at 119-120. (Citations omitted).

The evidence produced by both parties in order to set forth or rebut a motion for summary disposition is set forth in MCR 2.116(G)(6) which provides:

> (6) Affidavits, depositions, admissions and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.

The moving party has the initial burden of supporting its position by evidence that is admissible if a trial of the case is required. *Smith*, supra, 460 Mich at 454-455 and *Rozwood*, supra, 461 Mich at 119-121. This claim may not be made by the mere allegations or denials of the moving party or its attorney. The moving party cannot support this claim by its pleadings. MCR 2.116(C)(4). The moving party must, by affidavit, or otherwise, support their motion and cannot rely on mere allegations of its attorney. In this motion, Defendant has submitted only the unsupported allegations of its attorney. For this reason, Defendant's motion must be denied as Defendant has not met its burden of proof.

Additionally, when reviewing motions brought under MCR 2116(C)(10), the Court must be careful not to substitute a summary hearing for a trial. *Partich v Muscat*, 84 Mich App 724 (1978). The Summary Disposition rule must be strictly construed by the Court. See, *Doe v Osceola Twp*, 84 Mich App 514 (1978). Further, the Court must not make determinations of fact. See, *Schram v Chambers*, 79 Mich App 248 (1977); and *Baker v City of Detroit*, 73 Mich App 67 (1976). When evidence before the Court is incomplete or disputed, the matter should not be decided summarily. See, *Oliver v St. Clair Metal Products Co*, 45 Mich App 242 (1973); and *Renfroe v Higgins Rack Coating & Mfg Co*,

Inc, 17 Mich App 259 (1969). The Court must review the evidence presented in a light most favorable to the non-moving party and when reasonable minds might differ as to the outcome, the Court must deny the motion. See, *Rozwood*, supra; *Quinto*, supra, 451 Mich at 362-363; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618 (1995); and *Jackson Lib v Jackson Cty #1*, 146 Mich App 392 (1985).

The Court must give the benefit of any reasonable doubt to the non-moving party and grant a motion only if it is impossible for the claim to be supported at trial because of a deficiency that cannot be overcome. See, *Peterfish v Frantz*, 168 Mich App 43, 48-49 (1988); and *Struble v Lack Industries, Inc*, 157 Mich App 169, 172-73 (1986); *Huff*, supra; *Partrich*, supra; *Adas v Ames Color-Tile*, 160 Mich App 297, 300 (1987); *Bob v Holmes*, 78 Mich App 205 (1977); and *Rizzo v Kretschmer*, 389 Mich 363 (1973).

BAZZI IS DISTINGUISHED FROM THE INSTANT CASE

Bazzi v Sentinal Ins Co., ___ Mich App (2016), *Southeast Mich Surgical Hosp. v Allstate Ins Co*, ____ Mich App _____ (2016) and *State Farm Mut. Auto. Ins. Co. v. Mich. Mun. Risk Mgmt. Auth*, __ Mich App __ (2016) are distinguishable from the instant case and do not require that Justin Fortson's benefits be terminated. The factual basis for the claim of fraud of all three cases relate to an insured's procurement of insurance by fraud. See, *Bazzi*, Slip Opinion (pages 2-3) attached as **Exhibit D,** *Southeast Mich Surgical Hosp*, Slip Opinion (pages 1-3) attached as **Exhibit E** and *Mich. Mun. Risk Mgmt. Auth*, Slip Opinion, (pages 1-2) attached as **Exhibit F**. Not one of these cases involved an attempt to terminate an insured's statutorily required benefits because of a fraud committed by a healthcare provider. Similarly, the Michigan Supreme Court case reviewed in these cases and found to be the basis for *Bazzi*, *Titan Ins Co v Hyten*, 491 Mich 547 (2012) involved a

claim involving fraud in the application for insurance. 491 Mich at 560 and 564. In all four cases the insurer claimed that a policy of insurance never existed. The factual basis for each of these decisions is distinguishable from the facts that are present in the instant case. In the instant case, a policy of insurance existed at the time of the accident and for years after the accident. In all three cases, benefits were found to be unavailable because no policy existed due to the fraud on procurement. The majority in *Bazzi* noted:

> We now turn to the other question posed in this case, whether the holding in *Titan* extends to mandatory no-fault benefits. We conclude that it does. *Titan* did, in fact, involve optional benefits not mandated by statute. But this was not the basis of the Court's decision. And it makes the rather unremarkable observation that, where insurance benefits are mandated by statute, coverage is governed by that statute. It is also true that 'because insurance policies are contracts, common-law defenses may be involved to avoid enforcement of an insurance policy, *unless those defenses are prohibited by statute*.' The Court ultimately holds 'that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party.' And it does so without qualification regarding whether those benefits are mandated by statute. Thus, if there is a valid policy in force, the statute controls the mandated coverages. But what coverages are required by law are simply irrelevant where the insurer is entitled to declare the policy void ab initio. The situation would be akin to where the automobile owner had never obtained an insurance policy in the first place; they would have been obligated by law to obtain such coverage, but failed to do so.
>
> *Bazzi* Slip Opinion, (page 5), citing *Titan*, 491 Mich at 554 and 571. Footnotes omitted.

As noted in *Bazzi*, because there was a valid policy in force in the instant case, the no-fault statute controls mandated coverages. *Bazzi*, Slip Opinion (page 5). The majority in *Bazzi* noted specifically "...if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void ab initio and rescind it, including

denying the payment of benefits to innocent third-parties." *Bazzi*, Slip Opinion (page 10). *Southeast Mich Surgical Hosp* also involved fraud in the application for insurance. Id. at pages 1-3. In the instant case, no factual basis exists for claiming that the policy at issue was obtained through fraud. In the instant case, the policy existed at the time of the accident as noted by the majority in *Bazzi*, "...[T]hus, if there is a valid policy in force, the statute controls the mandated coverages..."

The Michigan No-Fault Act is a compulsory insurance system that requires most motorists operating motor vehicles in Michigan to purchase mandatory no-fault coverage or face fine or imprisonment. See, MCL 500.3101(1) and *Southeast Mich Surgical Hosp* at page 5. No-fault coverage, unlike uninsured motorist coverage, is mandatory and required by the terms of the Michigan No-Fault Act. The Legislature has chosen to require every Michigan No-Fault Insurance policy to contain Personal Protection Insurance coverage. *Hyten, supra* did not address an insurer's responsibility for personal protection coverage under Michigan statutory required No-Fault Act. See, *Southeast Mich Surgical Hosp*, (page 5). In *Rohlman v Hawkeye – Security Ins. Co*, 447 Mich 520, 524-525 (1993) the Michigan Supreme Court noted that when the provisions of an insurance contract are mandated by statute, the statute applies to control the rights and limitations of the coverage required by statute. The entitlement to Personal Protection Insurance benefits is statutory and not contractual. MCL 500.3101(1), MCL 500.3107, and MCL 500.3114(5). There is no excess coverage to fall under the contract terms. See, *Southeast Mich Surgical Hosp*, (page 5). The existence of No-Fault coverage from the date of the accident makes this case different from *Hyten, Bazzi, Southeast Mich Surgical Hosp* and *MMRMA*.

The Michigan No-Fault Insurance Act should be construed liberally as it is remedial in nature. *Putkamer v TransAmerica Ins Corp of Amer*, 454 Mich 626, 631 (1997). This rule of construction is intended to apply to payment of benefits to injured parties who were intended to benefit from the adoption of the No-Fault Legislation. The Act should be broadly construed to effectuate coverage. *McMullen v Motors Ins Corp*, 203 Mich App 102, 107 (1993). The Act provides that an insurer is liable to pay benefits for accidental bodily injury arising from the operation, ownership or use of a motor vehicle as a motor vehicle. See, *Douglas v Allstate*, 492 Mich 241 (2012); and MCL 500.3105. Personal Protection Insurance is a mandatory coverage required by MCL 500.3101(1) and are provided regardless of fault. MCL 500.3107(1)(a) establishes medical benefits that an insurer must provide within the mandatorily required insurance coverage. It is Justin Fortson's medical benefits Plaintiff/Counter-Defendant wishes to avoid.

MCL 500.3112 provides that:

> Personal protection insurance benefits are payable to or for the benefit of an injured person...

In the instant case the benefits at issue were not paid to Justin Fortson, but were paid directly to Richard Fortson for the benefit of Justin Fortson. Plaintiff/Counter-Defendant does not argue or offer any proof that Justin Fortson's coverage was not in effect at the time of the accident. MEEMIC does not claim that coverage was procured though fraudulent activities. The allegations of Plaintiff/Counter Defendant focus completely on the actions of the health care provider, Louise Fortson, but seek to punish Justin. It is the medical mandatory benefits required by the Michigan No-Fault Act that MEEMIC seeks to bar. MCL 500.3112 requires that Justin's medical benefits are payable

to him. The statute does not provide or allow a claim against Mrs. Fortson to extinguish or limit in any way other medical benefits due her son.

The Michigan Legislature has set forth specific provisions in the Michigan No-Fault Act to limit and/or disqualify mandated No-Fault benefits. At no point in the Michigan No-Fault Insurance Act did the Legislature allow an innocent insured's Personal Protection Insurance benefits to be limited by alleged misrepresentation and fraudulent activity by a health care provider. Several of the limitations that the Legislature has chosen to place upon no-fault coverage are contained within MCL 500.3106 (Parked Vehicle and Worker's Compensation Exclusion) and MCL 500.3145 (the 1 year Statute of Limitations). MCL 500.3113 sets forth specifically activities that the Michigan Legislature has chosen to disqualify an injured person's right to Personal Protection Insurance benefits. Again, no portion of §3113 provides for an innocent insured to lose his/her Personal Protection Insurance benefits due to misconduct by a health care provider.

The Michigan Legislature provided in MCL 500.3112 a means that would allow an insurance company or any other interested person or organization to come to Circuit Court and to answer doubts that may exist about the proper persons to receive payments and/or the proper apportionment amount of persons entitled to payment. The provision provides, in part:

> If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate.

Thus if there is question concerning a person's right to payment, any interested party could seek answer or protection in the Circuit Court. Plaintiff/Counter-Defendant may seek to test Mr. and Mrs. Fortson's right to receive payment under this provision. This provision does not allow MEEMIC to cancel Justin's medical benefits because of his healthcare provider's conduct.

The rules of statutory construction apply to the application of the Michigan No-Fault Insurance Act as it relates to Plaintiff/Counter-Defendant's motion. When interpreting a statute, the Court must first and foremost give affect to the intent of the Legislature. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 51 (2006); *Trye v Michigan Veteran's Facility*, 451 Mich 129, 135 (1996); *People v Hawkins*, 181 Mich App 393, 396 (1989); and *Joy Management Co v Detroit*, 176 Mich App 722, 730 (1989). The Court must ascertain the legislative intent that may be inferred from the statutory language. *Satelo v Grant Twp.*, 470 Mich 95, 100 (2004). The first criterion in determining intent is the specific language of the statute. *Saint George Greek Orthodox Church v Laupmani Assoc*, 204 Mich App 278, 282 (1994); and *Hawkins*, supra at 396. The Legislature is presumed to have intended the meaning it plainly expressed. *Trye*, supra; and *Fraiser v Model Coverall Service, Inc*, 182 Mich App 741, 744 (1990). Courts may not speculate with respect to the probable intent of the Legislature beyond the words expressed in the statute. *People v Breidenbach*, 489 Mich 1, 10 (2011); and *Mich Ed Assn'n v Secretary Of State (On Rehearing)*, 489 Mich 194, 218 (2011). If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted. *Koentz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002); *Trye*, supra; and *Nat'l Exposition Co v Detroit*, 169 Mich App 25, 29 (1988).

The Michigan Legislature set forth its intentions concerning limitation and disqualifications allowed with regard to claims for Personal Protection Insurance benefits. The Legislature did not provide for the relief requested by MEEMIC. The Court cannot assume that for some reason this was an oversight by the Legislature. The coverage at issue was not created through fraud. This coverage existed for a number of years. The fraud in this case involved a health care provider and occurred many years after Justin's insurance coverage was activated. Nowhere in the Act is there any suggestion that the Legislature intended to allow the termination of statutorily mandated no-fault benefits held by an innocent insured based upon the misconduct of a health care provider. MEEMIC's request for a termination of Justin Fortson's Personal Protection Insurance benefits should be denied.

CONCLUSION

Attached and marked hereto as **Exhibit G** is a letter from Susan Rumford at Hope Network. Recently, Hope Network was contacted hoping that they would accept Justin Fortson in-patient based on the recommendations made by Dr. Cynthia Pareigis (**Exhibit H**) and based upon the circumstance that they would get paid when this litigation is finalized. Because of the fact that MEEMIC Insurance Company has alleged fraud and are seeking to terminate any future coverage, Hope Network has refused to accept Justin at their agency. Frankly, Louise and Richard Fortson are better equipped now to take care of Justin than they were back in 2009. Louise and Richard have learned to better manage Justin in their home. They, in fact, are owed for attendant care services dating from September 1, 2014 through the present. (For purposes of this Motion, calculation will be available at the hearing.) If credit is afforded for the 94 days that MEEMIC Insurance Company believes was an overpayment, a balance will be

owed by MEEMIC. There is no question that attendant care has actually been rendered by Mr. and Mrs. Fortson in their home. Meredith Valko testified that she knows of no other days other than those 94 days set forth in the Complaint where Justin was not present in their home with his parents. (**Exhibit A**, page 68.) These are the days that MEEMIC believes Justin was in jail or rehabilitation. Contrary to MEEMIC Insurance Company's lawyer's statement in his brief that Louise was "lying", Meredith Valko, the adjuster for MEEMIC testified that she has no evidence that Louise nor Richard, nor Justin, intended to defraud, intended to steal, engage in willful and wanton activity, or otherwise committed a fraud. (**Exhibit A**, page 44, 51, 66-72.) She simply terminated Personal Injury Protection Benefits because Richard Fortson accepted the checks. In fact, Richard Fortson never sent a request to MEEMIC. His wife, Louise, directed the attendant care services forms based on the instructions given by Cynthia Temple and as had been certified, ratified, and accepted by MEEMIC Insurance Company since 2009! MEEMIC Insurance Company was well aware by the receipt of the forms that Louise was not well versed in how the forms were supposed to be prepared. They were deficient and incomplete but MEEMIC paid anyway. Louise Fortson simply did not know what attendant care services are and was told by the insurance company that they would pay her $11.00 an hour, 24 hours per day, seven days a week to take care of their son. MEEMIC Insurance Company was avoiding paying three to four times that much money to an agency like Hope Network. Hope Network instructed the Fortsons that Justin could not be kept there against his will and if he did not want to go there he could walk out any time. Justin told his mother, that if she dropped him off at Hope Network, he would kill himself. Dr. Cynthia Pareigis put in her office notes that she was pretty sure that if Justin was placed in an agency like Hope Network that he would "elope". (**Exhibit I**.)

Respectfully submitted,

Dated: September 7, 2016

CHASNIS, DOGGER & GRIERSON, P.C.
BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs Fortsons

Dated: September 7, 2016

LAW OFFICE OF JOSEPH S. HARRISON P.C.
BY: JOSEPH S. HARRISON (P30709)
Co-Counsel for Defendants/Counter-Plaintiffs Fortsons

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the Attorneys of Record herein at their respective addresses disclosed on the pleading this 7th day of September 2016.

X US Mail ___ Hand Delivered ___ UPS ___ Other
___ E-mail ___ Fed Express ___ FAX

Signature: Kimberly Kauffman
Kimberly Kauffman

STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

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/

SUPPLEMENTAL RESPONSE TO MEEMIC INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10), BRIEF IN SUPPORT, AND ADDITIONAL SUPPORT FOR SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS/COUNTER-PLAINTIFFS PURSUANT TO MCR 2.116(I)(2)

NOW COMES LOUISE M. FORTSON, RICHARD A. FORTSON, and JUSTIN FORTSON through his Conservator for RICHARD A. FORTSON, by and through their attorneys, CHASNIS, DOGGER AND GRIERSON, P.C. and the LAW OFFICE OF

JOSEPH S. HARRISON, PC., and moves this Court for summary disposition in their favor as Louise M. Fortson and Richard A. Fortson were not insureds during the time period under scrutiny and thus did not meet the terms set forth in the policy at issue with regard to termination of Justin Fortson's No-Fault medical benefits based on the conduct of his healthcare providers, Richard and Louise Fortson. As the facts in this case do not meet the requirements for termination under the policy at issue, MEEMIC Insurance Company's Motion for Summary Disposition must be denied and Justin Fortson is entitled to summary disposition in his favor. Additionally, MCL 500.3114(1) provides that MEEMIC owes No-Fault benefits to Justin Fortson. Justin Fortson adopts the attached brief with regard to these arguments.

SUPPLEMENTAL STATEMENT OF FACTS

It is admitted by all parties that Justin Fortson was injured on September 18, 2009 and at that time was covered by policy number PAP0632676 issued by MEEMIC. See Declaration Page of the insurance policy in effect at the time of the accident and contained within **Exhibit J**. The policy period covered was from June 29, 2009 through January 29, 2010. *Id.* The named insureds on the policy were Louise M. Fortson and Richard A. Fortson. It is admitted by all parties that Justin Fortson was covered by this insurance policy at the time he was injured and that the injury involved the operation and maintenance or use of a motor vehicle as a motor vehicle. It is admitted by all parties that Justin Fortson did not commit fraud and that MEEMIC's declaratory action and the basis of its pending motion rests solely upon the conduct of Louise Fortson, a healthcare provider in September 2012, December 2012 through March 2013, April 2013, August 2013 through December 2013, July 2014 and August through September 2014. See Plaintiff/Counter-

Defendant MEEMIC Insurance Company's Renewed Motion For Summary Disposition Pursuant To MCR 2.116 (C) (10) at page 6 of 13. Louise and Richard Fortson's coverage under policy number PAP0632676 was terminated effective July 29, 2010 by way of a Notice Of Termination Or Declination Of Insurance by MEEMIC Insurance Company (See **Exhibit K**). MEEMIC mailed the notice of termination on June 14, 2010. *Id.* It is to be noted that it was MEEMIC that terminated the policy effective July 29, 2010. MEEMIC noted:

> This is to notify you that for the reason(s) stated in the "Important Notices" section the insurance provided in the above-indicated policy will be terminated at and from the hour and date stated above. This notification is in compliance with law and the provisions in your policy relating to the termination of insurance.

According to the notice of termination, the policy termination date and time was July 29, 2010 at 12:01 AM (See **Exhibit K**). The form notes that this policy became effective January 29, 2010 and thus was a renewal of the policy in effect at the time of Justin Fortson's injuries.

ARGUMENT

In the instant case, law of contract applies. See *Eghotz v Creech*, 365 Mich 527.530 (1962). The contract should be viewed from the standpoint of the insured. See *Fresard v Michigan Millers Ins Co*, 14 Mich 686, 694 (1982). In reviewing the contract language, a Court must attempt to determine the intent of the parties and effectuate that intent. See *Auto Owners v Churchman*, 440 Mich 560, 567 (1992); and *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 630 (1994). If the language is clear and unambiguous, the terms should be applied as written. See *Churchman, supra* at 567. The entire policy must be read

as a whole in order to determine what provisions actually mean. *Id.*; and *Boyd v General Motors Acceptance Corp*, 162 Mich App 446 (1987); *Parrish v Paul Revere Life Ins Co*, 103 Mich App 95 (1981). Exclusionary clauses in insurance policies are strictly construed in favor of the insured. See *Churchman, supra* at 566-567. Any question regarding the application of policy language is construed against the insurer who drafted the contract under review. See *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38 (1996); *Arco Industries Corp v American Motorist Ins Co*, 448 Mich 395, 402-403 (1995); and *Raska v Farm Bureau*, 412 Mich 355 (1982); *reh den* 412 Mich 119 (1982).

In reviewing the insurance contract, the Court must apply the terms set forth in the contract. It is important to remember that ambiguity is defined broadly. *See Marzonie, supra*, 447 Mich at 631; *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 03, 709 (1997); *GAF Sakes and Service, Inc v Hastings Mutual Ins Co*, 224 Mich App 259, 261 (1997); and *Cavalier Mfg Co v Employers Ins of Wausau*, 222 Mich App 89, 94 (1997). Ambiguous terms of the insurance policy should be construed in favor of the insured. See *Frankenmuth Mut Ins v Masters*, 460 Mich 105, 111-112 (1999).

The insurance contract at issue contains provisions referring to an insured's concealment or fraud (See **Exhibit J** at page 22, section 22). This provision reads as follows:

> 22. CONCEALMENT OR FRAUD
> This entire Policy is void if any Insured person has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;
> B. The Application for it;
> C. Or any claim made under it.

This provision clearly provides that it applies to "any Insured person". In the instant case only Justin Fortson was an insured person and there is no argument that he acted to conceal or committed any fraudulent act. In the instant case MEEMIC's claim is that healthcare provider Louise Fortson misrepresented the amount of time she spent providing attendant care to Justin Fortson. Louise Fortson was not an insured with MEEMIC after July 29, 2010. Louise Fortson was not an insured at the time she allegedly committed fraud or made misrepresentations. MEEMIC itself acted to terminate policy number PAP0632676 by way of Notice of Termination Or Declination Of Insurance mailed June 14, 2010. See **Exhibit K**. By the terms of the notice itself the insurance coverage under the policy was ended by MEEMIC. According to MEEMIC, Louise Fortson and Richard Fortson were not insureds after July 29, 2010. Reading the cancellation provision as written, it applies solely to insured persons. Thus the provision drafted by MEEMIC does not apply to the conduct of non-insured persons. By the very terms of the insurance policy at issue, the conduct of a healthcare provider does not activate section 22 concealment or fraud.

Bazzi v Centennial Insurance Company, ____ Mich App ____ (2016), *Southeast Mich Surgical Hosp v Allstate Insurance Company*, _____ Mich App _____ (2016) and *State Farm Mutual Auto Insurance Company v Mich Mun Risk Mgmt Auth*, ____ Mich App ____ (2016) (respectively **Exhibit D, Exhibit E,** and **Exhibit F**[1]) are all distinguishable from the instant case in that each of those policies arose from an insured's procurement of insurance by fraud. In this case the insurance at issue was in effect at the time of the accident and coverage questions did not arise until 2012-2014. MEEMIC acted to terminate

[1] Attached to Defendants/Counter-Plaintiffs' Response to MEEMIC Insurance Company's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), Brief in Support, and Request for Summary Disposition in Favor of Defendants/Counter-Plaintiffs Pursuant to MCR 2.116(I)(2) dated September 7, 2016.

the coverage of Louise and Richard Fortson on July 29, 2010 long before the alleged fraud took place. The cases noted above do not apply to instances where the person committing the fraud was a healthcare provider and not an insured. In each case the policy at issue was being applied to an insured. By the language of the contract at issue and by way of the notice of termination, Louise and Richard Fortson were not insureds at the time the alleged misconduct took place. *Bazzi* and the cases that follow it do not apply to the facts presented in the instant case.

In the instant case Justin Fortson's position is also supported by the priority provisions of the Michigan No-Fault Act contained within MCL 500.3114(1). This provision applies personal protection insurance to those persons suffering accidental bodily injury and establishes what insurance coverage is to provide the benefits. In this case the coverage for Justin's medical benefits were provided by MEEMIC. This statutorily required coverage has not been cancelled by Justin Fortson's conduct and is still in effect. To the extent that MEEMIC has canceled the insurance policy held by Louise Fortson and Richard Fortson, section 3114 (1) applies only to Justin Fortson and does not apply to Louise Fortson or Richard Fortson. Louise Fortson and Richard Fortson were not injured in the accident and any coverage they had under policy number PAP0632676 was terminated by MEEMIC. Pursuant to the terms of the priority provisions of the Michigan No-Fault Act, the alleged conduct of Louise Fortson cannot terminate Justin Fortson's right to receive medical benefits. The right to receive medical benefits was created at the time of the accident, by the coverage that was in effect through MEEMIC. This coverage continues to provide Justin Fortson with No-Fault benefits while the coverage itself has been

terminated for Louise Fortson and Richard Fortson. Louise Fortson and Richard Fortson were not insureds of MEEMIC at any point following July 29, 2010.

CONCLUSION

For the reasons set forth above and as set forth in this party's prior pleading, Justin Fortson requests that the Court deny MEEMIC's Motion for Summary Disposition with regard to his claim for medical coverage and grant his Motion for Summary Disposition establishing that coverage exists to provide him with the medical coverage established by the Michigan No-Fault Act.

Dated this 5th day of October 2016.

Respectfully submitted,

Dated: October 5, 2016

CHASNIS, DOGGER & GRIERSON, P.C.
BY: ROBERT J. CHASNIS
Attorneys for Defendants/Counter-Plaintiffs Fortsons

Dated: October 5, 2016

LAW OFFICE OF JOSEPH S. HARRISON P.C.
BY: JOSEPH S. HARRISON (P30709)
Co-Counsel for Defendants/Counter-Plaintiffs Fortsons

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the Attorneys of Record herein at their respective addresses disclosed on the pleading this 5th day of October 2016.

X US Mail ___ Hand Delivered ___ UPS ___ Other
___ E-mail ___ Fed Express ___ FAX

Signature: Kimberly Kaufman
Kimberly Kaufman

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street * St. Joseph, MI * 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v

Case No.: 2014-260-CK

Hon. John M. Donahue

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants/Counter-Plaintiffs.

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SUPPLEMENT TO PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

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I. INTRODUCTION

On or around September 18, 2009, Defendant/Counter-Plaintiff Justin Fortson ("**Justin**") was riding on the hood of a vehicle. A sudden turn of the vehicle unsurprisingly resulted in Justin's exit from the hood. Injuries and medical expenses followed. On September 18, 2009, Plaintiff/Counter-Defendant Meemic Insurance Company ("**Meemic**") insured Defendant/Counter-Plaintiffs Louise M. Fortson ("**Louise**") and/or Richard A. Fortson ("**Richard**") (collectively, the "**Fortsons**") under Meemic Policy Number PAP0632676 (the "**Policy**"). At the *occurrence* of the accident, Meemic's coverage under the Policy was triggered. Subject to the terms and conditions of the Policy, Meemic would reimburse the Fortsons in relation to Justin's care. Unfortunately for Meemic, the Fortsons thereafter engaged in fraudulent conduct, claiming attendant care benefits payable under the Policy for time periods when Justin was either incarcerated or in drug rehabilitation. Based on the Fortsons' actions, Meemic has now moved to terminate its future obligations under the Policy and recoup improperly claimed benefits.

Defenses advanced to Meemic's rescission attempts have shifted. Initially, the Fortsons argued that as a so-called "innocent third party" Justin's benefits could not be terminated for any reason. The innocent third party doctrine is now a dead letter and no longer applicable. Under the decision in *Bazzi v Sentinel Ins Co*, ____ Mich App ____; ____ NW2d ____ (2016), "the judicially created innocent third-party rule has not survived."[1] Separate from the innocent third party doctrine, the Fortsons also attempted to portray themselves as ignorant and unsophisticated, unknowing in their fraud. Testimony taken under oath undercuts the Fortsons' purported ignorance:

[1] Westlaw citation available *Bazzi v Sentinel Ins Co*, No 320518, 2016 WL 3263905 (Mich Ct App June 14, 2016).

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Q. Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?

A. No, because either I would be there or Richard would be there.

Q. Okay.

A. Richard's always home after 3:00, and I can go to the store or Justin can go with me or he can go with me in the morning or I can wait until Richard gets home or whatever.

Q. So one of the two of you is always with Justin?

A. Always.

Q. 365 days a year?

A. We're always there.

Q. And that's why you're billing Meemic for that?

A. Yes.

With no other defense available, the Fortsons now assert that provisions of the Policy are no longer controlling as the Fortsons are not "Named Insureds." Citing no applicable case law, other than those cases generally related to contract interpretation, the Fortsons' argument is that benefits remain payable under the Policy, but conditions on receipt of those benefits are no longer valid.

This Court cannot accept the argument advanced. The Policy is a so-called "occurrence" policy. Occurrence policies are implicated and provide coverage on the happening of specifically defined "occurrences." Once the occurrence happens – in this case an automobile accident – coverage is afforded, ***subject to the terms and conditions of the policy.*** On September 18, 2009, there was an occurrence – an automobile accident resulting in injuries to Justin. Coverage, as well as terms and conditions relating to coverage, was then triggered.

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Once triggered, the Fortsons remained "Named Insureds" subject to the terms of the Policy throughout their fraudulent actions charging Meemic for unearned attendant care benefits.

Any argument to the contrary is without merit. The Fortsons are asking this Court to intellectually stand on its head to reach their desired conclusion. The logical extreme of the Fortsons' argument would have dire consequences for insurance coverage in the State of Michigan. As a hypothetical, Meemic would note the following. An accident occurs in 2016. The insured notifies Insurance Company A. Thereafter, Insurance Company A and the insured agree to cancel coverage because Insurance Company B has a cheaper plan. In 2019, the insured is sued by the other party injured in the *2016* accident. Under the Fortsons' argument, Insurance Company A would have no duty to defend its former insured because he or she is no longer an insured. Similarly, the insured could no longer claim benefits because Insurance Company A's policy was cancelled. The foregoing result is contrary to Michigan law.

In an occurrence based policy, such as the Policy, coverage is triggered at the time of the occurrence. Whether an insured switches insurance companies thereafter is not relevant. Coverage, ***subject to the terms and conditions in the policy***, remains in force in relation to the occurrence. The Fortsons remained subject to the terms and conditions of the Policy, during the time period in which they were committing fraud. This Court should grant Meemic's ***Renewed Motion For Summary Disposition Pursuant To MCR 2.116(C)(10)***.

III. ANALYSIS

The key feature of an occurrence based insurance contract was set-forth in *Stine v Continental Casualty Company,* 419 Mich 89; 349 NW2d 127 (1984), when a comparison was made to a so-called claims made policies. In *Stine*, plaintiff was a licensed architect performing design work for commercial and residential clients. Plaintiff purchased professional liability

insurance with defendant, effective on February 28, 1972 and continuing until January 16, 1974, when defendant cancelled the policy for non-payment of premiums. *Id.* at 93. A claim was eventually made against Plaintiff in 1976 for work done when plaintiff's policy of insurance with defendant was in effect. *Id.* at 94. Defendant denied coverage because the claim made against plaintiff was *after* 1974, or outside of the applicable policy period. *Id.*

Under the plain language of defendant's policy, only those claims made *during* the policy period were covered. *Id.* Disregarding whether the act giving rise to the claim occurred when plaintiff was insured, there was no coverage because the claim itself was made outside of the policy period. Following defendant's denial, Plaintiff filed a declaratory action seeking coverage. Plaintiff was successful at the trial court and intermediate appellate court. Both the trial court an intermediate appellate court were reversed by the Michigan Supreme Court. *Id.* at 96.

In reversing the lower court's decision, the Michigan Supreme Court noted the important distinction between a claims made policy (like the one at issue in the case) and an occurrence policy (like the Policy in this case). A claims made policy "is one in which indemnity is provided no matter when the alleged error or omission or act of negligence occurred, provided the misdeed complained of is discovered and the claim for indemnity is made against the insurer during the policy period." *Id.* at 97. By comparison, an occurrence insurance policy "is one in which indemnity is provided no matter when the claim is brought for the misdeed complained of, providing it occurred during the policy period." *Id.* Stated differently,

> [t]he major distinction between the 'occurrence' policy and the 'claims made' policy constitutes the difference between the peril insured. In the 'occurrence' policy, the peril insured is the 'occurrence' itself. **Once the 'occurrence' takes place, coverage attaches even though the claim may not be made for some time thereafter.** While in the 'claims made' policy, it is the making of the claim

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> which is the event and peril being insured and, subject to policy language, regardless of when the occurrence took place.

Id. (emphasis added). Unlike in a claims made policy, "**coverage in an 'occurrence' policy is provided no matter when the claim is made, subject, of course, to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period.**" *Id.* at 98. Consequently, because the policy at issue was a 'claims made' policy and the claim was made outside of the policy period, there was no coverage for plaintiff. Had plaintiff been insured under an occurrence policy, there would have been coverage because the *occurrence* itself happened during the policy period.

A number of conclusions can be drawn from *Stine*. Cancellation can preclude coverage under a claim made policy. The policy needs to be continually maintained so that claims will be within the policy period. By comparison, under an occurrence policy, the subsequent cancellation of the policy will not affect an otherwise covered occurrence. Rather, it is only pertinent whether the *occurrence* took place when the occurrence policy was in force. Once the occurrence takes place under an occurrence policy ***coverage attaches*** even though the claim itself may not be made until well after the policy was already cancelled. Moreover, once coverage attaches, coverage is still subject to the terms and conditions of the underlying policy. Even though the policy itself may have been cancelled, the insured cannot avail itself of the benefits of the policy, while ignoring its own duties under the same policy.

Applying the conclusions from *Stine* to the present case directly undercuts the Fortsons' position. The Policy is an occurrence policy. Coverage under the Policy for the types of benefits at issue, personal injury protection benefits, applies when an insured person "suffers accident bodily injury arising out of the ownership, operation, maintenance of use of a motor vehicle as a motor vehicle." So long as the occurrence is during the policy period, then coverage is

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applicable – irrespective of when the claim is made. Consequently, as of the date of the accident underlying this litigation, which was during the applicable policy period, coverage was afforded under the Policy.

Clear from *Stine*, however, is that while coverage may be implicated, the coverage implicated remains subject to the terms and conditions of the underlying policy of insurance and other statutory provisions. The Fortson's argument is essentially that they must be provided the benefits of the Policy without being subject to any of the conditions. Under the Fortsons' theory, they could have cancelled coverage one day after the accident and then immediately started to submit fraudulent claims, leaving Meemic with no recourse to terminate coverage. This type of argument is contrary to applicable Michigan law and the plain language of the Policy. Coverage under the Policy is expressly and continually subject to "all terms of this Policy" and "compliance with all applicable provisions of this policy." Once coverage attached because of the accident, the Fortsons, as named insureds, remained subject to the terms of the Policy.

III. CONCLUSION

This Court previously denied Meemic from rescinding the Policy for the sole reason that the so-called innocent third party rule protected Justin. Following *Bazzi* the innocent third party rule no longer provides a defense in this matter. This Court also remained concerned about whether a factual dispute exists. No factual dispute remains. Based on the Fortsons own statements and actions, the critical facts in this case have been established and are not in dispute. Having resolved the legal question and established that material facts cannot be disputed, one conclusion emerges: **Meemic can void the Policy.**

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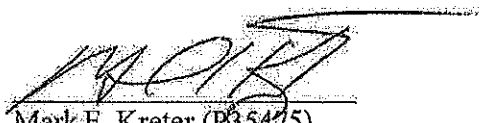
Battle Creek, MI
49017

As a last resort, the Fortsons are now trying to avoid responsibility for their actions by arguing that they are no longer subject to the terms of the Policy. Benefits remain payable under the Policy, but conditions on payments of those benefits purportedly no longer apply. The Fortsons' argument plainly ignores the key feature of the type policy at issue in this matter – an occurrence policy. Under an occurrence policy, once the event happens, coverage attaches, even if a claim is not made with the insurer until a later date. Once coverage attaches, the insured and insurer remain subject to the provisions of the underlying policy. A subsequent cancellation does not excuse an insured from its duties under an occurrence policy. The Motion must be granted.

Respectfully submitted,

KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

Dated: October 18, 2016.

By: 

Mark E. Kreter (P35475)
Stephen J. Staple (P77692)

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Battle Creek, MI
49017

STATE OF MICHIGAN

IN THE 2nd JUDICIAL CIRCUIT COURT FOR THE COUNTY OF BERRIEN

MEEMIC INSURANCE COMPANY

Plaintiff, Case No. 14-000260-CK

vs.

LOUISE M. FORTSON and RICHARD A. FORTSON, individually; and RICHARD A. FORTSON, as conservator for JUSTIN FORTSON,

Defendants.

_______________________________________/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE JOHN M. DONAHUE

St. Joseph, Michigan - Monday, March 13, 2017

APPEARANCES:

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St. Joseph, Michigan
Monday, March 13, 2017 - 11:07 a.m.

THE COURT: Meemic vs. Fortson. Counsel, your appearances?

MR. KRETER: Mark Kreter, your Honor, on behalf of Meemic. You confused me this morning. I was over in the other courtroom. I'm used to that as part of my home.

MR. CHASNIS: Good morning, your Honor. Robert Chasnis on behalf of the Fortsons.

MR. HARRISON: Good morning, your Honor. Joseph Harrison on behalf of the Fortsons.

THE COURT: All right. How did you wish to proceed? I'm willing to allow you to put anything on the record that you care to, although, frankly, this is in some measure a difficult case, and in some measure an interesting case, but clearly, no matter how I decide this matter, this is going to end up in the Court of Appeals, if not the Supreme Court. So what I believe I know is that the case law, although I arguably do not agree with it, arguably has done away with the so-called innocent third party rule.

I understand that there is a question in part as to whether or not there is a distinguishing feature in certain of those cases where that matter was addressed that had to do with fraud and the application, and that this one is arguably more addressing the issue of fraud during the

pendency and payout of an attendant care claim for first party benefits, so there is a difference there. Unfortunately, the cases that have addressed this to date have not necessarily spoken directly as to whether or not this doing away of the innocent third party rule would only be in regard to where there are demonstrated proofs of fraud and the application, versus what we have in this case where there's not a claim that there was fraud in the application, but after a claim was made.

As I indicated, the claim of fraud is that the attendant care providers submitted requests for payment when the individual they were attending to was in the jail or in a rehab program for lengthy periods of time where it was utterly impossible for them to have provided the attendant care services. Now, Mr. Kreter would argue that because the policy provides that the policy may be voided at any time where fraud is discovered, with the courts having basically abolished the innocent third party rule, and his belief that there has been actual proved fraud in this case, that case closed, right, Mr. Kreter?

MR. KRETER: That's correct, your Honor.

THE COURT: And the Plaintiff has continued to assert that either there's a fact question as to whether or not there really was fraud, claiming that the attendant care providers did not really understand the parameters of what

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they were supposed to do under these circumstances and had very little input from the insurance company and the person they were working with to really fully understand, and/or whether there is a distinguishment in this particular case, as I referred to earlier, and/or otherwise, I might add, that would somehow take this case out of the -- and I'm forgetting. Bazzi? What's the name of that case?

MR. KRETER: Bazzi.

MR. CHASNIS: Yes, Bazzi.

THE COURT: And I think that there's even -- wasn't there a leave taken?

MR. CHASNIS: Yes. It's waiting -- the Supreme Court has granted leave, and as late as December 28th there's been amicus granted to several entities on that case. If I can, just while you're on the subject, your Honor, I think the significance of the Bazzi case with respect to fraud committed at the application stage is extremely important because the idea that all those opinions have spelled out is that the policy never would have been issued in the first place.

THE COURT: And I agree. Frankly, I -- my own personal feeling is that's a very strong argument. I'm going to tell you, as sorrowful as I am in part to say this, I'm going to grant the Motion for Summary Disposition, but I almost hope it comes back because I personally do think that

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that is a key distinguishing difference that arguably should result in a different outcome, but to be perfectly frank with you, given the fact that this matter is going to the Court of Appeals, if not higher, no matter which way I rule, and given the fact that depending on what the Supreme Court does, if this issue is addressed, you will be back, and if you're not back it's because the writing is on the wall and I will have saved you the agony and grief of going through a trial or anything else, and spending all that money and time and energy and angst for nothing.

Now, maybe you'd rather do that, but I don't think this is one where the insurance company is going to say on the eve of trial, "Let's settle," because there's just too much at stake, and frankly, I think that given the testimony in this case, I could have been inclined at one point to feel sorry for the attendant care providers in that there is a fairly good argument that they weren't given a whole lot of instruction, but nonetheless, I have to after careful consideration tell you that to submit claim forms for attendant care services on these facts when Justin was in jail one day in September, 2012; five days in December, 2012; 78 days from December of 2012 through March of 2013; nine days in April of 2013; 139 days from August 13th through December 13; in-patient treatment facility from August 13, 2014 through September 29, 2014, reasonable minds

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just simply could not differ that these people were submitting claims for attendant care services when they knew or clearly should have known that they were not due those payments.

I mean, my God. Pick up the telephone and call if you've got any confusion and say, "You know, Justin has been in jail now for over two months and we're submitting these claims for 24-hour care. Is this what we're supposed to be doing?" I mean, it's just ludicrous to believe that on these facts that a jury wouldn't say these people were appreciating getting these checks and knew that they were defrauding the insurance carrier and were getting away with it. I mean, again, I have some empathy for the fact that they weren't the brightest bulbs in the box, and that they didn't get all kinds of help from the insurance carrier, but it's just beyond belief that reasonable jurors could find with these facts that this wasn't fraud, and the policy does provide that if there is fraud that the policy may be voided.

So, you know, again, for purposes of appeal, I'm going to let you address the Court and put anything else on the record that you want to put on the record, but this matter needs to be decided upstairs and like I say, I do think, and I am taken by the fact that these other cases had to do with fraud in the application and this is a bit of a

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different animal, but unfortunately for a trial court such as myself, when they talk about the abolition of the innocent third party rule, it doesn't really help us because they haven't come out and said in all circumstances, on any fact pattern there simply is no more innocent third party rule, or is it confined to those cases where there is fraud in the application? I don't know.

I see the difference. I think that arguably it merits a different result, but I'm going to leave it for those people who are arguably wiser than me and have more law experts than I do, and have all the time in the world to take this under advisement and study it and research it, even though I've taken a long time in this case. I know it's been under advisement for a long time and I requested further oral arguments. In preparing for this motion today, I kind of finally came to the conclusion as to, even somewhat begrudgingly, how I was going to rule, but all that having been said, did you wish to elevate the record a little bit more?

MR. CHASNIS: Yes. Thank you, your Honor. I would, your Honor. Thank you very much. I appreciate the fact that you have put a lot of time in. We've met in this courtroom with you and I know that you've struggled with it. We've struggled with it, Judge. It is a hard case and it's unfortunate the result as applied to the facts in this case.

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and I think the only thing that I really want to emphasize on the record, pretty much everything is in the briefs and we've talked about it. It's been briefed very well by both sides.

Your Honor, I think it is very important that the alleged fraud was allegedly committed by Mr. and Mrs. Fortson while they were providers, not insureds, and I think that's an important distinction. But perhaps might -- one thing that might be more critical to where this case ends up eventually, if it isn't over today, is the finding under 2116(c)(10) that there is no genuine issue of material fact with respect to whether or not Louise Fortson committed a fraud, and the part that doesn't get talked about. We talk a lot about the AC forms that Louise submitted, and we've talked about the testimony she gave in an examination under oath. What doesn't get addressed and is hard to bring out is the testimony of the two insurance adjusters from Meemic that basically testified that they knew -- they knew that Louise Fortson did not understand those forms. They had an understanding that she was uneducated and they told me at the deposition that's attached to the briefs that they understood that she was confused and she didn't know what they meant, and they just paid her anyway.

Meredith Volko's testimony was very clear that she didn't need proof that he had an injury that required 24/7

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attendant care services. She testified that the file was -- it was important enough, it was a big enough file, he was brain injured to the extent that she didn't need to keep getting medical records. They didn't need to get independent medical examination, and the form that they accepted by fax, you couldn't even read them because they were poor copies and when she would sign them and just change the dates on them, she even had the wrong number of days per month sometimes, but the insurance adjusters just kept accepting them and saying thank you, and making the check.

They never met these people personally. They don't know anything about Louise Fortson. She has brain issues herself. They paid her 24 -- no, they paid Richard Fortson 24/7 $12.00 an hour and they said, "Yeah, we know Richard has to sleep eight hours a day and Richard has to work eight hours a day. We know Richard does not provide 24/7 care for Justin, but it's okay for us to pay him 24 hours," so it was very loosely handled. And you're correct there were some issues about whether the insurance company has handled it properly, and the only contact they ever had was with Louise Fortson over the phone, but the only checks they ever made were to Richard Fortson because he was the conservator. And so, when I asked the two insurance adjustors, "You understand he couldn't be -- Richard

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couldn't be watching him 24 hours a day, seven days a week?" and they said, "Yeah, we understand that." "But why did you give him all the checks? You wrote checks to Richard Fortson. Did Richard Fortson ever sign a document saying that he gave any attendant care services?" and the answer was "No."

They got attendant care services forms from Louise signed and dated, faxed, when they knew she didn't know what the form meant. She didn't -- she knew she didn't understand it. She was mixing mileage in with the attendant care services form, and they paid them anyway, so I think those are some facts that are extremely important to the finding that you have to make before we get to granting summary disposition, and that is there is no genuine issue of material fact but that Louise Fortson committed a fraud, and based on that fraud the policy is going to be cancelled ab initio. So those are the facts I think that are very important, your Honor, to where we end up in this ruling, and I think they are critical. Thank you.

THE COURT: And I -- again, I did struggle with that. Again, as I indicated earlier, not to beat a dead horse, but given the length of time that Justin was in jail and in rehab, it just became to me apparent that you put this before a jury, it's just -- no reasonable jury is going to listen to that testimony and accept that this wasn't

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fraud. Although, I realize that that is your argument, and frankly, it certainly is a worthwhile argument. I will note -- and I'll let Mr. Kreter speak to this as well -- on page 4 of Mr. Kreter's brief Louise testified under oath that Justin was always with her or Richard. "Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?" "No, because either I would be there or Richard would be there." "So one or two of you is always with Justin?" "Always."

I just -- I just -- you know, I don't get it. I just -- I don't get it. Mr. Kreter?

MR. KRETER: Well, the only comment I would make is you just read what I would have read. You know, Meemic gave every benefit of the doubt to the Fortsons in adjusting this claim, because Justin Fortson has serious injuries and they recognize and the doctor said he needs 24/7 care, so they were not monitoring him or the Fortsons on a day-to-day or week-to-week or month-to-month basis. They just assumed that when the Fortsons were submitting their claim for reimbursement of over $9,000 a month that they were providing the services. In Louise Fortson's EUO, I gave her every opportunity to get off the hook. I mean, I asked these questions several different times, several different ways, and it was clear each time she said -- testified that Justin was in her care 24/7, and that wasn't the facts, as

we've learned, so clearly there was fraud, as the Court has found.

THE COURT: All right, gentlemen. Well, Mr. Kreter, would you prepare the order?

MR. KRETER: Yes, your Honor.

THE COURT: And I may see you back again. It's a -- I have a lot of empathy for the Plaintiffs in this matter because it's a horrible injury and a horrible issue, and the law is afflux. And like I said, no matter how I rule -- I could have just pointed and said that there was a factual dispute, but I looked at the stuff and I gave it as considered thought as I could, and I read that deposition testimony and saw the number of days that he was not there. It just becomes impossible to believe that a reasonable jury would not find this to have been fraud. If the Court of Appeals sends it back and takes the easy way out and says -- just bumps it on that issue, then you'll be back. Maybe this will be resolved and the more substantive matter of the innocent third party rule, and the difference between the Bazzi case in regard to fraud and the application and otherwise is distinguished here. Hopefully, it will be resolved.

MR. KRETER: Thank you, your Honor. Your Honor, just for the record, we did this ourselves this morning. As a defense -- or as an attorney who represents the insurance

company, I'm usually the Defendant and the other party, the insureds, usually are the Plaintiffs, but in this case we're actually the Plaintiff. You said a few times this morning -- you referred to the Forsons as the Plaintiff. I assume you meant the Defendant/Counter-Plaintiffs.

THE COURT: Yes, I misspoke.

MR. CHASNIS: I understood.

THE COURT: Okay. All right. Thank you very much.

MR. KRETER: Thank you, your Honor.

MR. CHASNIS: Thank you.

(At 11:26 a.m., proceedings concluded)

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TRANSCRIBER'S CERTIFICATE

I do hereby certify that the foregoing transcript was prepared by me from a video tape supplied by the Berrien County Circuit Court, and that said transcript is true and correct to best of my ability to prepare.

I further certify that I am not related to or employed by any party to this cause or their respective counsel.

Janice Fulkerson
CER - 8980

3/14/17

STATE OF MICHIGAN

2ND CIRCUIT – BERRIEN COUNTY TRIAL COURT
811 Port Street, St. Joseph, MI 49085-1187
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

vs.

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs,
/

Case No.: 2014-260-CK

Hon. John M. Donahue (P38669)

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ORDER GRANTING PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND DENYING DEFENDANTS/COUNTER-PLAINTIFFS LOUISE M. FORTSON, RICHARD A. FORTSON AND JUSTIN FORTSON'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

At a session of said Court held in the Circuit Courtroom in the County of Berrien, State of Michigan, held on the 14 day of March, 2017

Present: Hon. John M. Donahue
Berrien County Circuit Court Judge

This matter having come before this Court pursuant to ***Plaintiff/Counter-Defendant Meemic Insurance Company's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*** and ***Defendants/Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson and Justin Fortson's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*** on February 13, 2017 and based upon pleadings filed by the parties as well as hearings held on August 17, 2015 and September 19, 2016, and the Court noting that Plaintiff/Counter-Defendant Meemic Insurance Company previously filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) to void the insurance contract issued by Plaintiff/Counter-Defendant, and the Court having denied that Motion, in part, citing the "Innocent Third-Party Doctrine" and Meemic Insurance Company having renewed its Motion for Summary Disposition based upon the June 14, 2016 Michigan Court of Appeals Opinion No. 320518 entitled *Bazzi v Sentinel Ins Co,* and this Court having reviewed pleadings filed by the parties in support of their respective positions and based upon the hearings held in open Court on the issues presented, and the Court being otherwise fully advised in the matter; NOW THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that ***Plaintiff/Counter-Defendant Meemic Insurance Company's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*** is GRANTED for the reasons stated in the Court's oral opinion read into the record at the hearing held on February 13, 2017.

IT IS HEREBY ORDERED AND ADJUDGED that ***Defendants/Counter-Plaintiffs Louise M. Fortson, Richard A. Fortson and Justin Fortson's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)*** is DENIED for the reasons stated in the Court's oral opinion read into the record at the hearing held on February 13, 2017.

This is a full and final Order.

JOHN M. DONAHUE

Hon. John M. Donahue
Circuit Court Judge

Prepared by:

Mark E. Kreter (P35475)
Attorney for Plaintiff/Counter-Defendant Meemic

STATE OF MICHIGAN

COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee,

v

LOUISE M. FORTSON and RICHARD A. FORTSON, individually and as conservator for JUSTIN FORTSON,

Defendant/Counter-Plaintiff-Appellant.

FOR PUBLICATION
May 29 2018
9:05 a.m.

No. 337728
Berrien Circuit Court
LC No. 2014-000260-CK

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

M. J. KELLY, J.

Defendants/Counter-Plaintiffs, Louise Fortson and Richard Fortson, individually and as conservator for their son, Justin Fortson, appeal as of right the trial court's order granting plaintiff, Meemic Insurance Company's, motion for summary disposition under MCR 2.116(C)(10) and denying the Forton's motion for summary disposition under MCR 2.116(I)(2). For the reasons stated in this opinion, we reverse.

I. BASIC FACTS

This case arises out of a motor-vehicle incident that occurred in September 2009. On that day, Richard and Louise's 19-year-old son, Justin, was riding on the hood of a vehicle when the driver suddenly accelerated and turned. The motion flung Justin from the vehicle, and he struck his head. Justin suffered extensive injuries, including a fractured skull, a traumatic brain injury, and shoulder bruising. He was initially hospitalized, but eventually returned to his parents' home. According to Louise, Justin's brain injury continued to manifest itself after he returned home.

Justin received benefits under his parents' no-fault policy with Meemic. Relevant to this appeal, Louise and Richard provided attendant care to Justin. The record reflects that from 2009 until 2015, Louise submitted attendant care services payment requests to Meemic. On each request, Louise simply noted "24" on each day of the calendar, indicating that she and Richard had provided Justin with constant daily supervision. Meemic routinely paid these benefits, and Meredith Valko, a claims representative employed by Meemic, testified that these payment

requests were sufficient because she knew that Justin had a serious traumatic brain injury with significant residual effects requiring "24/7" supervision.

Around 2014, Meemic initiated an investigation into Louise and Richard's supervision of Justin and discovered that they had not provided him with daily direct supervision. Indeed, the investigation showed that Justin had been periodically jailed for traffic and drug offenses and had spent time at an inpatient substance-abuse rehabilitation facility. Additionally, on social media, Justin had referenced spending time with his girlfriend and smoking marijuana. Based on its investigation, Meemic concluded that the Louise and Richard had fraudulently represented the attendant-care services they claimed to have provided. Meemic terminated Justin's no-fault benefits and filed suit against Louise and Richard, alleging that they had fraudulently obtained payment for attendant care services that they had not provided. Louise and Richard filed a counter-complaint, arguing that Meemic breached the insurance contract by terminating Justin's benefits and refusing to pay for attendant-care services. The parties filed cross-motions for summary disposition. Relying on this Court's decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017), the trial court granted summary disposition in Meemic's favor.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Louise and Richard argue that the trial court erred by granting summary disposition in Meemic's favor. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

1. FRAUD

Louise and Richard first argue that the trial court erred by finding that there was no genuine question of material fact with regard to whether they committed fraud. We disagree.

Generally, whether an insured has committed fraud is a question of fact for a jury to determine. See generally *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 658-660; 899 NW2d 744 (2017). However, under some circumstances, a trial court may decide as a matter of law that an individual committed fraud. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425-426; 864 NW2d 609 (2014). In order to establish that an individual committed fraud, the insurer must establish (1) that the individual made a material misrepresentation, (2) that the representation was false, (3) that when the individual made the representation he or she knew it was false or made it with reckless disregard as to whether it was true or false, (4) that the misrepresentation was made with the intention that the insurer would act upon it, and (5) that the insurer acted on the misrepresentation to its detriment. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Here, Louise and Richard admit that they were aware that Justin was incarcerated and that he spent time at an inpatient drug rehabilitation facility. Despite the fact that he was not being cared for by Louise and Richard at those times, Louise submitted payment requests to Meemic, stating that they had provided constant attendant care to Justin. That

constituted a material misrepresentation. In addition, the payment requests were submitted with the intention that Meemic would rely on them and remit payment to Louise and Richard for constant attendant care services, despite the fact that Louise and Richard knew that they were not providing constant physical care for their son. Further, although Louise and Richard provided other services to Justin while he was incarcerated or at inpatient rehabilitation, such as paying his car loan or lease and contacting his lawyers, those general tasks are not properly compensable as attendant care services. See *Douglas v Allstate Ins Co*, 492 Mich 241, 259-260, 262-263; 821 NW2d 472 (2012) (stating that allowable attendant-care services must be for an injured person's care, recovery or rehabilitation); see also MCL 500.3107(a). Moreover, even if they were compensable, it cannot be seriously argued that Louise and Richard provided those services to their son on a "24/7" basis, as was claimed on the payment request form. As a result, the trial court did not err by finding that Louise and Richard had committed fraud in connection with their request for payment for attendant care services.

2. APPLICABILITY OF *BAZZI*

Louise and Richard next argue that the trial court erred by determining that Justin's argument—i.e., that Meemic could not deny him coverage based on fraud committed by other individuals—was, essentially, barred by *Bazzi*. In *Bazzi*, this Court concluded that the "innocent third party rule," also known as the "easily ascertainable rule," from *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), was abolished by our Supreme Court's decision in *Titan*. *Bazzi*, 315 Mich App at 767-768, 771. Under the innocent-third-party rule, an insurer could not use fraud as a defense to avoid paying no-fault benefits if (1) fraud in the procurement of the policy was easily ascertainable and (2) an innocent third-party claimant was involved. *Id.* at 771-772; see also *Titan*, 491 Mich at 563-564. Here, because there are no allegations or evidence that Justin participated in or even benefited from his parents' fraud, he is properly considered an innocent third party, which implicates the holdings in *Bazzi* and *Titan*.

Nevertheless, *Bazzi* and *Titan* addressed fraud in the *procurement* of an insurance policy, not fraud arising after the policy was issued. *Titan*, 491 Mich at 571 (stating "that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party"); *Bazzi*, 315 Mich App at 781-782 (holding that "if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of PIP benefits to innocent third parties"). Here, because the fraud in this case was not fraud in the procurement of the policy and instead arose after the policy was issued, neither *Titan* nor *Bazzi* is dispositive.

This is because there is a meaningful distinction between fraud in the procurement of a no-fault policy and fraud arising *after* a claim was made under a properly procured policy. For instance, when a policy is rescinded on the basis of fraud in the procurement of the policy, it is as if no valid policy ever existed. As this Court explained in *Bazzi*, mandating no-fault benefits when an insurer can declare a policy void *ab initio* on the basis of fraud in the procurement would be akin to requiring the insurer to provide benefits in a case where the automobile owner had never obtained an insurance policy in the first place. *Id.* at 774. Thus, fraud in the procurement essentially taints the entire policy and all claims submitted under it. In contrast, "if

there is a valid policy in force, the statute controls the mandated coverages." *Id.* Here, when Justin submitted his claim there *was* a valid policy in place; there were no allegations of fraud in the application tainting the validity of the policy. Therefore, under the no-fault act Justin was required to seek no-fault benefits from his parents' no-fault policy. See MCL 500.3114(1). The mere fact that fraud arose in connection with attendant-care services forms submitted *after* Justin made his claim simply has no bearing as to whether there was a valid policy in effect at the time he made his claim. Accordingly, we conclude that the trial court erred by finding *Bazzi* dispositive.[1]

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[1] It is worth noting that the remedy sought by Meemic is to void or rescind the policy on the basis of fraud. Generally, "[i]n order to warrant recision [sic], there must be a *material* breach affecting a substantial or essential part of the contract." *Holtzlander v Brownell*, 182 Mich App 716, 721; 453 NW2d 295 (1990) (emphasis added).

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo*. [*Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995) (quotation marks and citation omitted).]

"[A] material misrepresentation *made in an application for no-fault insurance* entitles the insurer to rescind the policy." *Id.* (emphasis added). This is because the policy would not have been issued had the material misrepresentation not been made. *Id.* at 103-104.

Here, regardless of Louise and Richard's fraudulent attendant care payment requests, the policy still would have been issued. Therefore, there are no grounds for *automatic* rescission of the policy on the basis of fraud arising after the policy was issued, i.e., fraud that does not affect whether the policy would have been issued in the first place. Instead, at a minimum, Meemic must establish Louise and Richard's misrepresentation affected "a substantial or essential part of the contract." *Holtzlander*, 182 Mich App at 721. And, because rescission is generally viewed as an equitable remedy, *Madugula v Taub*, 496 Mich 685, 712; 853 NW2d 75 (2014), it should not be routinely granted if it would achieve an inequitable result. We recognize that in *Bahri*, this Court held that when an insured claimant makes a fraudulent claim for replacement services, an insurer may use a fraud-exclusion clause to void the entire contract despite the fact that the fraud arose after the policy was procured. *Bahri*, 308 Mich App at 424-426. However, in this case, equity appears to lean in favor of protecting the innocent third party who was statutorily mandated to seek coverage under a validly procured policy and was, unlike the claimant in *Bahri*, wholly uninvolved in the fraud committed *after* the policy was procured.

3. VALIDITY OF FRAUD-EXCLUSION CLAUSE

We next address whether the fraud-exclusion clause—as applied to Justin's claim—is a valid contract provision. MCL 500.3114(1) provides that a person sustaining an accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle must first look to his or her own no-fault policy, to his or her spouse's policy, or to a no-fault policy issued to a relative with whom he or she is domiciled. Therefore, if Justin were not an "insured person" as defined by the policy,[2] he would be statutorily entitled to benefits under his parents' no-fault policy by virtue of the fact that he is a relative of his parents and was domiciled with them. In other words, if the policy did not define a resident relative as an "insured person," then Meemic would be required *by statute* to pay Justin benefits and would be unable to terminate his coverage because of fraud committed by a policyholder with regard to his claim. See *Shelton*, 318 Mich App at 653-654 (stating that when a claimant's no-fault benefits are governed solely by statute an insurer cannot use a fraud-exclusion clause to bar the claimant's claim).

Under Meemic's logic, by duplicating statutory benefits in a no-fault policy, an insurer can avoid paying no-fault benefits to an injured claimant if someone other than the claimant commits fraud and triggers a fraud-exclusion clause that allows the policy to be voided. We do not agree that the statutory provisions can be so easily avoided. "An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Lewis v Farmers Ins Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016) (quotation marks and citation omitted; brackets in original). Contractual provisions in an insurance policy that conflict with statutes are invalid. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 261; 819 NW2d 68 (2012). Because MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL 500.3114(1). And, as explained above, his statutory right to receive benefits under the no-fault act was triggered because his parents had a validly procured no-fault policy in place at the time of the motor-vehicle incident. See *Bazzi*, 315 Mich App at 774.

4. CONTRACT INTERPRETATION

Finally, even if the fraud-exclusion clause were valid, Louise and Richard's fraud is insufficient to trigger it because, at the time they committed fraud, they were no longer "insured persons" under the policy. The fraud-exclusion clause in the no-fault policy provides:

> This entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;

[2] As explained below, Justin is an "insured person" as that term is defined in Louise and Richard's no-fault policy with Meemic.

B. The Application for it;

C. Or any claim made under it.

The policy defines the term "insured person" as a named insured or the "resident relative" of a named insured. Because Louise and Richard were named insureds under the policy, they are "insured persons," as defined by the policy *so long as that policy remains in effect.*

The policy, however, was cancelled by Meemic. Specifically, on June 14, 2010, Meemic sent a notice of cancellation to Louise and Richard. The notice stated that as of July 29, 2010 at 12:01 a.m., the policy would no longer be in effect. Generally, once a contract of insurance is cancelled, neither the insured nor the insurer retain any rights or obligations pursuant to the cancelled agreement. See 2 Couch, Insurance (3d), § 30:22, pp 49-50 ("Cancellation of a policy at a time and in the manner specified therein cuts off all rights of the insured and bars recovery on the policy for any subsequent accident. By definition, there can be no breach of a contract with respect to transactions arising after the contract of insurance has been effectively cancelled."). See also *Titan*, 491 Mich at 567 ("When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date[.]") (quotation marks and citation omitted; brackets in original). Accordingly, once the policy was cancelled on July 29, 2010, Louise and Richard were no longer named insureds under the policy, which means that they were no longer "insured persons" as defined in the policy. Further—and this is key—because the fraud was committed *after* the cancellation of the policy, when they were no longer insured persons, their actions were irrelevant for purposes of triggering the fraud-exclusion clause.

The cancellation of the policy did not have any effect on Justin's claim because his claim was made before the policy was cancelled. Automobile no-fault insurance policies are "occurrence" policies as opposed to "claims made" or "discovery" policies. *Stine v Continental Casualty Co*, 419 Mich 89, 98; 349 NW2d 127 (1984). Under an occurrence policy, coverage "is provided no matter when the claim is made, subject, of course, to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period." *Id.* Moreover, the policy in this case contains a cancellation clause, which expressly limits the effect of cancellation. The policy states, "Cancellation will not affect any *claim* that originated prior to the date of cancellation." (Emphasis added). There are no other limitations on the effect of cancellation on the rights and obligations of the parties.

When interpreting a contract, such as an insurance policy, the primary goal "is to honor the intent of the parties." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). When a contract is unambiguous, it must be enforced according to its terms, and this Court must resist "the temptation to rewrite the plain and unambiguous meaning of the policy under the guise of interpretation." *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Because, by its unambiguous terms, only a claim predating the cancellation of a policy survives the cancellation of the policy, we must determine what constitutes a claim. Because the policy does not define "claim," we must give it its commonly used meaning. See *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). According to *Black's Law Dictionary* (9th ed), a "claim" is "[t]he assertion of an existing right . . . ." A "claimant" is the person who makes a claim, i.e. "[o]ne who asserts a right or demand, esp. formally." *Black's Law Dictionary* (9th ed).

Under the heading of "What Must Be Done In Case Of A Car Accident Or Loss," the Meemic policy mandates that:

> In the event of an accident, occurrence or **loss**, **you** (or someone acting for **you**) must inform **us** or **our** authorized agent promptly. The time, place and other facts must be given, to include the names and addresses of all involved persons and witnesses.

It then sets forth a list of "other duties" that "[a] person claiming any coverage under this Policy must" perform, which includes cooperating with Meemic, promptly sending copies of notice or legal papers received in connection with the accident, providing written proofs of loss upon request, and submitting to examinations under oath for matters related to the claim. The policy provides a list of additional requirements for a person claiming personal injury protection insurance, underinsured motorist coverage, uninsured motorist coverage, or "car damage insurance" coverage. The common element is that *the person seeking coverage* is required to take actions or provide assistance to Meemic. There is no language mandating that *other individuals covered by the policy* have any rights or obligations with respect to that claim. The only individual who has obligations with respect to making a claim is the insured person who is claiming benefits under the policy, i.e., the claimant. Given the complete absence of language extending the obligations on the claim to all insured persons under the policy, there is no basis to extend Louise and Richard's status as insured persons beyond the date the policy was cancelled. "Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008).

Here, the only person with "a claim" is Justin. He is the person who sustained an injury arising out of the ownership, operation, maintenance, or use of a motor vehicle, MCL 500.3105, and it is he who had an application for benefits submitted to Meemic on his behalf.[3] Therefore, as set forth in the policy, his claim continues to be covered and was "locked in" as of the date of the injury, irrespective of whether the policy was cancelled at a later date. Louise and Richard, however, did not sustain an injury arising out of a motor-vehicle incident. They do not have a

[3] An application for benefits form is required to be completed by a claimant. In this case, a review of Justin's application is consistent with the language in the policy. The application for benefits submitted states that the applicant is Justin, and no other applicant is listed. It provides Justin's name and contact information in the blanks left for information about the "applicant." It provides details about when, where, and how Justin was injured, as well as the type of injuries he sustained. Further, the signature line requests the signature of the "applicant or parent/guardian." Absent from the application is any language even hinting that other individuals insured under the policy but not making a claim have any rights or obligations with respect to the claim.

"claim" with Meemic, nor do they have any obligations with respect to Justin's claim. Instead, Louise and Richard were merely attendant care providers for Justin when they committed fraud.[4]

Meemic asserts that it would be illogical to allow Louise and Richard to escape their obligations under the policy—in this case an obligation not to commit fraud—while simultaneously mandating that Meemic continue to provide benefits under the policy. We disagree. If Louise and Richard had made a claim under the policy before it was terminated, then their obligations under the policy would continue *with respect to their claim*, and Meemic's obligations with respect to that claim would also continue. Because Louise and Richard's obligations would continue under such a scenario, if they committed fraud the policy's fraud-exclusion clause would apply. See *Bahri*, 308 Mich App at 424-426 (stating that when an insured claimant commits fraud in connection with his or her claim the insurer may use a fraud-exclusion clause to deny benefits under the policy). Here, however, because we are obligated to enforce the terms of the contract as they are stated in the contract, we conclude that at the time they committed fraud, Louise and Richard were not insured persons under the policy. Consequently, their fraud did not trigger the fraud-exclusion clause, so Meemic cannot use it to void the policy and deny Justin's claim.[5]

III. CONCLUSION

In sum, we reverse the trial court's order granting summary disposition in favor of Meemic. We do not read *Bazzi* as dispositive or applicable because there was no fraud in the procurement of the Fortson's no-fault policy with Meemic. Further, the fraud-exclusion clause in the policy is invalid to the extent that it conflicts with MCL 500.3114(1), which entitled Justin to claim statutory benefits under his parents' properly procured no-fault policy. Finally, under the plain language of the policy, Louise and Richard were not insured persons under the policy when they committed fraud, so the fraud-exclusion clause is inapplicable and cannot be used to void the policy and deny Justin's claim.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Jane E. Markey

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[4] Being a named insured is not a prerequisite to providing attendant-care services under a no-fault policy. Rather, any person approved by the insurance company can provide attendant-care services. The particular responsibilities of the provider are typically based upon the need of the injured person and the skill and training of the provider.

[5] This is not to say that a defrauded insurer does not have a remedy against the person who committed the fraud. See *Titan*, 491 Mich at 555 (stating the elements required to establish fraud and noting that if someone commits fraud the defrauded party may be entitled legal or equitable remedies). See also *Shelton*, 318 Mich App at 655 (noting remedies an insurer may use in the event that someone makes a fraudulent claim).

STATE OF MICHIGAN

COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff-Counter Defendant-Appellee,

v

LOUISE M. FORTSON and RICHARD A. FORTSON, individually and as conservator for JUSTIN FORTSON,

Defendants-Counter Plaintiffs-Appellants.

FOR PUBLICATION
May 29, 2018

No. 337728
Berrien Circuit Court
LC No. 2014-000260-CK

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

CAMERON, J. (*dissenting*).

The majority resurrects, albeit in a new form, the abolished innocent-third-party rule.[1] It also concludes that an insurance policy's fraud provision contravenes the no-fault act when applied to resident relatives. Finally, it concludes that, after cancellation, the policy's provisions will no longer apply to the policyholder who committed the fraud when the claimant is a third party. Because I disagree with all three holdings, I respectfully dissent.

Defendants, Louise Fortson and Richard Fortson, submitted false requests for attendant care benefits to plaintiff, Meemic Insurance Company, from 2009 to 2015. Defendants provided care for their son, Justin Fortson, who was injured while riding on the hood of a car. Because Justin was a "resident relative" under defendants' policy, plaintiff provided personal injury protection (PIP) benefits under MCL 500.3114(1). In 2014, plaintiff discovered that defendants were fraudulently claiming 24/7 attendant care services even when Justin was incarcerated, in drug rehabilitation programs, or staying with his girlfriend. Defendants collected over $100,000 in payments over six years.

[1] See *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017).

I. INNOCENT-THIRD-PARTY RULE

The majority first concludes that Justin, as an innocent third party, can continue to collect PIP benefits because there was no fraud in the procurement of the policy. While I agree that the fraud did not occur in the procurement of the policy, there is no basis to apply the now-abolished innocent-third-party rule to the circumstances in this case.

As the majority correctly states, the innocent-third-party rule prevented insurers from voiding a policy using fraud as a defense to paying no-fault benefits, but only if (1) there was fraud in the procurement of the policy that was easily ascertainable, and (2) involved an innocent third-party claimant. *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 771-772; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017). Neither defendants, nor the majority, have provided support for the proposition that the innocent-third-party rule may be applied in cases that *do not* involve fraud in the procurement. Yet, the majority concludes that "because the fraud in this case was not fraud in the procurement of the policy and instead arose after the policy was issued, neither *Titan* nor *Bazzi* are dispositive." We concluded that our Supreme Court abolished the innocent-third-party rule, and there is no indication that any application of this rule was left open for future use. *Id.* at 767-768, 781-782.

Furthermore, we should not adopt the rule in a new form in order to allow a third-party claimant to collect PIP benefits when an insurer is entitled to void the policy for fraudulent conduct on the part of the policyholder. This Court clearly held in *Bazzi* that "if an insurer is entitled to rescind a no-fault insurance policy because of fraud, it is not obligated to pay any benefits under that policy, *including PIP benefits to a third party innocent of the fraud.*" *Id.* at 770 (emphasis added). The majority claims there is a "meaningful distinction" between fraud in the procurement of an insurance policy and fraud arising after a claim was made under a properly procured policy. However, in both instances, the insurer is allowed to void the policy, and under *Bazzi*, "if an insurer is entitled to rescind a no-fault insurance policy because of fraud," an innocent third party cannot collect PIP benefits under that policy. *Id.* As discussed in more detail below, plaintiff is entitled to rescind, i.e., void, the no-fault insurance policy, and Justin, as an innocent third party, should not be allowed to continue to collect PIP benefits. The fact that the fraud here occurred in subsequent claims for services—and not in the procurement of the policy—is of no consequence to the outcome of this case. The only question here is whether the fraud provision at issue was valid and should be applied to the circumstances of this case.

II. FRAUD PROVISION

A. VALIDITY

The majority's application of the innocent-third-party rule is premised on the conclusion that the fraud provision does not void the insurance policy governing Justin's claim. To reach this conclusion, the majority determines that the fraud provision contravenes MCL 500.3114(1), and therefore, cannot apply to Justin's claim. I disagree.

According to the majority, "Because MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL

500.3114(1)." This reasoning is flawed, and the majority's holding carves out an unprecedented exception to the general rule that a fraud provision in an insurance policy is valid. First, in *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014), this Court concluded that a fraud provision in an insurance policy applies to a policyholder's claim and can preclude all PIP benefits if the claimant submits fraudulent claims for replacement services. The majority concludes that *Bahri* is not binding in this case because the fraud provision at issue applies to a resident relative, not to the named insured under the policy, and a resident relative's entitlement to PIP benefits is governed by statute. However, there is no meaningful distinction for purposes of coverage between a policyholder and a resident relative. MCL 500.3114(1) states that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." Whether a policyholder or a resident relative, the policy's provisions are applicable to the no-fault claim as long as they do not conflict with the no-fault act. See *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 434; 773 NW2d 29 (2009) ("Insurance policy provisions that conflict with statutes are invalid . . . ."). In this case, the policy, including the fraud provision, applies to Justin's claim as a resident relative, and that fraud provision does not contravene the no-fault act. See *Bahri*, 308 Mich App at 424-425.[2] Contrary to what the majority claims, the policy is not "duplicating statutory benefits." Instead, it is providing the terms of coverage, which are subject to the no-fault act. *Lewis v Farmers Inc Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016).

The majority relies on *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 653-654; 899 NW2d 744 (2017), for the proposition that a resident relative's claim cannot be subject to a fraud provision because the claim is governed solely by statute; however, it misconstrues the holding in that case. In *Shelton*, we concluded that the plaintiff "was not a party to, nor an insured under, the policy; she was injured while a passenger, and because neither she nor her spouse or resident relative had a no-fault policy, [the] defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement." *Id.* at 652. Thus, the plaintiff in *Shelton* was entitled to benefits by operation of the statute only and was not bound by any fraud provision in the other driver's policy because she was not the policyholder, a spouse, or a resident relative. *Id.* at 652-654. Therefore, the plaintiff's claim in *Shelton* was not subject to any fraud provision,

[2] The majority holds that the fraud provision conflicts with the no-fault act, but there is no provision in the no-fault act that prevents the use of a fraud exclusion in a policy. Instead, the majority concludes that because a resident relative is entitled to PIP benefits by operation of the statute, no policy provision can prevent the resident relative, or for that matter anyone entitled to claim benefits under another's policy, from his or her "statutory right to receive benefits under MCL 500.3114(1)." Of course, insurers are allowed to include various exclusions to manage their risk when insuring drivers so long as those exclusions do not conflict with the no-fault act. "It is a bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent . . . a contract in violation of law or public policy." *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 256; 819 NW2d 68 (2012) (quotation marks and citation omitted).

and because the no-fault act does not have its own fraud exclusion, the defendant could not avoid paying any remaining PIP benefits.

Unlike the plaintiff in *Shelton*, Justin is an insured under the policy because he is a resident relative. There is no question that the relevant insurance policy applies to his claim for PIP benefits under MCL 500.3114(1). Therefore, Justin's claim is not governed "solely by statute," and just as the fraud provision was valid in *Bahri*, the fraud provision in defendants' policy should also be deemed valid.

B. APPLICABILITY OF THE FRAUD PROVISION

Finally, the majority concludes that the fraud provision, even if it is valid, would not apply to Justin's claim and cannot void the insurance policy. I disagree.

Insurance policies are agreements between parties, and "[t]he primary goal in the interpretation of an insurance policy is to honor the intent of the parties." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). Unless an ambiguity is present within the policy, an insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206-207; 476 NW2d 392 (1991). The terms of an insurance policy are interpreted in accordance with their common meanings. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). If an ambiguity is present, it must be construed in favor of the insured. *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208, 214-215; 444 NW2d 803 (1989). Further, "when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute." *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). However, if a provision is not mandated by statute, the rights and limitations of the coverage are interpreted without reference to the statute. *Id.*

This case concerns the fraudulent acquisition of payments for allowable expenses. The insurance policy issued to defendants contained the following fraud provision:

> 22. CONCEALMENT OR FRAUD
>
> This entire Policy is void if any **insured person**[3] has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;

[3] The policy defines an "insured person" in part as "You, if an individual." The policy further defines "you" as "any person or organization listed as a Named Insured on the Declarations Page" as an assigned driver or another named insured. Louise and Richard were the named insureds on the declarations page.

B. The Application for it;

C. Or any claim made under it.

To prove fraud and void a policy, the insurer must demonstrate that

> (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. [*Bahri*, 308 Mich App at 424-425.]

In *Bahri*, we concluded that clear evidence of fraud would operate to void a policy under that policy's fraud provision. *Id.* at 425.

I agree with the majority that the evidence clearly demonstrates that defendants defrauded plaintiff. However, according to the plain terms of the policy, plaintiff was entitled to void the policy if an insured person made a material misrepresentation in a claim made under the policy. See *Upjohn Co*, 438 Mich at 207 (stating that an insurance policy must be enforced in accordance with its terms). Louise was a named insured on the policy, and her fraudulent requests for attendant care benefits constituted a material misrepresentation in a claim made under the policy. Moreover, defendants have not provided statutory authority that would specifically prohibit plaintiff from exercising its rights under this clause of the policy. See *Titan*, 491 Mich App at 554. There was no genuine issue of material fact precluding the trial court from granting summary disposition to plaintiff.

Finally, the majority concludes that defendants were only attendant care providers for Justin and were no longer the named insureds due to plaintiff's cancellation of the insurance policy in 2010. The majority maintains that "there is no basis to extend [defendants'] status as insured persons under the policy beyond the date it was cancelled." I disagree.

Plaintiff provided Justin coverage by virtue of his status as a "resident relative" of the named insureds, i.e., defendants. Justin's claim is subject to the terms of the policy even if it was subsequently cancelled, and defendants remain the named insureds under the policy. The policy at issue is an "occurrence" policy, which provides coverage "no matter when the claim is made, subject, of course, to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period." *Stine v Continental Cas Co*, 419 Mich 89, 98; 349 NW2d 127 (1984). One contractual provision under the policy provides a consequence for fraudulent conduct. That provision clearly states that the "entire policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to . . . any claim made under it." An "insured person" includes the "Named Insured on the Declarations Page." Defendants have been at all times named insureds under the policy on which Justin's claim is based. This makes sense because Justin's claim is governed by the named insureds' policy. The fact that plaintiff cancelled the policy *after* Justin's claim was filed does not affect the terms of the policy as it was written. Defendants are still named insureds on the declarations page of that policy, and it would be illogical to treat the policy, for purposes of Justin's claim, as not having any named insured simply because plaintiff

cancelled the policy after Justin filed his claim. Moreover, the fraud provision at issue states that *any* insured person—rather than *the* insured person—who commits fraud will void the entire policy. For purposes of Justin's claim, defendants were still considered insureds for servicing any and all future claims based on the occurrence at issue—Justin's injuries from the accident.

As a final point, the majority relies on the language of the cancellation clause, which states, "Cancellation will not affect any claim that originated prior to the date of cancellation." The claims for attendant care benefits—even if sought after the cancellation of the contract—still originate from the initial claim for no-fault benefits. Defendants cannot avoid the consequences of committing fraud simply because the policy is no longer in effect. Any such outcome contravenes the purpose of an occurrence-based policy.

III. CONCLUSION

I would conclude that the trial court did not err in granting summary disposition to plaintiff because there is no genuine issue of material fact and plaintiff is entitled to relief. Defendants submitted fraudulent claims in contravention to the policy's fraud provision, and the innocent-third-party rule should not allow Justin to continue collecting PIP benefits.

/s/ Thomas C. Cameron

STATE OF MICHIGAN

COURT OF APPEALS

SECURA INSURANCE,

Plaintiff-Appellee,

v

JOY B. THOMAS,

Defendant-Appellant,

and

DELORES SWINGLER-REID and CARL REID,

Defendants.

UNPUBLISHED
December 1, 2015

No. 322240
Muskegon Circuit Court
LC No. 12-048218-CK

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

In this declaratory action involving an insurance contract, defendant Joy B. Thomas appeals as of right the trial court's order awarding a judgment in favor of plaintiff, Secura Insurance, against Thomas and codefendant Delores-Swingler Reid, jointly and severally, in the amount of $68,787.24. This order followed the trial court's previous order granting Secura's motion for summary disposition and declaring the subject insurance policy void on the basis of misrepresentations made by Thomas and Swingler-Reid. We affirm in part, vacate in part, and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Secura provided Swingler-Reid and her husband Carl, who reside in Michigan, with homeowners insurance, personal automobile insurance, and umbrella liability insurance. With respect to the auto policy, Secura provided personal injury protection (PIP) benefits as well as optional underinsured motorist (UIM) coverage. While the policy, as originally issued, did not provide coverage for a 2001 Chevrolet Impala—the vehicle at issue in this case—Swingler-Reid

later added that vehicle to the policy in November 2009. According to Secura, when Swingler-Reid added the Impala to her policy, she represented that she was the owner of the automobile.[1]

On February 8, 2010, the Impala was involved in an automobile accident in the state of Georgia. Thomas—Swingler-Reid's daughter and a resident of Atlanta, Georgia—was the driver. Thomas thereafter filed a claim with Secura for PIP benefits, which Secura paid. Thomas also filed a lawsuit in Georgia against the allegedly negligent driver who caused the accident. Finally, Thomas filed a claim with Secura for UIM benefits. In response to the latter claim, Secura filed the instant declaratory action seeking to rescind the policy, based, in relevant part, on its contention that Swingler-Reid was not the owner of the Impala and that both Swingler-Reid and Thomas had made material misrepresentations about Swingler-Reid's ownership of the automobile.

In connection with this litigation, Secura deposed both Thomas and Swingler-Reid. During their respective depositions, each testified that the Impala was in Georgia on the date of the accident because Swingler-Reid had driven it there to visit Thomas. Each further asserted that Thomas was driving the Impala on the date of the accident because it had been parked in the driveway, blocking Thomas's vehicle, and Thomas needed to run errands.

In the midst of the instant litigation, Swingler-Reid filed a separate action against Secura in Oakland County for PIP/UIM benefits in connection with two automobile accidents that she was allegedly involved in on October 22, 2009, and December 22, 2009, respectively. As part of that litigation, Secura again deposed Swingler-Reid. In that deposition, Swingler-Reid testified that following her second accident in December 2009, she did not drive again until April 2010. She further indicated that in February 2010, she was in Michigan receiving medical care, and that she never went out of town during this time frame. As part of that litigation, Secura also obtained several of Swingler-Reid's medical records, which definitively showed that she was in Michigan the day of the February 8, 2010 accident that took place in Georgia.

In light of the above developments, Secura, with the trial court's permission, filed an amended complaint which added counts of fraud and conspiracy to commit fraud. It then moved the trial court for summary disposition. In pertinent part, Secura argued that it was entitled to void the policy pursuant to the terms of the policy itself—specifically, a "concealment, misrepresentation or fraud" provision—because Swingler-Reid made false representations in connection with Thomas's UIM claim. Additionally, Secura argued that Thomas and Swingler-Reid had committed actionable fraud and conspiracy to commit fraud by lying about the circumstances surrounding the accident (i.e., why the Impala, if owned by Swingler-Reid and garaged in Michigan, was involved in an accident in Georgia involving Thomas). Following a hearing on the matter, the trial court granted Secura's motion, concluding that the record evidence clearly showed that Thomas and Swingler-Reid misrepresented the circumstances surrounding the February 8, 2010 accident. In making this ruling, the court referenced the terms

[1] According to both Thomas and Swingler-Reid, Thomas gave the Impala to Swingler-Reid in November 2009. A transfer of title, which was signed in December 2009 but never registered with the Secretary of State, is contained in the record.

of the insurance policy. The court's written order stated that the policy was "voided and/or rescinded" with regard to the Impala. Because it granted summary disposition in Secura's favor, the trial court found that a cross-motion for summary disposition filed by Thomas was "moot," and therefore denied it.

In June 2013, Secura moved the trial court for summary disposition pursuant to MCR 2.116(C)(10) on the issue of damages. Secura argued there was no genuine issue of material fact as to its recovery of the following damages: (1) all benefits paid by Secura in connection with Thomas's PIP claim; (2) all costs, expenses, and attorney fees expended to defend Thomas's claim in Georgia; (3) all costs, expenses, and attorney fees expended to prosecute the instant litigation; (4) all benefits paid by Secura in connection with Swingler-Reid's PIP claim; and (5) all costs, expenses, and attorney fees expended in connection with Swingler-Reid's PIP/UIM claim in Oakland County. Secura styled its request for damages as one seeking "restitution." It asked the court to hold Thomas and Swingler-Reid jointly and severally liable with respect to the damages.

At an October 18, 2013 hearing, the trial court granted the motion for summary disposition as to damages, stating that the damage award "would be based on the—all the counts that were set forth involving fraud and misrepresentation, as well as the [request for] rescission." It awarded Secura $68,787.24 in damages against Thomas and Swingler-Reid, jointly and severally.[2] This award consisted of the entire amount requested by Secura and included recoupment of benefits paid as well as costs and attorney fees. Thomas now appeals as of right.[3]

II. RESCISSION OF THE POLICY

Thomas first argues that the trial court erred in granting summary disposition in Secura's favor with regard to rescinding the policy. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). It is apparent that the trial court granted summary disposition in this case pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In deciding a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* The proper interpretation of a contract is a question of law that we review de novo. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 526; 791 NW2d 724 (2010).

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[2] Secura did not seek to hold Carl Reid liable on the damage award, and he was subsequently dismissed from the lawsuit.

[3] Swingler-Reid has not filed a claim of appeal in this matter.

The crux of Thomas's argument is that the trial court erred in granting summary disposition in Secura's favor without addressing each element of actionable fraud, see *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012), and where there existed genuine issues of material fact on those elements. We need not consider this argument, however, because it is clear that rescission was justified pursuant to the terms of the policy itself, without regard to the elements of actionable fraud. "Insurance policies are contracts and, in the absence of an applicable statute, are subject to the same contract construction principles that apply to any other species of contract." *Id.* at 554 (citation and quotation marks omitted). "[W]hen a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual . . . ." *Id.* The claim at issue in this case involved underinsured motorist coverage, which is optional coverage not mandated by statute. *Dawson v Farm Bureau Mut Ins Co*, 293 Mich App 563, 568; 810 NW2d 106 (2011). Thus, the express terms of the contract governed the claim. The relevant policy provision provided, in pertinent part, that the policy would be void "if, whether before or after loss, an *insured* has" "[m]ade false statements . . . [r]elating to this insurance." This provision is clear and unambiguous: Secura was entitled to void the policy if an insured,[4] at any time, made false statements relating to the policy. "[U]nless a contract provision violates law or one of the traditional [contract] defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005) (citation and quotation marks omitted).

The trial court properly determined that there was no genuine issue of material fact that both Thomas and Swingler-Reid made false statements in connection with the February 8, 2010 accident that led to Thomas's claim for UIM benefits. Specifically, while each testified that the Impala was in Georgia in February 2010 because Swingler-Reid had traveled to visit Thomas, and that Thomas was driving the Impala because her own vehicle was blocked in her driveway, subsequent evidence definitively proved this story to be false. Notably, by Swingler-Reid's own admission, she was never in Georgia in February 2010, but was rather in Michigan receiving medical care in connection with her October and December 2009 accidents. Her medical records confirmed as much. As such, because Thomas and Swingler-Reid both made false statements regarding the February 8, 2010 accident, Secura was entitled, under the plain terms of the policy, to void the policy.

Thomas also argues on appeal that the trial court erred in denying her cross-motion for summary disposition. On the basis of the above conclusion, we disagree. However, we briefly note and explore two of Thomas's arguments. She contends that MCL 257.520(f)(1) prohibited Secura from voiding the policy in this case. The statute provides, in pertinent part:

> (f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

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[4] In this regard, we note that pursuant to the terms of the policy, an "insured" means not only the named insured, but also "any family member" and "any other person occupying [the named insured's] covered auto." Thus, this provision applied to both Swingler-Reid and Thomas.

> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor. [MCL 257.250.]

However, as Secura correctly notes in its brief on appeal, MCL 257.520(f)(1) is limited in its application by MCL 257.520(g), which provides, in relevant part:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter.

As our Supreme Court has previously concluded, the effect of MCL 257.520(g) is to render MCL 257.520(f)(1) "inapplicable" to coverages that are not required by statute (i.e., optional coverages). *Cohen v Auto Club Ass'n*, 463 Mich 525, 530; 620 NW2d 840 (2001). Because underinsured motorist coverage—the coverage at issue in this case—is optional, *Dawson*, 293 Mich App at 568, MCL 257.520(f)(1) did not bar Secura from seeking rescission of the policy after the accident occurred.

Thomas next argues that Secura was precluded by MCL 500.2123 from cancelling the policy because it failed to provide notice as required by that statute. MCL 500.2123 pertains to the cancellation of insurance policies, and provides, in pertinent part:

> (1) Except as provided in subsection (2) or (3), a termination of insurance shall not be effective unless the insurer, at least 30 days prior to the date of termination, delivers or mails to the named insured at the person's last known address a written notice of termination. The notice shall state the effective date of termination and each specific reason for the termination.

We do not agree with Thomas's position. MCL 500.2123 governs the *cancellation* of policies, not the rescission of policies. See *Lewis v Farmers Ins Group*, 154 Mich App 324, 329; 397 NW2d 297 (1986). Cancellation is a distinct remedy from rescission; whereas cancellation terminates the contract prospectively and releases the parties from further obligation to each other, rescission "annul[s] the contract and restore[s] the parties to the relative positions which they would have occupied if no such contract had ever been made." *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984) (citations and quotations omitted).

III. DAMAGES

Thomas next argues that the trial court erred in awarding Secura $68,787.94 in damages as restitution for (1) benefits previously paid by Secura in connection with Thomas's PIP claim; (2) all costs, expenses, and attorney fees expended to defend Thomas's claim in Georgia; (3) all costs, expenses, and attorney fees expended to prosecute the instant litigation; and (4) all benefits paid and costs, expenses, and attorney fees expended in connection with Swingler-Reid's separate PIP/UIM claim in Oakland County. For the reasons discussed below, we vacate all but the first of the above enumerated damage awards and remand for further proceedings.[5]

A. ATTORNEY FEES

We first turn our attention to the issue of attorney fees. We review for an abuse of discretion the trial court's decision to award attorney fees. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 216; 818 NW2d 478 (2012). "A court may award costs and attorney fees only when specifically authorized by statute, court rule, or a recognized exception." *Id.* Here, the trial court did not cite any basis for its award of attorney fees. As such, we remand and instruct the trial court to articulate a basis for the award of attorney fees. See *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 364; 824 NW2d 609 (2012).

Secura urges us to affirm the trial court's award of attorney fees for two reasons. It first argues that we should affirm the award of attorney fees because the remedy involved—restitution—is an equitable remedy, and it contends that a court may award attorney fees when the failure to do so would be inequitable. However, a court may not award attorney fees "solely on the basis of what it perceives to be fair or on equitable principles." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005). See also *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003) ("it is improper to award attorney fees on general equitable principles.").

Next, Secura argues that we can affirm the trial court's award of attorney fees based on Thomas's—and, for that matter, Swingler-Reid's—unlawful or fraudulent conduct. While we are to narrowly construe exceptions to the general rule that attorney fees are not recoverable, this Court has recognized an exception to the rule for situations "where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct." *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d 357 (2006) (citation and quotation marks omitted). See also *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286; 761 NW2d 761 (2008). Again, we note that the trial court made no findings as to whether an award of attorney fees was appropriate in light of this exception. As such, we decline to rule on this matter. See *Gentris*, 297 Mich App at 364. We also make no comment with regard to whether the conduct in this case would rise to the level of "fraudulent or unlawful" conduct present in cases such as *Kircher*.

[5] We recognize that Swingler-Reid is not a party to this appeal; however, because the errors in the trial court's damages award affect the entirety of the award, we vacate the entire award, including those portions that affect Swingler-Reid.

B. REPAYMENT OF PIP BENEFITS

Next, Thomas argues that the trial court erred by requiring her to make restitution to Secura for the PIP benefits[6] it paid in connection with the accident in Georgia. However, this issue is not properly before the Court because, aside from the fact that it was not identified in her statement of the questions involved, Thomas failed to cite any applicable authority supporting her position and did little more than raise the issue in a cursory fashion. See MCR 7.212(C)(5) and (C)(7). "[A]ppellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority." *VanderWerp v Plainfield Chart Tp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Thus, she did not properly present this issue for appellate review and we deem it abandoned.

C. JOINT AND SEVERAL LIABILITY

Lastly, Thomas argues that the trial court erred by holding her and Swingler-Reid jointly and severally liable for the full award. Secura urges us not to consider this issue, contending that Thomas failed to raise the issue before the trial court. We note that Thomas raised this issue at the May 6, 2014 hearing, as she argued that she should not be held liable for Swingler-Reid's conduct. We also agree with Thomas's contention that she should not be held jointly and severally liable for Swingler-Reid's conduct pertaining to the Oakland County PIP/UIM case with which Thomas had no involvement. The trial court granted the remedy of restitution, based on its decision to rescind the policy. While a contract—such as the insurance policy at issue—can provide for joint and several liability, see *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 641; 734 NW2d 217 (2007), we are unable to find any basis in the policy for imposing joint and several liability in the instant case. Nor has Secura pointed to any provision of the policy indicating that Thomas—who is not a party to the contract but can best be described as a third-party beneficiary with regard to her claims under the policy—should be jointly and severally liable for restitution on a contract for conduct having nothing to do with her or with her status as a third-party beneficiary.[7]

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[6] In her brief on appeal, Thomas acknowledged that these are PIP benefits. Yet, in her reply brief, she contends that Secura paid UIM benefits to her. As Secura correctly argues, the record shows that any benefits paid to Thomas were undeniably PIP benefits, not UIM benefits.

[7] We note that when the trial court granted summary disposition on the issue of damages, it indicated that its earlier grant of summary disposition on the merits was based, not only on its ruling that rescission was warranted, based on the terms of the policy itself, but on all of Secura's claims, including its tort claims. As Thomas accurately points out, the imposition of joint and several liability cannot be upheld by simply pointing to Secura's tort claims. As an initial matter, the trial court never made any rulings as to the tort claims; rather, its first summary disposition ruling only pertained to whether rescission of the policy was warranted *under the terms* of the policy. Second, and more importantly, even assuming the trial court had granted summary disposition on the tort claims, our Legislature has abolished joint and several liability in certain

IV. CONCLUSION

In sum, although we affirm the trial court's grant of summary disposition to Secura with regard to whether it was permitted to rescind the policy based on the terms of the policy itself, we vacate all aspects of the trial court's damages award except for its restitution award to Secura for the PIP benefits it paid in connection with the accident in Georgia. On remand, if the trial court decides to award attorney fees, it must state its basis for doing so on the record, in accordance with our opinion.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael F. Gadola

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tort actions, which would include the torts alleged in this case. See MCL 600.2956; *Laurel Woods*, 274 Mich App at 641.

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH STOOPS, Personal Representative of the Estate of KRISTIN STOOPS,

Plaintiff-Appellee/Cross-Appellant/Cross-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee/Cross-Appellant.

UNPUBLISHED
March 23, 2006

No. 260454
Wayne Circuit Court
LC No. 02-233990-CZ

JOSEPH STOOPS, Individually and as Personal Representative of the Estate of KRISTIN STOOPS,

Plaintiffs-Appellants,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellee.

No. 261917
Macomb Circuit Court
LC No. 02-004556-CZ

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

The parties in Docket 260454 appeal and cross-appeal the trial court's rulings granting attorney fees to both parties pursuant to MCL 500.3148 following a mixed jury verdict. Defendant also claims the trial court denied it a fair trial by placing time limits on the presentation of its defense to plaintiff's claims for personal protection insurance benefits arising out of an automobile accident. We affirm in part and reverse in part.

In Docket 261917, plaintiffs appeal by right the trial court's order granting summary disposition to defendant on the basis of plaintiffs' concealment, misrepresentation, or fraud regarding the claim in Docket 260454 voided defendant's underinsurance coverage. We affirm.

I. Docket 260454

Plaintiff Kristen Stoops[1] filed an action in Wayne Circuit Court on September 25, 2002 seeking personal protection insurance benefits for attendant care under MCL 500.3107(1)(a) and reimbursement for medical expenses arising out of injuries received in a March 28, 1998 automobile accident. Plaintiff was driving a one-ton Ford F-350 pickup truck insured by defendant in the name of S & S Mason, Inc., a business of plaintiff's husband, Joseph Stoops. A van pulling out of a drive struck the pickup. By outward appearances, the accident was relatively minor. Plaintiff stated at the time that she hurt her left wrist but refused medical treatment. In her a claim for no-fault benefits, plaintiff asserted that during the accident she reached over with her right hand to protect her passenger son while turning the steering wheel sharply with her left, and in doing so, hyperextended her left wrist. Before the accident, plaintiff was already being treated for pain in her left shoulder, elbow and wrist. These injuries apparently arose out of repetitive movements during plaintiff's work at an envelope factory.

After the accident, Dr. Robert Salaman[2] treated plaintiff's wrist conservatively with ice packs and anti-inflammatory drugs. When plaintiff continued to complain of pain in her wrist, Dr. Salaman referred her to Dr. Stephen DeSilva, an orthopedic surgeon. Dr. DeSilva performed arthroscopic surgery on May 29, 1998. Although plaintiff attended physical therapy, she continued to complain of discomfort and pain at levels making physical therapy difficult. Her condition did not improve by her last visit to Dr. DeSilva on July 29, 1999.

On May 19, 1999, plaintiff complained to Dr. Salaman of pain and popping in her left shoulder, pain in her elbow, her neck and jaw. Dr. Salaman performed surgery on her shoulder. Plaintiff complained in August 1999 of elbow pain radiating into her hand, and Dr. Salaman performed elbow surgery on September 28, 1999. After the surgery, plaintiff continued to complain of pain in the left elbow when she attempted activities at home. In December 1999, Dr. Salaman told Plaintiff she could not perform household chores, or activities requiring repetitive use of her hands. According to Dr. Salaman, plaintiff's left wrist was permanently damaged in the automobile accident, as was her left elbow, and her left shoulder.

In the three years after the automobile accident, defendant paid over $100,000 in plaintiff's medical expenses and the statutory maximums for work loss benefits and replacement

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[1] Mrs. Stoops died of natural causes (arteriosclerotic cardiovascular disease) while these appeals have been pending. Her husband Joseph Stoops, the personal representative of her estate, has substituted for the deceased as a party in both cases. We use the singular plaintiff to refer to Kristen Stoops because she was the sole claimant in the Wayne circuit court case, and because Joseph Stoops' individual claim for insurance benefits in the Macomb circuit court case is solely derivative of injuries his wife allegedly sustained in the March 1998 accident.

[2] The parties spell the doctor's name as both "Salaman" and "Solomon."

services benefits of $20.00 per day. See MCL 500.3107(1)(b) & (c). These benefits expired at the end of March 2001.

In July 2001, plaintiff submitted to defendant three computer-generated letters bearing the title "Amber Baker / In-home Nursing Care Giver," which detailed hours that Ms. Baker purportedly spent attending to plaintiff's care. The letters stated Baker began providing plaintiff care on April 20, 2001, and continued to do so through June 30, 2001, seven days week, for eight to ten hours a day.

Plaintiff also submitted to defendant several copies of checks drawn on a personal checking account bearing only plaintiff's name and payable to Amber Baker. Most of these checks were for the amount of $1680 purporting to be in payment for one week of care (56 hours at $30 per hour). Defendant's claims representative learned that Ms. Baker was last employed as a nurse's aide earning $9.50 an hour; defendant paid most but not all of the claimed attendant care at the rate of $9.50 per hour rate rather than the requested $30 per hour. Defendant paid plaintiff $9,452.50 for attendant care through August 2001, but then stopped.

At trial, plaintiff sought compensation for the cost of attendant care provided by Amber Baker in 2001, 2002, and 2003, and for medical expenses of $80,798.85, consisting of $78,281.25 for surgery on plaintiff's shoulder at St. Joseph Mercy Hospital and $2,517.60 for treatment of plaintiff's elbow. In closing argument, plaintiff's counsel requested that the jury award plaintiff medical expenses in the amount of $80,798.85, and $83,111.25 for attendant care expense, which was calculated by multiplying the claimed amount of care hours by $17.50 per hour, and subtracting the $9,452.50 defendant had already paid for attendant care services.

Defendant contended at trial that plaintiff's medical problems were not the result of the automobile accident of March 28, 1998, but from plaintiff's pre-existing condition, and the result of falls and other injuries plaintiff received after the accident. During discovery, defendant also caught plaintiff, her husband Joseph Stoops, and Amber Baker in web of deception regarding the alleged attendant care. First, defendant subpoenaed the bank records of plaintiff's personal checking account, which showed the purported checks plaintiff wrote to Amber Baker were never cashed. In plaintiff's deposition, she admitted the checks were not cashed but that Baker gave them to her husband, Joseph Stoops, who then gave Baker cash and a receipt. Copies of the receipts were mysteriously produced for defense counsel. Next, Joseph Stoops was deposed and he advanced the story that he went behind his wife's back to get the checks back from Baker and gave her cash he obtained by making ATM withdrawals on his business (S & S Mason) account. Although Joseph could not produce records to substantiate the cash withdrawals, he produced a receipt book from which he allegedly wrote contemporaneous receipts to Baker in 2001. This story floundered when defendant produced evidence that the receipt book was not even available until 2002, and the receipt book itself bore a 2002 copyright mark.

The story regarding payment to Amber Baker shifted again at trial. Baker testified she lost the "original" receipts that Joseph had given her in 2001 and when defendant subpoenaed her to produce the receipts, Joseph Stoops provided her "copies." According to Baker, plaintiff would write a check to her, Baker would put the check under a jewelry box on Joseph's dresser, and Joseph would give Baker cash and a receipt. Joseph Stoops testified that in 2001 his business was in trouble and he hid money from his business in his wife's personal account; Stoops got the checks his wife wrote for Baker back from Baker and gave Baker cash so it would

not appear that Baker was his employee. Stoops also testified regarding a jewelry box on his dresser. According to Joseph, Baker would "leave the check [-] I got like a jewelry box thing on my dresser [-] she leaves the check there and I'd leave the money for her" and a receipt. Joseph admitted that he obtained the receipt book in June 2003, and that he manufactured the receipts produced during discovery when Baker said she needed copies.

The jury returned a mixed verdict. It found that although plaintiff had sustained a wrist injury in the accident, that defendant owed nothing for medical expenses for that injury. The jury found that plaintiff's shoulder injury was not related to the accident and therefore defendant was not responsible for medical expenses to treat plaintiff's shoulder. But the jury found plaintiff's elbow was injured in the accident and awarded medical expenses of $2,517.16. Regarding attendant care, the jury found that plaintiff was entitled to compensation of $3,247.50 for 2001, $17,500.00 for 2002, and $3,165.63 for 2003, for a total of $23,913.13. The jury also awarded interest in the amount of $7,786.95. Finally, the jury answered, "yes" to the question whether some of plaintiff's attendant care claim was excessive.

The trial court entered judgment in favor of plaintiff on January 5, 2005 in the amount of $42,004.19, which included additional interest of $7,786.95. Both parties sought attorney fees pursuant to MCL 500.3148. Plaintiff argued she should be awarded attorney fees under § 3148(1) because defendant had unreasonably refused to pay her no-fault claim, and defendant sought an award of attorney fees under § 3148(2) because plaintiff's claim was "in some respect fraudulent or so excessive as to have no reasonable foundation." After several hearings, the trial court entered an order on January 13, 2005 that awarded plaintiff attorney fees of $106,712.50[3] and costs of $16,522.04; it then awarded defendant attorney fees of $65,500.

A. Directed Verdicts

Defendant argues that the trial court erred in its rulings on the parties' various motions for directed verdict. We review de novo a trial court's decision on a motion for a directed verdict. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). We must review all of the evidence presented up to the time of the motion in a light most favorable to the nonmoving party to determine whether a factual question exists. *Id.* A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Id.*

Defendant first contends the trial court erred by not directing a verdict in its favor that plaintiff's claim was "in some respect fraudulent or so excessive as to have no reasonable foundation." MCL 500.3148(2). Defendant's argument is without merit. While defendant raised this issue in its pleadings for the purpose of ultimately recovering its attorney fees, it did not affirmatively assert fraud as a counter-claim against plaintiff. Also, defendant did not assert fraud as an affirmative defense that would void its policy coverage. Rather, defendant asserted that plaintiff's injuries were not related to the automobile accident, and that attendant care

[3] This award consisted of $84,837.50 for Christopher Ambrose, who represented plaintiff throughout the claim process, and $21,875.00 for plaintiff's trial counsel, Robert Darling.

expenses were either not actually incurred or were unnecessary. The trial court properly ruled such factual questions were for the jury to resolve.

Next, defendant argues that the trial court erred by granting plaintiff's motion for directed verdict and subsequently entering an order that stated defendant had failed to create a genuine issue of material fact regarding the elements of a tort action for fraud. We agree.

The record is not clear that plaintiff ever moved for a directed verdict regarding defendant's assertion that plaintiff's claim was, at least in part, fraudulent. Instead, the record reflects that defendant believed its inchoate claim to attorney fees under § 3148(2) presented factual questions for the jury to resolve. Defendant argued that the trial court should read to the jury a modified version of M Civ JI 128.01 for the purpose of determining whether defendant could obtain attorney fees under the statute. In objecting to the proposed instruction, defense counsel stated, "I don't know if it would be the appropriate time for directed verdict or my argument with regard to this . . . jury instruction because I don't believe that there's any evidence that would establish fraud." Ultimately, the trial court correctly ruled that whether attorney fees may be awarded under the statute is for the court, not the jury, to resolve. The trial court further reasoned that although defendant could argue fraud as a defense, i.e., that plaintiff did not actually incur attendant care expenses, or that plaintiff inflated her claim, defendant had not asserted a counter-claim for affirmative relief against plaintiff on the basis of fraud. The court stated, "I'm going to grant the motion for directed verdict on the offensive claim of fraud, and I'm not [going to] instruct the jury on all the elements of fraud in that regard." Nevertheless, the court ruled that defendant could still argue "there was fraud in the submission" of the claim, "I'm just not [going to] give that instruction about fraud and all the elements of it." But, without objection, the trial court included in the verdict form an advisory question: "In plaintiff's claim for attendant care, was some of the claim excessive?" As noted, *supra*, the jury answered "yes."

Even though the trial court did not instruct the jury regarding the elements of the tort of fraud, the record is clear that the trial court did not rule that the evidence defendant produced regarding fraud and material misrepresentation was insufficient to be submitted to the jury as a defense to plaintiff's claim. Quite the contrary, the trial court specifically ruled that the issue raised questions for the jury to resolve. Despite this, plaintiff submitted an order for the court's signature that defendant had failed to create a genuine issue of material fact with respect to the elements of a tort action for fraud, to which defendant objected. In addition to arguing that the proposed order did not reflect the court's ruling, defense counsel predicted that plaintiff's counsel would use the order to assert the doctrine of res judicata to defendant's affirmative defense of fraud or material misrepresentation in the Macomb action for underinsurance benefits. In sum, the trial court did not rule on the issue of fraud, except to decline to instruct the jury on its tort elements, and permit defense counsel to argue fraud to the jury. We conclude that the trial court's October 22, 2004 order granting plaintiff's motion for directed verdict does not accurately reflect the ruling of the court and it is therefore vacated. MCR 7.216(A)(7).[4]

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[4] "The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . (7) enter any judgment or order or grant further or different relief
(continued...)

B. Attorney Fees

The heart of this appeal concerns attorney fees. Both parties assert the trial court erred in granting attorney fees to the other party, and in determining the amount of a reasonable attorney fee. Generally, attorney fees may not be recovered either as an element of costs or damages unless expressly allowed by statute, court rule, judicial exception, or contract. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002); *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 101-102; 527 NW2d 524 (1994). Here, the statute plainly permits a trial court upon making certain preliminary findings of fact to award attorney fees to either a claimant of personal or property protection insurance benefits or an insurer defending against such a claim. In pertinent part, MCL 500.3148 provides:

> (1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue . . . if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.[5]
>
> (2) An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation.

We review for clear error a trial court's factual findings regarding § 3148. MCR 2.613(C); *McCarthy, supra* at 103; *Attard v Citizens Ins Co,* 237 Mich App 311, 316-317; 602 NW2d 633 (1999). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred." *Amerisure Ins Co v Auto-Owners Ins Co,* 262 Mich App 10, 24; 684 NW2d 391 (2004).

When a trial court determines that an award of attorney fees under § 3148 is appropriate, the court must only award a reasonable fee. The statute does not define reasonable for purpose of awarding an attorney fee, so in *Liddell v DAIIE*, 102 Mich App 636, 651-652; 302 NW2d 260 (1981), this Court adopted the guidelines stated in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor

(...continued)

as the case may require."

[5] "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). For benefits to be overdue, allowable expenses must actually have been incurred. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003). If benefits are "overdue" within the meaning of § 3142(2), "a rebuttable presumption of unreasonable refusal or undue delay arises." *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982).

> involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275 and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics.

Likewise, our Supreme Court adopted the *Crawley* factors for the purpose of determining a reasonable attorney fee under § 3148 in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). The Court observed that although "a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination." *Id.* Moreover, a trial court need not detail its findings regarding each factor the court considers. *Id.* "The award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Id.*

We first review defendant's argument that the trial court erred by declining to rule on its motion for attorney fees on the basis that plaintiff's claim "was in some respect fraudulent." § 3148(2). We also consider at the same time plaintiff's argument in her cross-appeal that the trial court abused its discretion by awarding defendant attorney fees based solely on the jury determination that "some of [plaintiff's] claim [was] excessive." Plaintiff argues that the trial court erred by abdicating to the jury its responsibility to find facts necessary to the application of § 3148(2), and that the trial court also failed to find the additional necessary requirement for attorney fees that a claim must be so "excessive as to have no reasonable foundation." We consider these issues together because they are linked by the parties' arguments below.

On September 15, 2004, in the first of several post-trial hearings on the issue of attorney fees, the trial court heard arguments of the parties regarding whether defendant had "unreasonably refused to pay [plaintiff's] claim or unreasonably delayed in making proper payment." § 3148(1). The trial court ruled in favor of plaintiff on this question, reasoning that (1) at least one of plaintiff's medical bills had not been paid, (2) plaintiff had been prescribed attendant care, and (3) "the jury did find the care was excessive, but nevertheless warranted because there was an award." The court found the determinative factor to be that although plaintiff did not receive all she asked for, she did prevail. Accordingly, the court ruled it would award Mr. Darling $21,875 for 62 hours and initially awarded Mr. Ambrose $203,925. But the court also recognized that defendant prevailed in part, so it awarded defendant attorney fees of $50,000 as an offset to plaintiff's attorney fees. Plaintiff's counsel did not object.

The parties next appeared before the trial court on October 22, 2004 to attempt to settle the terms of a proposed judgment. The trial court sua sponte informed counsel that it had erred by not considering appropriate factors in setting attorney fees for Mr. Ambrose and defense counsel, who had not even submitted an affidavit or itemized statement. The court noted that it had ruled in part out of frustration. The court also observed it was "very comfortable" with the fee request of Mr. Darling, plaintiff's lead trial counsel, finding it "right on the money."

During the course of the October 22 hearing, defense counsel requested a ruling from the trial court under § 3148(2), that plaintiff's claim "was in some respect fraudulent." Mr. Darling responded by stating that, "on September 15th when you heard the motion with regard to attorney fees, you determined that the defendant would receive attorney fees because the verdict [sic] was somewhat excessive. You've already made that determination that it was excessive." Counsel

noted that § 3148(2) provides alternative grounds for awarding attorney fees, and when asked by the court if it had already ruled on "excessiveness," plaintiff's counsel answered, "Correct." The trial court ruled that because the statute provided alternative bases to award attorney fees, and it had found plaintiff's claim was excessive, it would not make a finding regarding fraud.

On October 27, 2004, plaintiff's counsel filed a motion for partial summary disposition regarding defendant's affirmative defense of concealment, misrepresentation, or fraud to plaintiff's claim for underinsurance benefits then pending in Macomb circuit court. Plaintiff asserted in her motion that the trial court's October 22, 2004 order granting plaintiff's motion for directed verdict barred defendant's affirmative defense under principles of res judicata or collateral estoppel. Defendant subsequently sought an order in Wayne circuit court that the trial court had specifically declined to render a ruling on the issue of fraud. Defendant's motion was heard on November 12, 2004.

Defendant sought the order despite transcripts showing that the court had not ruled on the issue because plaintiff argued in the underinsurance case, "a court speaks through its orders." Defendant reminded the trial court that it declined to rule on defendant's claim for attorney fees on the basis that plaintiff's claim was "in some respect fraudulent" because it had already determined that defendant was entitled to attorney fees on the alternative basis that plaintiff's claim was excessive. Plaintiff argued that the order was unnecessary because the court had ruled it would reconsider the issue of attorney fees. Defendant countered that the court intended only to reconsider the amount of the attorney fee awards, not each parties' entitlement to them. The trial court agreed with defendant and found the proposed order comported with its ruling. Accordingly, the trial court entered an order on November 12, 2004 that provides: "the jury having found that some of the claim for Plaintiff's attendant care was excessive and this Court having found the claim was excessive thereby entitling Defendant to attorney fees of this action, the Court hereby declines to rule upon whether or not the claim was in some respects fraudulent under MCL 500.3148(2)."

The trial court held the final hearing on attorney fees on December 23, 2004. Although intended to serve as the "reasonableness" hearing on the amount of attorney fees the parties would be awarded, plaintiff also argued that the trial court should reconsider its ruling that defendant was entitled to attorney fees under § 3148(2). Plaintiff argued for the first time that her claim had a reasonable basis and therefore was not "so excessive as to have no reasonable foundation." The trial court noted it had already ruled: plaintiff prevailed and therefore was entitled to attorney fees. With respect to defendant, the trial court stated, "it's clear from the evidence that the jury found that the claim was excessive, and I agree, I think it was excessive. So I think consequently the defendant is entitled to attorney fees."

On appeal, defendant argues the trial court erred by not also ruling under § 3148(2) that plaintiff's claim "was in some respect fraudulent." Defendant cites no authority for the proposition that a court must rule on an alternative ground for relief after having already granted relief on a different ground. Defendant's failure in this regard constitutes an abandonment of this issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

With respect to plaintiff's counter-claim regarding § 3148(2), the record reveals that the trial court did not rely solely upon the jury's finding that plaintiff's case was excessive but also independently reached the same conclusion. Moreover, plaintiff at one point assured the court it

had already so ruled. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

We agree that § 3148(2) plainly requires that for attorney fees to be awarded to an insurer because a claim is excessive, the claim must be so "excessive as to have no reasonable foundation." Plaintiff argues on appeal that her claims had a reasonable foundation because although the jury rejected one medical claim, plaintiff's treating physicians opined her injuries were related to the automobile accident at issue. Further, with respect to attendant care, plaintiff argues the jury awarded her compensation for the hours of care she claimed albeit at a reduced hourly rate. But, plaintiff did not argue this issue below until the fourth of four hearings in which attorney fees were addressed. At a minimum, the record reflects plaintiff's counsel acquiesced to the trial court believing its ruling that plaintiff's claim was excessive was sufficient to award attorney fees to defendant. "Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence." *Mucci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 442-443; 705 NW2d 151 (2005). Further, plaintiff sought to foreclose a ruling by the trial court that plaintiff's claim was "in some respect fraudulent" - - a ruling that abundant record evidence would have supported. Under these circumstances, it is simply not fair to allow plaintiff to finesse a non-ruling on whether plaintiff's claim was "in some respect fraudulent" while still being permitted to pack her appellate parachute with respect to so "excessive as to have no reasonable foundation." See, e.g., *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

The record reflects that the trial court readily concluded that defendant should be awarded attorney fees under § 3148(2) when it sua sponte ruled it would do so. This Court will affirm a trial court when it reaches the correct result even if for an incorrect reason. *Ellsworth v Hotel Corp,* 236 Mich App 185, 190; 600 NW2d 129 (1999). In this regard, the reasoning of *Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court Appeals decided May 11, 2004 (Docket No.'s 244824; 245363) is persuasive. The *Robinson* panel found that a $4000 verdict on an $82,000 claim was evidence that the jury found that the plaintiff's claim "was in some respect fraudulent or so excessive as to have no reasonable foundation" and therefore remanded to the trial court for an "award of a reasonable sum" to the insurer under § 3148(2). *Robinson, supra*, slip op at 2. In sum, we are not left with a definite and firm conviction that the trial court clearly erred by awarding defendant attorney fees under § 3148(2).

Next, defendant argues that the trial court erred by granting plaintiff attorney fees under § 3148(1). A claimant of personal protection insurance benefits is entitled to attorney fees when benefits are overdue[6] "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." As noted already, the trial court's factual findings regarding § 3148(1) are reviewed for clear error. *Attard, supra* at 316-317. With respect to determining whether an attorney fee should be awarded to a no-fault benefits claimant,

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[6] See n 5, *supra*.

an insurer's "refusal or delay in payments . . . will not be found 'unreasonable' within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co,* 428 Mich 51, 66; 404 NW2d 199 (1987), citing *Liddell, supra* at 650. Furthermore, "the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy, supra* at 105. After a careful review of the record, the parties' arguments, and the trial court's reasoning, we are convinced that the trial court clearly erred by awarding plaintiff attorney fees under § 3148(1).

Defendant presented evidence contemporaneous with plaintiff's claim for attendant care that raised a bona fide question regarding whether such care was necessary. Specifically, defendant points to three forms it received from plaintiff's attending physicians that each checked the box for "no" to the question, "Will the patient require attendant care?" Dr. Noellert, dated September 28, 2001, Dr. Michael Friedlander, dated September 7, 2001, and Dr. Eric Borofsky, dated April 13, 2001, submitted these forms. Plaintiff argues these reports were contradicted by an April 15, 2001 hand-written "prescription" by Dr. Borofsky for eight hours of daily attendant care.[7] Plaintiff asserts that it was incumbent on defendant to reconcile the conflicting reports, citing *Liddell, supra* at 651. That case is distinguished from the instant case because in *Liddell* a report unfavorable to the plaintiff was followed by two subsequent reports that helped the plaintiff. Here, the converse occurred. Conflicting reports by the same doctor were followed by two subsequent reports indicating attendant care was unnecessary. Moreover, under MCL 500.3142(2) a claim for benefits is not overdue until the claimant submits to the insurer "reasonable proof of the fact and of the amount of loss sustained." The statute does not place the burden on the insurer to resolve ambiguous evidence of a claim.

In addition, private investigators that defendant hired conducted surveillance and testified plaintiff was performing activities she claimed a caregiver performed. Although the surveillance was limited to a few days and only pertained to outdoor activities, it raised questions regarding both the need for and accuracy of plaintiff's claim for attendant care.

The timing of plaintiff's claim for attendant care also raised questions. Plaintiff's first claim for attendant care was three years after a relatively minor automobile accident, and a month after no-fault work loss and replacement services benefits expired. Further, plaintiff claimed reimbursement for attendant care at the rate of $30 per hour, a rate that was neither supported by the type of care allegedly being provided, nor the qualifications of the caregiver.

In sum, at the point defendant stopped paying plaintiff's attendant care claim, there was evidentiary support for finding defendant possessed legitimate questions regarding both the need for attendant care and whether attendant care expenses had actually been incurred. Thus, a bona fide dispute existed regarding "proof of the fact and of the amount of loss sustained."[8] MCL

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[7] A copy the "prescription" has not been furnished to this Court. Interestingly, Dr. Borofsky did not testify at trial, nor does it appear that he was even deposed.

[8] Indeed, plaintiff in the course of arguing that plaintiff's claim had a reasonable foundation, (continued...)

500.3142(2); *Attard, supra* at 318. This is so notwithstanding that defendant did not initially obtain an independent medical evaluation of plaintiff. *McCarthy, supra* at 105 (the defendant was entitled to rely on the plaintiff's own treating physician).

The trial court clearly erred by finding that defendant "unreasonably refused to pay" or "unreasonably delayed" paying overdue benefits. The trial court relied on three subsidiary findings to reach this conclusion: (1) the jury awarded plaintiff a $2,517 medical bill for treatment of her elbow, (2) plaintiff had been prescribed attendant care, and (3) plaintiff prevailed because she was awarded attendant care benefits even if they were less than she wanted. For the reasons already discussed, the second and third reasons do not negate the fact that legitimate factual uncertainty existed as to the necessity for and the amount of care hours provided, as well as the dollar value of plaintiff's claim. That plaintiff ultimately prevailed to some extent is not determinative. *Id.*

The trial court also erred by relying on the jury's awarding plaintiff $2,517 for treatment of her elbow. A benefit is not overdue until it has been incurred and has not been paid within thirty days after "an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500. 3142(2).[9] Further, an insurer's refusal or delay in paying a benefit is not unreasonable if before it becomes overdue a "bona fide factual uncertainty" exists whether the incurred expense is causally related to the insured event. See *Gobler, supra* at 66; *Liddell, supra* at 650; See, also, *Proudfoot v State Farm Mut Ins Co,* 469 Mich 476, 485; 673 NW2d 739 (2003). This lawsuit was instituted on September 25, 2002. Nevertheless, defendant continued to pay plaintiff's medical bills through May 2003. At trial, even while the jury was deliberating, counsel for both plaintiff and defendant believed that the only outstanding unpaid medical bills related to treatment of plaintiff's shoulder, which the jury ultimately determined was not related to the insured automobile accident. Only a question from the jury prompted counsel to stipulate that a small portion of the unpaid medical bills, $2,517, related to treatment of plaintiff's elbow.

The record is unclear exactly when the $2,517 expense was incurred, but plaintiff's closing argument at trial indicates that all of the unpaid medical bills were incurred after June 17, 2003 but before May 4, 2004. By June 17, 2003, significant discovery had occurred in this case, including defendant's receipt of medical records relating to plaintiff's treatment, the taking of Amber Baker's and plaintiff's depositions, and obtaining bank records through subpoenas. In addition to uncovering the check-writing scheme, it was discovered that plaintiff had suffered work-related injuries to her neck, shoulder, elbow and wrist before the accident. Further, plaintiff had sustained falls both before and after the accident that might account for her medical problems. Furthermore, in her deposition on June 9, 2003, plaintiff admitted authoring a May 18, 1998 note to her employer that stated her neck, shoulder, and tennis elbow ailments were not the result of the March 1998 automobile accident. Also, plaintiff asserted in the note that only her wrist injury was related to the automobile accident. Further, defendant retained experts during 2003, two of whom opined at trial that plaintiff's injuries were not caused by the

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(...continued)

asserts, "what we have here is a bona fide factual dispute between the parties regarding the cost of attendant care services." Cross-appeal brief at 17.

[9] See n 5, *supra*.

automobile accident at issue. In sum, this evidence establishes that at the time the elbow-related unpaid medical expense was incurred, a bona fide dispute existed whether plaintiff's medical condition was causally related to the auto accident.[10] *Attard, supra* at 317; *Liddell, supra* at 650. Accordingly, even though the jury ultimately awarded plaintiff $2,517 for treatment of her elbow, we are left with a definite and firm conviction that the trial court clearly erred by finding defendant unreasonably refused or unreasonably delayed to pay an overdue medical expense. *Amerisure Ins Co, supra* at 24; See, also, *McCarthy, supra* at 105 ("the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable").

Because the trial court clearly erred by awarding plaintiff attorney fees under § 3148(1), it is unnecessary to address defendant's argument that the trial court abused its discretion when setting a reasonable amount to award as an attorney fee. We also conclude that defendant has not established the trial court abused its discretion by determining an amount for a reasonable attorney fee to be awarded to defendant. The record reflects that the trial court properly considered the *Crawley* factors in establishing a reasonable attorney fee. Further, the trial court did not abuse its discretion by considering that plaintiff's counsel worked pursuant to a contingent fee agreement while defense counsel would be paid by a financially stable client regardless of the trial outcome. See *Liddell, supra* at 652 ("a contingent fee agreement may be considered as one factor in determining the reasonableness of a fee"). Additionally, the trial court did not abuse its discretion by assigning greater relative value under *Crawley* to the work of plaintiff's counsel. Of course, these comparisons are moot based on our determination that plaintiff is not entitled to attorney fees under § 3148(1).

C. Trial Error

We reject defendant's claim that the trial court denied it a fair trial by imposing time constraints during the presentation of its defense. A trial court has broad discretion to control the conduct of a trial, including the mode, order, and manner of the examination and cross-examination of witness. MRE 611; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994). When defense counsel objected that the trial court's restrictions were preventing him from presenting a meaningful defense, the trial court responded that defense counsel consumed the great bulk of the time taken during plaintiff's case in chief by cross-examination, particularly through the use of videotapes. In essence, the trial court determined that the defense was beginning to present repetitive and redundant evidence, but would permit defense counsel to do so within time constraints. In light of the jury's verdict, we find defendant's claim of having been denied a fair trial to be utterly without foundation.

In summary, with respect to Docket No. 260454, we reject all of defendant's claims of trial error, except we vacate the directed verdict order of October 22, 2004. We reverse the award of attorney fees to plaintiff but affirm the award of attorney fees to defendant.

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[10] Plaintiff acknowledges that "a genuine and bona fide dispute" existed between the parties whether plaintiff's shoulder problems were related to the accident. Cross-appeal brief at 14-15.

II. Docket 261917

In Docket 261917, plaintiff and her husband Joseph Stoops sought underinsurance benefits from defendant arising out of the March 28, 1998 accident. Plaintiffs filed their complaint in Macomb circuit court on October 2, 2002. Plaintiffs alleged they settled a claim against the other driver for his insurer's $20,000 residual liability policy limits. Plaintiff Kristin Stoops sought compensation for injuries alleged to have been caused in the accident; plaintiff Joseph Stoops sought compensation for loss of consortium.

After the trial in the Wayne circuit court case, defendant moved to amend its answer and affirmative defenses to plaintiffs' complaint. This motion was based on information defendant learned through discovery, including the depositions of Amber Baker, Kristin Stoops, Joseph Stoops, and Brian Hazelwood, a representative of the receipt book manufacturer. Defendant sought to assert the following policy condition of its business auto insurance policy:

> **2. CONCEALMENT, MISREPRESENTATION, OR FRAUD**
>
> This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured," at any time, intentionally conceal or misrepresent a material fact concerning:
>
> a. This Coverage Form;
>
> b. The covered "auto";
>
> c. Your interest in the covered "auto"; or
>
> d. A claim under this Coverage Form.

The trial court granted defendant's motion on September 27, 2004. Defendant alleged in its amended affirmative defenses that forfeiture occurred because plaintiffs misrepresented the following material facts during the no-fault benefits claim: (1) submitted checks to defendant as evidence of payment to Amber Baker that plaintiffs knew had never been cashed, (2) presented receipts as purported evidence of payment to Amber Baker, (3) Joseph Stoops testified that the receipts were prepared contemporaneous with payment to Amber Baker in 2001, and produced a receipt book as corroboration, and (4) presentation of claims for attendant care that were not performed.

As already noted, plaintiffs moved for partial summary disposition on defendant's affirmative defense on October 27, 2004. Plaintiffs asserted that the October 22, 2004 order granting plaintiff a directed verdict in the Wayne circuit court case barred defendant's affirmative defense under principles of res judicata or collateral estoppel. On December 6, 2004, the trial court heard the motion and denied it, finding that the Wayne circuit court did not render a ruling on fraud that would bar defendant's affirmative defense.

Subsequently, plaintiffs moved for reconsideration and defendant moved for summary disposition on the basis of its affirmative defense, submitting evidence gathered through trial and discovery in the Wayne circuit court case. The trial court ruled on these motions in an opinion

and order issued February 25, 2005. First, the trial court denied plaintiffs' motion for reconsideration. The court reviewed both the transcripts of the proceedings in Wayne circuit court and also that court's November 12, 2004 order declining to rule whether the no-fault claim was in some respects fraudulent. The court ruled that the Wayne judge reached no definitive conclusion on the issue. So, plaintiffs' failed to demonstrate palpable error. MCR 2.119(F)(3).

With respect to defendant's motion for summary disposition brought under MCR 2.116(C)(8) and (C)(10), the trial court recognized that defendant did not attack the validity of plaintiffs' claim for underinsurance benefits but rather asserted a once valid claim no longer existed. "An affirmative defense . . . accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but . . . denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Accordingly, the trial court correctly determined that defendant's motion could properly be analyzed under MCR 2.116(C)(10). Ultimately, the trial court determined on the basis of the evidence submitted by the parties that reasonable factfinders could only conclude that plaintiffs misrepresented material facts regarding the claim for attendant care benefits, and granted defendant's motion.

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. Like the trial court, we must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id.* at 120-121. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, and may not rest upon mere allegations or denials in the pleadings. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Granting summary disposition is proper under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

Plaintiffs argue that the trial court erred because genuine and material issues of disputed fact remain for trial. We disagree.

First, we reject plaintiffs' argument that the October 22, 2004 directed verdict order barred defendant's affirmative defense on the basis of res judicata for the reason the issue was never decided in the no-fault case. Further, by this opinion we have vacated that order.

Next, we reject plaintiffs' argument that defendant must satisfy a burden of proof higher than the preponderance of the evidence because fraud is alleged. See *Mina v General Star Indemnity Co,* 218 Mich App 678, 685; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866; 568 NW2d 80 (1997). To void an insurance policy on the basis of intentional misrepresentation of a material fact, "an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made

or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it." *Id.* at 686. "A statement is material if it is reasonably relevant to the insurer's investigation of a claim." *Id.*

In essence, plaintiffs contend that viewing the evidence submitted to the trial court in the light most favorable to them, Kristin Stoops was unaware of the fraud being perpetrated behind her back by her husband Joseph Stoops, who did not want checks to be written on his wife's personal checking account because it was really his business account. Thus, plaintiffs argue, there is no evidence Kristin Stoops ever knowingly made a false representation to defendant. Plaintiffs also argue that defendant did not rely, nor was it harmed any false representation. According to plaintiffs, based on Baker's and their testimony, Baker provided services that plaintiffs paid for, albeit in a convoluted, non-business-like manner. For the trial court to conclude otherwise, plaintiffs assert, it must have engaged in fact finding based on weighting credibility. Thus, plaintiffs argue the trial court must be reversed.

Plaintiffs correctly note that a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Moreover, this Court will liberally find the existence of a genuine issue of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). But, plaintiffs' argument misses the mark. First, the issue in this case is not whether Baker provided services to Kristin Stoops, nor whether the Stoops paid for Baker's services, nor even whether defendant paid for no-fault benefits to which Kristin Stoops was not entitled. Those were issues resolved in the Wayne circuit court case. Second, the material question in this case is whether any "insured" under defendant's business auto insurance policy, either Kristen Stoops or Joseph Stoops, "at any time, intentionally conceal[ed] or misrepresent[ed] a material fact concerning . . . [a] claim" under the policy. The plain language of this policy condition does not require that defendant have actually paid a fraudulent claim. See *Mina, supra* at 686. The issue then on defendant's motion for summary disposition on its affirmative defense is whether defendant produced admissible evidence from which reasonable minds could only conclude that the answer to the above question is "yes." If so, the policy condition must be enforced as written. See *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) ("[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written."); See, also, *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 531-532; 620 NW2d 840 (2001) (uninsured-motorist coverage is neither required by statute, nor contrary to the no-fault act).

Here, it is undisputed that Kristin Stoops submitted copies of checks to defendant as evidence of payment for attendant care services. It is also undisputed that the checks were drawn on a personal checking account in Kristin Stoops name and never cleared the bank on which they were drawn. Accepting plaintiffs' story about the checks as being true, the checks were still false evidence of payment for the alleged attendant care expenses. From Kristin Stoops own deposition testimony, it is clear that at some point she knew these checks were false evidence. Further, from plaintiff Joseph Stoops own testimony, he at all times knew the checks were false evidence. Yet, both plaintiffs concealed the truth about the checks from defendant until confronted with bank records to the contrary at their depositions. Moreover, Joseph Stoops admitted that he manufactured false evidence of the alleged cash payment for attendant care benefits in the form of purported 2001 receipts. From this admissible evidence reasonable minds

could not differ, even when viewing the evidence in the light most favorable to plaintiffs, that plaintiffs intentionally concealed or misrepresented material facts regarding a claim under defendant's business auto insurance policy. Thus, reasonable minds could only conclude that the general policy condition regarding concealment or misrepresentation voided the policy's underinsurance coverage. *West, supra* at 183; *Cohen, supra* at 532. Consequently, the trial court properly granted defendant summary disposition under MCR 2.116(C)(10).

III. Conclusion

With respect to Docket No. 260454, we vacate the directed verdict order of October 22, 2004. We reverse the award of attorney fees to plaintiff and affirm the award of attorney fees to defendant; we remand for entry of an amended judgment in accordance with this opinion. We do not retain jurisdiction.

We affirm in Docket No. 261917.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey

STATE OF MICHIGAN

COURT OF APPEALS

TAMIRA JONES,

Plaintiff-Appellee,

v

AUTO CLUB GROUP INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
August 23, 2005

No. 261089
Wayne Circuit Court
LC No. 03-310745

Before: Zahra, P.J., and Cavanagh and Owens, JJ

PER CURIAM.

Defendant appeals by leave granted from the circuit court's order granting plaintiff partial summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a pedestrian, was struck and injured by an automobile whose driver has never been identified. Plaintiff had a no-fault insurance policy with defendant which provided both no-fault personal protection insurance (PIP) coverage and uninsured-motorist coverage.

Plaintiff submitted a claim for PIP benefits after the accident. Defendant provided benefits, but later concluded that plaintiff had made several material misrepresentations in connection with her claim, involving her address, employment, health insurance, and the extent of the attendant care service her sister was providing.[1] Plaintiff subsequently submitted a claim for uninsured-motorist benefits. Defendant cited a concealment or fraud clause in the insurance policy, and denied the claim on the basis of the alleged misrepresentations made in connection with the PIP claim.

Plaintiff filed suit alleging breach of contract. Defendant responded that plaintiff's misrepresentations in connection with her PIP claim voided the uninsured-motorist coverage. Plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(9) on the ground that

[1] The truth of these allegations was not determined below, and does not bear on our analysis.

no misrepresentations connected with her claim for PIP benefits afforded a basis for denying benefits in connection with the claim for uninsured-motorist benefits. The trial court granted plaintiff's motion, but stayed proceedings pending defendant's appeal.

Interpretation of an insurance contract poses a question of law subject to review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

This case concerns the following provision:

> This entire Policy is void if an **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> a. this insurance;
>
> b. the Application for it.
>
> **We** do not provide coverage for any **insured person** if an **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to a claim for which coverage is sought under this Policy. [Bold in original.]

A fraud and concealment provision can void uninsured-motorist coverage where the fraud or concealment took place in connection with a claim for no-fault PIP benefits under the policy. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 526-527, 532; 620 NW2d 840 (2001). In the instant case, the trial court acknowledged *Cohen*, *supra*, but noted that the language in the two policies differed somewhat, and concluded that *Cohen*, *supra*, was not controlling. The provision in *Cohen*, *supra*, read as follows:

> This entire Policy is void if an insured person has intentionally concealed or misrepresented any material fact or circumstances relating to:
>
> a. this insurance;
>
> b. the Application for it;
>
> c. or any claim made under it. [*Cohen, supra* at 527 (internal quotations marks omitted).]

The trial court emphasized that the provision in the instant policy says "under this policy," apparently in contrast to the reference in *Cohen*, *supra*, to the insurance in general or any clam made under it. The trial court concluded, "when [plaintiff] made her [uninsured-motorist] claim, that's not under this policy, and that's the problem."

We reverse and remand. We conclude that the operative words in this case are indistinguishable from the operative words in *Cohen*, *supra*, and that the decision in that case is controlling. Plaintiff's argument that the exclusion in the instant policy applies to only the

specific claim in connection with which the misrepresentations were offered is strained. The language refers to misrepresentations "relating to *a* claim for which coverage is sought under this Policy" (emphasis added). Had the exclusion referred to "the claim," instead of "a claim," plaintiff's argument would have merit. But the choice of the indefinite article cannot be ignored. See *Hagerman v Gencorp Automotive*, 457 Mich 720, 728-729; 579 NW2d 347 (1998) ("the" refers to a specific object, while "a" means "one" or "any"). By use of the indefinite article, the contract affords defendant the broadest protections in response to any material misrepresentation or omission in connection with any claim under the policy.

As was the case in *Cohen*, *supra*, this case concerns not statutorily mandated no-fault provisions, but optional uninsured-motorist coverage. Accordingly, we determine that the exclusion in question applies fully to plaintiff's uninsured-motorist claim, without concerning ourselves with its applicability to a no-fault claim. See *Cohen, supra* at 532.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

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CASE

Judicial Officer	Date Filed	Adjudication	Status
DONAHUE, JOHN	10/9/14	SUMMARY DISPOSITION 3/14/17	CLOSED 3/29/17
JURY DEMAND			

PARTICIPANTS

PLAINTIFF 1	MEEMIC INSURANCE COMPANY	FILED: 10/9/14
	ATTY: ROBB S. KRUEGER # 66115 PRIMARY RETAINED	
DEFENDANT 1	FORTSON, LOUISE M	FILED: 10/9/14
	ATTY: ROBERT J. CHASNIS # 36578 PRIMARY RETAINED	
DEFENDANT 2	FORTSON, RICHARD A	FILED: 10/9/14
	ATTY: ROBERT J. CHASNIS # 36578 PRIMARY RETAINED	
DEFENDANT 3	FORTSON, JUSTIN	FILED: 10/9/14
	ATTY: ROBERT J. CHASNIS # 36578 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
CASE	$18.00	$18.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
PTF 1 MEEMIC INSURANCE COMPANY	$295.00	$295.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
DEF 1 LOUISE M FORTSON	$85.00	$85.00	$0.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
10/9/14	SUMMONS AND COMPLAINT	$150.00	d1m d1m	10/9/14 10/9/14
	PTF 1			
	DEF 1			
	DEF 2			
	DEF 3			
10/9/14	JUDICIAL OFFICER ASSIGNED TO DONAHUE, JOHN 38669		d1m	10/9/14
10/9/14	RECEIVABLE CIVIL FILING FEE-STATE	$119.00	d1m	10/9/14
10/9/14	RECEIVABLE CIVIL FILING FEE-COUNTY	$31.00	d1m	10/9/14
10/9/14	JURY DEMAND	$85.00	d1m d1m	10/9/14 10/9/14
	PTF 1			
10/9/14	RECEIVABLE JURY DEMAND - STATE	$60.00	d1m	10/9/14
10/9/14	RECEIVABLE JURY DEMAND-COUNTY	$25.00	d1m	10/9/14
10/9/14	PAYMENT	$235.00	d1m	10/9/14
	RECEIPT NUMBER: SJCLK.0002375			
	METHOD: CHECK $235.00			
11/13/14	AMENDED COMPLAINT FIRST AMENDED		d3s	11/13/14

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Activity Date	Activity		User	Entry Date
	PTF 1			
12/19/14	ANSWER, CIVIL TO PLTFS FIRST AMENDED COMPLAINT AND COUNTER COMPLAINT AND DEMAND FOR JURY TRIAL WITH PROOF OF SERVICE		d3s d3s	12/23/14 12/23/14
	DEF 1			
	DEF 2			
	DEF 3			
1/13/15	ANSWER, CIVIL PLTFS/COUNTER DEFTS ANSWER TO DEFT/COUNTER PLTFS COUNTER-CLAIM FOR PERSONAL INJURY PROTECTION BENEFITS AND PROOF OF SERVICE		d3s	1/14/15
	PTF 1			
1/27/15	CASE MANAGEMENT SCHEDULING ORDER POM		cdk	1/27/15
	PTF 1			
	DEF 1			
	DEF 2			
	DEF 3			
1/27/15	SETTLEMENT CONFERENCE	CANCELLED 1/25/16 9:30 A	cdk	1/27/15
1/27/15	JURY TRIAL 4 DAY	CANCELLED 2/23/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 2/24/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 2/25/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 2/26/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 3/1/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 3/2/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 3/3/16 8:30 A	cdk	1/27/15
	LOC: 307			
1/27/15	JURY TRIAL 4 DAY	CANCELLED 3/4/16 8:30 A	cdk	1/27/15
	LOC: 307			
2/12/15	NOTICE OF TAKING DEPOSITION OF JUSTIN FORTSON AND PROOF OF SERVICE		d3s	2/12/15
3/3/15	STIPULATION AND ORDER RE: JOINT SETTLEMENT PLAN		d3s	3/5/15
3/6/15	REQUEST FOR ADMISSION FORTSON'S FIRST REQUESTS TO MEEMIC INS CO AND NOTICE OF SERVING		d3s	3/6/15
	DEF 1			
	DEF 2			
3/11/15	PROOF OF SERVICE		d3s	3/11/15
3/31/15	ANSWER, CIVIL TO REQUESTS FOR ADMISSIONS, INTERROGATORIES AND PRODUCTION OF DOCUMENTS WITH PROOF OF SERVICE		d3s	4/1/15
	PTF 1			
4/8/15	MT SUMMARY DISPOSITION	RESCHEDULED 5/26/15 2:45 P	cdk	4/8/15
	LOC: 307			
4/13/15	MOTION FOR SUMMARY DISPOSITION	$20.00	d3s d3s	4/13/15 4/13/15

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Activity Date	Activity		User	Entry Date
	PTF 1			
4/13/15	RECEIVABLE MOTION FEE-COUNTY	$10.00	d3s	4/13/15
4/13/15	RECEIVABLE MOTION FEE-STATE	$10.00	d3s	4/13/15
4/13/15	PAYMENT	$20.00	d3s	4/13/15
	RECEIPT NUMBER: SJCVL.0003563			
	METHOD: CHECK $20.00			
4/13/15	BRIEF FILED WITH NOTICE OF HEARING AND PROOF OF SERVICE		d3s	4/13/15
	PTF 1			
4/20/15	WITNESS LIST AND PROOF OF SERVICE		d3s	4/22/15
	PTF 1			
4/23/15	NOTICE OF HEARING RE NOTICE AND PROOF OF SERVICE		d3s	4/23/15
4/27/15	WITNESS LIST AND EXHIBIT LIST WITH PROOF OF SERVICE		d3s	4/28/15
	DEF 1			
	DEF 2			
	DEF 3			
4/29/15	MT SUMMARY DISPOSITION 5/26/15 2:45 PM		cdk	4/29/15
	RESCHEDULED TO: 6/8/15 9:45 AM			
	REQUESTED BY PLAINTIFF/ATTORNEY			
4/29/15	MT SUMMARY DISPOSITION	RESCHEDULED 6/8/15 9:45 A	cdk	4/29/15
	LOC: 307			
5/7/15	NOTICE OF TAKING DEPOSITION OF RAY GOTTSHALL AND PROOF OF SERVICE		d3s	5/7/15
5/7/15	NOTICE OF TAKING DEPOSITION OF MEREDITH VALKO WITH PROOF OF SERVICE		d3s	5/7/15
5/8/15	APPEARANCE		d3s	5/8/15
	DEF 1			
	DEF 2			
	DEF 3			
5/12/15	MT SUMMARY DISPOSITION 6/8/15 9:45 AM		cdk	5/12/15
	RESCHEDULED TO: 7/20/15 2:00 PM			
	REQUESTED BY PLAINTIFF/ATTORNEY			
5/12/15	MT SUMMARY DISPOSITION	CANCELLED 7/20/15 2:00 P	cdk	5/12/15
	LOC: 307			
5/15/15	NOTICE OF HEARING		d1m	5/15/15
5/15/15	PROOF OF SERVICE		d1m	5/15/15
5/18/15	NOTICE OF TAKING DEPOSITION RE: CYNTHIA TEMPLE AND PROOF OF SERVICE		d3s	5/20/15
5/22/15	NOTICE OF TAKING DEPOSITION RE-NOTICE REGARDING MEREDITH VALKO AND PROOF OF SERVICE		d3s	5/22/15
5/22/15	NOTICE OF TAKING DEPOSITION RE: RAY GOTTSHALL WITH PROOF OF SERVICE		d3s	5/22/15
6/1/15	EXPERT WITNESS LIST PLTF COUNTER DEFTS POTENTIAL EXPERT WITNESS LIST AND PROOF OF SERVICE		d3s	6/3/15
	PTF 1			
6/3/15	NOTICE OF SERVING AND PROOF OF SERVICE		d3s	6/3/15
	DEF 1			
	DEF 2			

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Activity Date	Activity		User	Entry Date
	DEF 3			
7/9/15	MT SUMMARY DISPOSITION 7/20/15 2:00 PM CANCELLED STIPULATION TO ADJOURN plaintiff atty to renotice		kaw	7/9/15
7/9/15	MT SUMMARY DISPOSITION LOC: 307	RESCHEDULED 8/17/15 2:45 P	kaw	7/9/15
7/13/15	NOTICE OF HEARING RE NOTICE AND PROOF OF SERVICE		d3s	7/14/15
7/29/15	ORDER CASE EVALUATION NTOICE AND ORDER WITH PROOF OF SERVICE		d3s	7/30/15
8/7/15	MOTION FOR SUMMARY DISPOSITION RESPONSE TO PLTFS MOTION FOR SUMMARY DISPOSITION AND REQUEST FOR SUMMARY DISPOSITION IN FAVOR OF DEFTS/COUNTER PLTFS W/PROOF OF SERVICE DEF 1 DEF 2 DEF 3	$20.00	d3s d3s	8/7/15 8/7/15
8/7/15	RECEIVABLE MOTION FEE-COUNTY	$10.00	d3s	8/7/15
8/7/15	RECEIVABLE MOTION FEE-STATE	$10.00	d3s	8/7/15
8/7/15	PAYMENT RECEIPT NUMBER: SJCVL.0003879 METHOD: CHECK $20.00	$20.00	d3s	8/7/15
8/7/15	BRIEF FILED WITH PROOF OF SERVICE DEF 1 DEF 2 DEF 3		d3s	8/7/15
8/13/15	BRIEF FILED PLTFS/COUNTER DEFT MEEMIC INS CO REPLY BRIEF AND PROOF OF SERVICE PTF 1		d3s	8/13/15
8/17/15	BENCHED FILED DEPOSITION OF HEATHER MCKIE AND RACHAEL RATZ		d3s	8/17/15
8/17/15	MT SUMMARY DISPOSITION HELD GRANTED		d1m	8/17/15
8/24/15	MEDIATION STATUS REPORT		d3s	8/25/15
8/26/15	MOTION TO APPROVE SETTLEMENT LOC: 307	CANCELLED 9/14/15 2:00 P	kaw	8/26/15
9/3/15	MOTION FOR APPROVAL OF PROPOSED SETTLEMENT AND PROOF OF SERVICE DEF 1 DEF 2 DEF 3	$20.00	d3s d3s	9/3/15 9/3/15
9/3/15	RECEIVABLE MOTION FEE-COUNTY	$10.00	d3s	9/3/15
9/3/15	RECEIVABLE MOTION FEE-STATE	$10.00	d3s	9/3/15
9/3/15	PAYMENT RECEIPT NUMBER: SJCVL.0003980 METHOD: CHECK $20.00	$20.00	d3s	9/3/15

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Activity Date	Activity	User	Entry Date
9/3/15	NOTICE OF HEARING AND PROOF OF SERVICE	d3s	9/3/15
9/10/15	MOTION 9/14/15 2:00 PM CANCELLED ADJOURNED WITHOUT A DATE	kaw	9/10/15
9/10/15	MOTION TO APPROVE SETTLEMENT CANCELLED 10/12/15 2:00 P LOC: 307	kaw	9/10/15
9/14/15	NOTICE OF HEARING RE NOTICE AND PROOF OF SERVICE	d3s	9/14/15
10/5/15	MOTION 10/12/15 2:00 PM CANCELLED ADJOURNED WITHOUT A DATE	kaw	10/5/15
10/23/15	NOTICE OF INDEPENDENT MEDICAL EXAMINATION OF JUSTIN FORTSON AND PROOF OF SERVICE PTF 1	d3s	10/23/15
1/7/16	TELEPHONE CONFERENCE 989-793-8300 CHASNIS / 269-330-5712 KRUEGER SET 1/12/16 10:30 A	kaw	1/7/16
1/12/16	SETTLEMENT CONFERENCE 1/25/16 9:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 3/4/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 3/3/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 3/2/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 3/1/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 2/26/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 2/25/16 8:30 AM CANCELLED ADJOURNED WITHOUT A DATE as a result of the telephone conference on 01-12-16	kaw	1/12/16
1/12/16	JURY TRIAL 2/24/16 8:30 AM CANCELLED	kaw	1/12/16

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Activity Date	Activity		User	Entry Date
	ADJOURNED WITHOUT A DATE			
	as a result of the telephone conference on 01-12-16			
1/12/16	JURY TRIAL 2/23/16 8:30 AM		kaw	1/12/16
	CANCELLED			
	ADJOURNED WITHOUT A DATE			
	as a result of the telephone conference on 01-12-16			
1/12/16	TELEPHONE CONFERENCE 1/12/16 10:30 AM		kaw	1/12/16
	HELD			
1/21/16	SETTLEMENT CONFERENCE	SET 5/2/16 3:30 P	kaw	1/21/16
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/14/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/15/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/16/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/17/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/21/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/22/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/23/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	JURY TRIAL 4 DAY	CANCELLED 6/24/16 8:30 A	kaw	1/21/16
	LOC: 307			
1/21/16	STIPULATION AND ORDER TO ADJOURN TRIAL AND SETTLEMENT CONFERENCE		d3s	1/22/16
1/21/16	ORDER NOTICE OF HEARING WITH CERTIFICATE OF SERVICE		d3s	1/22/16
1/22/16	NOTICE OF HEARING POM		kaw	1/22/16
	PTF 1			
	DEF 1			
	DEF 2			
	DEF 3			
1/27/16	PROOF OF SERVICE		d1m	1/27/16
2/3/16	NOTICE OF TAKING DEPOSITION OF DR. KENNETH ADAMS AND PROOF OF SERVICE		d3s	2/4/16
2/10/16	NOTICE OF TAKING DEPOSITION RE NOTICE OF TAKING DEPOSITION OF DR. KENNETH ADAMS WITH PROOF OF SERVICE		d3s	2/12/16
4/29/16	PROOF OF SERVICE		d3s	4/29/16
4/29/16	SUBPOENA UPON MEREDITH VALKO		d3s	4/29/16
	DEF 1			
5/2/16	SETTLEMENT CONFERENCE	CANCELLED 6/20/16 10:00 A	kaw	5/3/16
	LOC: 307			
	PTF 1			
	DEF 1			

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Activity Date	Activity	User	Entry Date
	DEF 2		
	DEF 3		
5/3/16	SETTLEMENT CONFERENCE 5/2/16 3:30 PM	kaw	5/3/16
	HELD		
5/3/16	JURY TRIAL 6/24/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/23/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/22/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/21/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/17/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/16/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/15/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/3/16	JURY TRIAL 6/14/16 8:30 AM	kaw	5/3/16
	CANCELLED		
	ADJOURNED WITHOUT A DATE		
	per agreement at settlement conference		
5/6/16	ORDER RE: SETTLEMENT CONFERENCE	d3s	5/9/16
5/17/16	PROOF OF SERVICE	d3s	5/18/16
6/16/16	SETTLEMENT CONFERENCE 6/20/16 10:00 AM	dfl	6/16/16
	CANCELLED		
	OTHER		
	ATTORNEYS ARE NOW INVOLVED WITH THE STATE OF MI AND THIS SC WILL BE TOO EARLY TO DISCUSS WITH ALL ISSUES INVOLVED.		
6/17/16	SETTLEMENT CONFERENCE RESCHEDULED 7/18/16 11:30 A	dfl	6/17/16

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Activity Date	Activity		User	Entry Date
	LOC: 307			
6/20/16	NOTICE OF HEARING - SETTLEMENT CONFERENCE AND PROOF OF SERVICE		d3s	6/22/16
7/14/16	SETTLEMENT CONFERENCE 7/18/16 11:30 AM		dfl	7/14/16
	RESCHEDULED TO: 7/28/16 10:00 AM			
	OTHER			
	ATTORNEY REQUESTING MOVE TO JULY 28, 2016			
7/14/16	SETTLEMENT CONFERENCE	SET 7/28/16 10:00 A	dfl	7/14/16
	LOC: 307			
7/14/16	SCHEDULING CONFERENCE	SET 7/28/16 10:00 A	dfl	7/14/16
	LOC: 307			
7/18/16	MOTION FOR RECONSIDERATION PURUSANT TO MCR 2.119(F) AND PROOF OF SERVICE	$20.00	d3s d3s	7/18/16 7/18/16
	PTF 1			
7/18/16	RECEIVABLE MOTION FEE-COUNTY	$10.00	d3s	7/18/16
7/18/16	RECEIVABLE MOTION FEE-STATE	$10.00	d3s	7/18/16
7/18/16	PAYMENT	$20.00	d3s	7/18/16
	RECEIPT NUMBER: SJCVL.0004783			
	METHOD: CHECK $20.00			
7/18/16	BRIEF FILED WITH PROOF OF SERVICE AND NOTICE OF HEARING WITH PROOF OF SERVICE		d3s	7/18/16
	PTF 1			
7/26/16	RESPONSE TO PLTFS MOTION FOR RECONSIDERATION AND PROOF OF SERVICE		d3s	7/26/16
	DEF 1			
	DEF 2			
	DEF 3			
7/26/16	BRIEF FILED AND PROOF OF SERVICE		d3s	7/26/16
	DEF 1			
	DEF 2			
	DEF 3			
8/18/16	MT SUMMARY DISPOSITION 8/17/15 2:45 PM		dfl	8/18/16
	RESCHEDULED TO: 9/19/16 11:00 AM			
	REQUESTED BY PLAINTIFF/ATTORNEY			
8/18/16	MT SUMMARY DISPOSITION	SET 9/19/16 11:00 A	dfl	8/18/16
	LOC: 307			
8/22/16	MOTION FOR SUMMARY DISPOSITION (RENEWED)	$20.00	d1m d1m	8/22/16 8/22/16
	PTF 1			
8/22/16	RECEIVABLE MOTION FEE-COUNTY	$10.00	d1m	8/22/16
8/22/16	RECEIVABLE MOTION FEE-STATE	$10.00	d1m	8/22/16
8/22/16	PAYMENT	$20.00	d1m	8/22/16
	RECEIPT NUMBER: SJCLK.0004865			
	METHOD: CHECK $20.00			
8/22/16	NOTICE OF HEARING		d1m	8/22/16
	PTF 1			

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Activity Date	Activity		User	Entry Date
8/22/16	PROOF OF SERVICE		d1m	8/22/16
	PTF 1			
9/9/16	MOTION FOR SUMMARY DISPOSITION RESPONSE TO PLTF RENEWED MOTION FOR SUMMARY DISP, BRIEF IN SUPPORT, AND REQUEST FOR SUMMARY DISP. IN FAVOR OF DEFT/COUNTER	$20.00	d3s d3s	9/9/16 9/9/16
	DEF 1			
	DEF 2			
	DEF 3			
9/9/16	RECEIVABLE MOTION FEE-COUNTY	$10.00	d3s	9/9/16
9/9/16	RECEIVABLE MOTION FEE-STATE	$10.00	d3s	9/9/16
9/9/16	PAYMENT	$20.00	d3s	9/9/16
	RECEIPT NUMBER: SJCVL.0004966			
	METHOD: CHECK $20.00			
9/9/16	NOTICE OF HEARING AND PROOF OF SERVICE		d3s	9/9/16
9/19/16	MT SUMMARY DISPOSITION COURT TO ISSUE NOTICE OF ARGUMENT		d1m	10/4/16
	HELD			
10/11/16	RESPONSE TO SUPPLEMENTAL RESPONSE TO MEEMIC INS CO RENEWED MOTION FOR SUMMARY DISPOSITION, BRIEF IN SUPPORT W/PROOF OF SERVICE		d3s	10/11/16
	DEF 1			
	DEF 2			
	DEF 3			
10/19/16	BRIEF FILED SUPPLEMENT TO PLTF/COUNTER DEFT MEEMIC INS CO RENEWED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AND PROOF OF SERVICE		d3s	10/19/16
	PTF 1			
12/28/16	MOTION /ORAL ARGUMENT	SET 2/13/17 11:00 A	dfl	12/28/16
	LOC: 316			
12/29/16	ORDER NOTICE OF CONTINUED ORAL ARGUMENT WITH PROOF OF SERVICE		d3s	12/29/16
2/13/17	MOTION FOR SUMMARY DISPOSITIONS - PLTF'S MOTION GRANTED / ATTY KRUEGER TO PREPARE ORDER 2/13/17 11:00 AM		fellowsl01	6/13/17
	HELD			
3/7/17	NOTICE OF PRESENTMENT - 7 DAY AND PROOF OF SERVICE		d3s	3/7/17
3/14/17	ORDER GRANTING PLTF MEEMIC INS CO RENEWED MOTION FOR SUMMARY DISP AND DENYING DEFTS MOTION FOR SUMMARY DISPOSITION		d3s d3s	3/15/17 3/29/17
	PTF 1			
	DEF 1			
	DEF 2			
	DEF 3			
3/20/17	PROOF OF SERVICE		fellowsl01	3/21/17
3/22/17	RECEIVABLE CERTIFIED COPIES	$10.00	d3s	3/22/17
3/22/17	PAYMENT	$18.00	d3s	3/22/17
	RECEIPT NUMBER: SJCVL.0005506			
	METHOD: CHECK $18.00			
3/22/17	RECEIVABLE COPIES CIRCUIT COURT	$8.00	d3s	3/22/17
3/29/17	CLAIM OF APPEAL	$25.00	d3s d3s	3/29/17 3/29/17

STATE OF MICHIGAN BERRIEN COUNTY TRIAL COURT	REGISTER OF ACTIONS	CASE ID 14-000260-CK C/BCV/S	Public 8/14/2018 1:18:05 PM Page: 10 of 10

Activity Date	Activity		User	Entry Date
	DEF 1			
	DEF 2			
	DEF 3			
3/29/17	RECEIVABLE APPEALS FROM CIRCUIT COURT	$25.00	d3s	3/29/17
3/29/17	PAYMENT	$25.00	d3s	3/29/17
	RECEIPT NUMBER: SJCVL.0005531			
	METHOD: CHECK $25.00			
3/30/17	ORDER REGARDING TRANSMISSION OF EXHIBITS ON APPEAL		d3s	3/30/17
4/25/17	NOTICE OF FILING OF TRANSCRIPT AND AFFIDAVIT OF MAILING		d3s	4/25/17
4/25/17	REPORTER/RECORDER CERTIFICATE OF ORDERIG OF TRANSCRIPT ON APPEAL		d3s	4/25/17
4/25/17	TRANSCRIPT OF MOTION FOR SUMMARY DISPOSITION DATED 3/13/17		d3s	4/25/17
4/25/17	TRANSCRIPT OF MOTION FOR SUMMARY DISPOSITION DATED 8/17/15		d3s	4/25/17
4/25/17	TRANSCRIPT OF MOTION FOR SUMMARY DISPOSITION DATED 9/19/16		d3s	4/25/17
6/12/17	BRIEF FILED IN THE COURT OF APPEALS DEFT/COUNTER PLTFS BRIEF ON APPEAL WITH PROOF OF SERVICE		d3s	6/12/17
	DEF 1			
	DEF 2			
	DEF 3			
7/18/17	RECORD PRODUCTION CHECKLIST FOR COURT OF APPEALS		d3s	7/18/17
7/18/17	COMPLETE FILE SENT TO COURT OF APPEALS - GRAND RAPIDS		d3s	7/18/17
5/30/18	OPINION AND ORDER (FROM APPELLATE COURT) REVERSED AND REMAND FOR FUTHER PROCEEDINGS		d3s	6/1/18
5/30/18	OPINION AND ORDER (FROM APPELLATE COURT) FROM DISSENTING JUDGE CAMERON		d3s	6/1/18
7/16/18	ORDER FROM COURT OF APPEALS - MOTION FOR RECONSIDERATION IS DENIED		d3s	7/18/18

Case Search

Case Docket Number Search Results - 337728

Appellate Docket Sheet

COA Case Number: 337728

MEEMIC INSURANCE COMPANY V LOUISE M FORTSON

1	MEEMIC INSURANCE COMPANY Oral Argument: Y Timely: Y	PL-CD-AE	RET	(35475) **KRETER MARK E**
2	FORTSON LOUISE M Oral Argument: Y Timely: Y	DF-CP-AT	RET	(30709) **HARRISON JOSEPH S**
			CO	(36578) **CHASNIS ROBERT J**
3	FORTSON JUSTIN	ZZ	SAM	
4	FORTSON RICHARD A INDIVIDUALLY/CONSERVATOR	DF-CP-AT	SAM	

COA Status: Case Concluded; File Open

03/29/2017 1 Claim of Appeal - Civil
- Proof of Service Date: 03/28/2017
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Attorney: 30709 - HARRISON JOSEPH S

03/14/2017 2 Order Appealed From
- From: BERRIEN CIRCUIT COURT
- Case Number: 2014-000260-CK
- Trial Court Judge: 38669 DONAHUE JOHN M
- Nature of Case:
  - Summary Disposition Granted

03/29/2017 3 Transcript Requested By Atty Or Party
- Date: 03/27/2017
- Timely: Y
- Reporter: 3000 - REPORTER UNKNOWN
- Filed By Attorney: 30709 - HARRISON JOSEPH S
- Hearings:
  - 08/17/2015
  - 09/19/2016
  - 02/13/2017

04/04/2017 4 Appearance - Appellee
- Date: 03/31/2017
- For Party: 1 MEEMIC INSURANCE COMPANY PL-CD-AE
- Attorney: 35475 - KRETER MARK E

04/14/2017 5 Invol Dismissal Warning - No Steno Cert
- Attorney: 30709 - HARRISON JOSEPH S
- Due Date: 05/05/2017

04/19/2017 6 Docketing Statement MCR 7.204H
- For Party: 2 FORTSON LOUISE M DF-CP-AT
- Proof of Service Date: 04/18/2017

Filed By Attorney: 30709 - HARRISON JOSEPH S

04/20/2017 7 Steno Certificate - Tr Request Received
Date: 03/27/2017
Reporter: 5175 - O'BRIEN TRACY L
Hearings:
08/17/2015
09/19/2016
02/13/2017

04/20/2017 8 Transcript Not Taken By Steno
Date: 03/27/2017
Reporter: 3000 - REPORTER UNKNOWN
Hearings:
08/17/2015
09/19/2016
02/13/2017

04/20/2017 9 Notice Of Filing Transcript
Date: 04/18/2017
Reporter: 5175 - O'BRIEN TRACY L
Hearings:
08/17/2015
09/19/2016
02/13/2017

06/09/2017 10 Brief: Appellant
Proof of Service Date: 06/08/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 30709 - HARRISON JOSEPH S
For Party: 2 FORTSON LOUISE M DF-CP-AT

07/12/2017 11 Brief: Appellee
Proof of Service Date: 07/12/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 35475 - KRETER MARK E
For Party: 1 MEEMIC INSURANCE COMPANY PL-CD-AE

07/12/2017 12 Proof of Service - Generic
Date: 07/12/2017
For Party: 1 MEEMIC INSURANCE COMPANY PL-CD-AE
Attorney: 35475 - KRETER MARK E
Comments: for appellee's brief

07/13/2017 13 Noticed
Record: REQST
Mail Date: 07/14/2017

07/21/2017 14 Record Filed
Comments: FILE; 3 ACCO'D FILES OF LCT PLEADINGS; 3 TRNS

02/07/2018 24 Submitted on Case Call
District: G
Item #: 25
Panel: JEM,MJK,TCC

05/29/2018 33 Opinion - Authored - Published
View document in PDF format
Pages: 8

Panel: JEM,MJK,TCC
Author: MJK
Result: Reversed and Remanded

05/29/2018 34 Opinion - Dissenting
View document in PDF format
Pages: 6
Author: TCC

06/19/2018 36 Motion: Reconsideration of Opinion
Proof of Service Date: 06/19/2018
Filed By Attorney: 36578 - CHASNIS ROBERT J
For Party: 2 FORTSON LOUISE M DF-CP-AT
Fee Code: EPAY
Answer Due: 07/03/2018
Comments: Appendices not printed for filed but are linked to this entry.

06/27/2018 37 Answer - Reconsideration
Proof of Service Date: 06/26/2018
Event No: 36 Reconsideration of Opinion
For Party: 2 FORTSON LOUISE M DF-CP-AT
Filed By Attorney: 30709 - HARRISON JOSEPH S

07/10/2018 38 Submitted On Reconsideration Docket
Event: 36 Reconsideration of Opinion
District: C
Item #: 1

07/12/2018 39 Order: Reconsideration - Deny - Appeal Remains Closed
View document in PDF format
Event: 36 Reconsideration of Opinion
Panel: JEM,MJK,TCC
Attorney: 36578 - CHASNIS ROBERT J
Comments: TCC would GRANT the motion for reconsideration.

Case Listing Complete

Order

Michigan Supreme Court
Lansing, Michigan

May 22, 2019

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

158302

MEEMIC INSURANCE COMPANY,
Plaintiff/Counterdefendant-
Appellant,

v

SC: 158302
COA: 337728
Berrien CC: 2014-000260-CK

LOUISE M. FORTSON and RICHARD A. FORTSON, Individually and as Conservator for JUSTIN FORTSON,
Defendants/Counterplaintiffs-
Appellees.

_____/

On order of the Court, the application for leave to appeal the May 29, 2018 judgment of the Court of Appeals is considered, and it is GRANTED. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 22, 2019

Clerk

d0515

STATE OF MICHIGAN

COURT OF APPEALS

AURELIOUS ALSTON and JULIA ALSTON,

Plaintiffs-Appellees,

v

FLINT EMERGENCY PHYSICIANS, P.C., and DR. FEDEWA,

Defendants,

and

McLAREN GENERAL HOSPITAL,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 176065
LC No. 91-005873-NM

Before: Fitzgerald, P.J., and Corrigan and P.D. Houk,* JJ.

PER CURIAM.

In this medical malpractice action, defendant McLaren General Hospital appeals as of right from a jury verdict and monetary judgment in favor of plaintiffs. We affirm in part, reverse in part, and remand.

Plaintiff Aurelious Alston presented at McLaren General Hospital Emergency Room on March 18, 1990, with complaints of pain in his elbow. He was examined by Dr. Fedewa, the emergency physician on duty. Dr. Fedewa was a resident in training, in her third year of an emergency residency program. Dr. Fedewa sought a consultation with the hospital's orthopedic department. Dr. Keller, a first-year general surgical resident undertaking a rotation in the orthopedic department, examined Mr. Alston. Dr. Keller then discussed Mr. Alston's condition with the senior orthopedic resident and the orthopedic surgeon on call. The surgeon on call formulated a discharge plan for Mr. Alston, which was related by Dr. Keller to Dr. Fedewa.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Mr. Alston returned to the emergency room the next day and was admitted into the hospital's intensive care unit because of an infection in his right arm. The infection resulted in the amputation of Mr. Alston's right arm.

Plaintiffs filed this medical malpractice action against Flint Emergency Physicians, P.C., Dr. Fedewa, and McLaren Hospital. Following a hearing on defendant's motion for summary disposition, the trial court determined that Dr. Kwiatowski could not testify to the local standard of care of emergency room residents and, therefore, dismissed the action against Dr. Fedewa and her employer, Flint Emergency Physicians, P.C. The court held, however, that Dr. Kwiatowski's testimony as it related to the operation of an emergency room was admissible. The court's ruling limited Dr. Kwiatowski's testimony to the standard of care with respect to the operation of an emergency department.

Using a special verdict form, the jury found that the hospital was negligent in its treatment of Mr. Alston and that the hospital's negligence was the proximate cause of Mr. Alston's injuries. The jury awarded $1,500,000 to Mr. Alston, and $500,000 to Mrs. Alston on her claim of loss of consortium.

Defendants first claim that the trial court abused its discretion in permitting Dr. Kwiatowski, an emergency medicine specialist from New York, to offer expert testimony regarding the operation of an emergency room. We disagree. Dr. Kwiatowski testified to the judge's satisfaction regarding his qualifications and familiarity with the standard of care for emergency rooms. He testified that he was familiar with the standard of care applicable to emergency rooms on the basis of his own education, practice, and development and running of an emergency medicine residency program. Dr. Kwiatowski also testified that he visited many hospitals in Southeastern Michigan and has had numerous specific discussions with emergency room physicians in Michigan regarding standards of practice. He has also had ongoing exposure to the health care system in Michigan, and indicated that the standard of care in Flint is similar to the standard of care in New York City. Thus, the trial court did not abuse its discretion in finding that Dr. Kwiatowski was qualified to testify regarding the standard of care applicable to emergency rooms. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141-142; 528 NW2d 170 (1995); *Turbin v Graesser (On Remand)*, 214 Mich App 215; 542 NW2d 607 (1995).

Defendant contends, however, that because the trial court granted defendant's motion to limit the proofs to the allegations in the complaint, plaintiff should not have been allowed to argue that the hospital itself was negligent. Defendant also maintains that a hospital may be liable only if its agents are liable. We disagree.

The court instructed the jury on plaintiff's theory of recovery:

> When I use the words professional negligence or malpractice with respect to the Defendant's conduct, I mean the failure to do something which a hospital through its agents in an emergency room failed to do in this community, or a similar one would do,

> or the doing of something which a hospital or its agents would not do under the same or similar circumstances you would find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the ordinary hospital acting through its agents would do or would not do under the same or similar circumstances.

First, defendant acceded to the jury instructions, which allowed the finding of fault for the "doing of something which a hospital *or* its agents would not do." Dr. Kwiatowski's expert testimony helped define the hospital's duty. *Wilson v Stillwill*, 411 Mich 587, 610-611; 309 NW2d 898 (1981). Second, there is no indication in the record that defendant objected to the jury form, which allowed a finding of negligence against the hospital itself as a defendant. Finally, despite the court's ruling that plaintiffs could present evidence only on the allegations in the complaint, the proofs and instructions placed the question of the hospital's negligence before the jury. When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. MCR 2.118(C)(1).

Defendant next contends that the trial court abused its discretion in admitting Dr. Kwiatowski's testimony regarding Dr. Fedewa, who had been dismissed from the case. A review of Dr. Kwiatowski's testimony, however, reveals that Dr. Kwiatowski was not particularly critical of Dr. Fedewa, but rather of the chain of command which left the physicians without guidance. Dr. Kwiatowski's primary criticism of defendant's conduct was that Mr. Alston should have been admitted to the hospital, and no one knew who was accountable for the decision to discharge. The evidence was relevant in that it tended to show that the hospital did not have a clearly defined structure for final treatment and subsequent discharge or admission of a patient. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). Contrary to defendant's suggestion, the testimony did not attempt to show that the hospital was vicariously liable for Dr. Fedewa's actions. Rather, the evidence showed that Dr. Fedewa conducted herself as she believed she should have. Therefore, the evidence, which was relevant to a material issue of whether the hospital breached a duty of care in the way it organized and administered the emergency room, was properly admitted.

The trial court also properly denied defendant's motion for partial summary disposition with regard to the claim of vicarious liability for the participation of Dr. Fedewa. The issue was not the vicarious liability of defendant, but whether defendant itself breached a duty of care in the manner in which it operated the emergency room.

Next, defendant asserts that the trial court abused its discretion in allowing plaintiff to cross-examine defendant's expert, Dr. Mangell, about Dr. Keller's failure to wear gloves while drawing fluid from Mr. Alston because defendant was not on notice that such testimony might be elicited.[1] Again, we disagree. On direct examination, Dr. Mangell testified that Dr. Keller did not breach a standard of care. On cross-examination, Dr. Mangell testified that emergency room physicians may not always wear gloves when draining or dressing a wound, but that it would be his choice that gloves be worn by

attending physicians. This testimony related to emergency room procedures and was relevant to the allegation that defendant owed a duty to establish rules and procedures to be followed in rendering care in the emergency room.

Defendant next cites twelve illustrative instances in the transcript that allegedly show the misconduct of plaintiff's counsel. Of the twelve, defense objections were sustained seven times. One objection was overruled. One question was withdrawn, and one led to a withdrawal based on improper recollection of prior testimony. Two of the citations refer to plaintiff's objections to defense examination of the witness, and one citation is to a remark in closing argument that was not challenged. Nonetheless, we have reviewed the comments to which defendant objects and find that the comments were either proper or had no effect on the verdict. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).

Defendant also argues that the trial court erroneously instructed the jury on loss of consortium. However, defendant did not object to the instruction and, indeed, acceded to the instructions as given. An appellate court is obligated to review only issues that are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A party waives review of jury instructions to which he accedes at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). We decline to disregard the issue preservation requirement because failure to review the issue would not result in manifest injustice. *Grant, supra* at 547.

Last, defendant maintains that the trial court erred in denying its motion for new trial or judgment notwithstanding the verdict or, in the alternative, motion for remittitur. The arguments raised by defendant with respect to the motion for new trial or JNOV have previously been addressed and do not warrant review.

In deciding a motion for remittitur, the "only consideration *expressly* authorized by [MCR] 2.611(E)(1)" is whether the award is supported by the evidence. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1989)(emphasis in original). A trial court should also examine a number of other factors, "such as whether the verdict was induced by bias or prejudice," but the inquiry should be limited to "*objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* (emphasis in original).

Here, the judge considered the evidence and concluded that the "catastrophic event" suffered by Mr. Alston justified the award of damages to Mr. Alston. We agree. The trial court did not, however, specifically address the $500,000 award to Mrs. Alston for loss of consortium. Loss of consortium includes loss of conjugal fellowship, companionship, services, and all other incidents of the marriage relationship. *Berryman v K Mart*, 193 Mich App 88, 94; 483 NW2d 642 (1992). The only testimony regarding the damages suffered by Mrs. Alston was that of Mr. Alston, who testified that Mrs. Alston has to do all the cooking and vacuuming and has to bring him his clothes and assist him in

getting dressed. The testimony shows that Mr. Alston is distressed by having to be cared for by Mrs. Alston, but there is no evidence that Mrs. Alston has suffered. The record in this case simply does not support an award of $500.000 to Mrs. Alston. Thus, we conclude that the trial court abused its discretion in denying the motion. *Palenkas, supra*. The case is remanded to the trial court for a rehearing on defendant's motion for remittitur with respect to Mrs. Alston's claim of loss of consortium in light of the scant evidence presented.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Peter D. Houk

[1] Defendant also suggests that Mr. Alston's children and grandchildren were improperly allowed to testify because they were not listed on the witness list. However, plaintiff's witness list indicates "family and friends." Further, defendant failed to preserve this issue with regard to the family by raising an objection at trial. *People v Barclay*, 208 Mich App 670, 673-674; 528 W2d 842 (1995).

STATE OF MICHIGAN
IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN
811 Port Street * St. Joseph, MI * 49085
(269) 983-7111

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

Case No.: 2014-260-CK

v

Hon. John M. Donahue

LOUISE M. FORTSON, and
RICHARD A. FORTSON, individually, and
RICHARD A. FORTSON, as Conservator for
JUSTIN FORTSON,

Defendants/Counter-Plaintiffs.

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Robb S. Krueger (P66115)
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PLAINTIFF/COUNTER-DEFENDANT MEEMIC INSURANCE COMPANY'S BRIEF IN SUPPORT

Q You're representing that you're providing 24-hour, around the clock, care to Justin?
A. Yes.

Q. And you're doing that truthfully and honestly?
A. Yes.

I. INTRODUCTION:

Subsequent to a motor-vehicle accident involving Defendant/Counter-Plaintiff Justin Fortson ("Justin") that resulted in extensive injuries, Plaintiff Counter-Defendant Meemic Insurance Company ("Meemic") paid allowable first party PIP benefits to Justin and his parents,

Louise M. Fortson ("Louise") and Richard A. Fortson ("Richard") (collectively, the "Fortsons"). Payments made by Meemic were predicated on information supplied by the Fortsons, averring without exception that services requiring compensation were actually being performed. PIP benefits payable to and sought by the Fortsons included payments for Justin's purported 24/7 care and monitoring. From approximately October 16, 2009 through the date of the Complaint, the Fortsons indicated to Meemic that *they were providing Justin with 24/7 attendant care every single day.* On at least one incident involving Justin's therapy, the Fortsons were told that they could not bill for time that he was with another party and Louise acknowledged this.

Contrary to the Fortsons' assertions, and sworn statements to Meemic concerning the same, providing round the clock attendant care was a ***factual impossibility***. Justin was both incarcerated for 233 days and participating in drug rehabilitation for another 78 days. Rather than notify Meemic, the Fortsons perpetuated a continual fraudulent scheme wherein they were paid for providing 24/7 attendant care, even when Justin was in jail or rehab. Plain language within the applicable insurance policy and supporting case law mandates one conclusion: the Fortsons' policy of insurance with Meemic is null and void; Meemic should not have any further responsibility towards making payments related to the treatment of Justin; and Meemic should be reimbursed for fraudulently obtained payments already made.

II. FACTUAL SUMMARY:

A. The Accident

Prior to the accident occurring on September 18, 2009, Justin had numerous pre-existing health conditions, including without limitation ADD, seizures, and a chronic liver condition (See **Exhibit A** – Meemic Medical Records). Reflective of his difficulty concentrating, Justin's grades in school and test scores were subpar (See **Exhibit B** – Academic Records). Poor decisions were also evident outside of the education context,

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One West Michigan
Battle Creek, MI
49017

specifically the circumstances surrounding his accident. On September 18, 2009, while riding on the hood of a vehicle, Justin fell-off when the vehicle suddenly turned (See **Exhibit C** – Lakeland Regional Discharge, p 1). Injuries resulting from the accident included a fractured skull, traumatic brain injury, and shoulder bruising. *Id.* Justin returned to his parents' home on October 16, 2009, where he has allegedly remained under the watch and care of his parents.

B. Post-Accident Treatment, Incarceration and Drug Rehabilitation

Justin's parents obtained a prescription for continuous 24/7 attendant care services that they represented they would provide. The Fortsons claimed that Justin's presence at the Fortsons' home was uninterrupted between 2009 and the present. Louise stated under oath, that other then Justin's rehabilitation stint, Justin has not spent one night outside of the home (See **Exhibit D** – EUO Transcript of Louise Fortson, p 31). Further, Louise claimed that either herself or her husband Richard have spent every night with Justin, providing 24/7 attendant care. *Id.* at 37. Care provided Justin included supervision, assistance with his medication, and transportation to medical appointments.

Allegedly the primary reason Justin requires 24/7 care is his tendency to occasionally suffer seizures. *Id.* at 15. As described by Louise, Justin will fall down and start jerking and twitching at a rate of approximately one time per day. *Id.* at 14. At his deposition, Justin also testified that he suffers near daily seizures (See **Exhibit E** – Deposition Transcript of Justin Fortson, p 7). Without minimizing Justin's condition, he has never been hospitalized as a result of his seizures and moreover the occurrence of seizures was lessened and controlled through prescription medication. *Id.* Records from Dr. Robert Ward ("Dr. Ward"), Justin's neurosurgeon, are also replete with examples of Justin admitting that he either skipped or stopped taking his seizure medication (See **Exhibit F** – Medical Records from Dr. Ward).

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Outside of his health issues, both Justin and his mother testified as to Justin's limited cognitive skills and difficulties with short-term memory. Justin's most common responses to questions posed in his deposition were "I don't know" or "I don't remember." *Id.* However, Justin's actions outside of the presence of his parents reflect a young man with far more capabilities then otherwise admitted. Review of Justin's Facebook postings evidences frequent outings with friends and even indications that Justin had been driving (See **Exhibit G** – Assorted Facebook Posts). Even more recent interactions make Justin's claims concerning his cognition less than credulous. On January 22, 2015, Justin was the passenger in his friend's vehicle when it was pulled over (See **Exhibit H** – Berrien County Sheriff Case Report, p 2). Justin was intoxicated and still had the wherewithal to attempt to provide false identification to the officer. *Id.* In violation of his probation, Justin was arrested and taken to Berrien County Jail. *Id.*

Justin's arrest on January 22, 2015 was far from his only run-in with the law. Despite the alleged "vigilance" of the Fortsons, Justin managed to repeatedly get himself into significant legal trouble. Criminal cases against Justin included convictions for possession of a controlled substance (methamphetamine), possession of narcotics (heroin), and retail fraud (See **Exhibit I** – Meemic Surveillance Report, p 3). The above recitation of criminal activity has resulted in Justin **going to jail on six separate occasions** subsequent to the date of his injury, including: 1) one day in September 2012; 2) five days in December 2012; 3) 78 days from December 2012 through March 2013; 4) nine days in April 2013; 5) 139 days from August 2013 through December 2013; and 6) one day in July of 2014. Despite purportedly being with Justin 24/7, for every day since October 16, 2009, Louise thought that Justin had only spent one night in jail "in Cassopolis because he was driving his car without a driver's license, but that was a long time ago." See Exhibit D, p 41.

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Battle Creek, MI
49017

Many of Justin's legal problems are drug related, a problem the Fortsons tried to address by sending Justin to Best Drug Rehabilitation ("Best Drug") to combat his heroin addiction. Initially admitted on August 13, 2014, Justin would remain at Best Drug for approximately six weeks, until September 29, 2014 (See **Exhibit J** – Best Drug Rehabilitation Daily Logs). Not coincidently, while in the care of Best Drug, there is no indication that Justin suffered one of his "daily" seizures. No health issues of any import were noted in Best Drug's records. The only issues present in the records from Best Drug are related to Justin's poor attitude. Michelle Lamb, a social worker assigned to Justin, repeatedly described Justin as manipulative:

> Justin continues to manipulate within the treatment venue to get what he wants, including sick passes and elevator passes, he is asked about this and he finds it humorous.
>
> Justin continues to manipulate, rationalize, and justify all of his actions; often he adds that his behaviors are secondary to his TBI.
>
> With a smirk he admits that the can comprehend when someone writes to him . . . and when asked if he manipulates situations so he does not have to do much, he does not deny.

(See **Exhibit K** – Clinical Progress Notes). Prior to his rehab in 2014, Justin had spent another month at a separate rehab facility, A Forever Recovery. See Exhibit D, p 31. **Justin's time at Best Drug, A Forever Recovery, and his previous incarceration mean that he was outside of his parents' presence for no less 310 days, or over ten months since October 16, 2009.** Days Justin was not under his parents' direct supervision are likely far greater than 310 days and Meemic intends to prove so with further discovery. Specifically, this calculation does not include the numerous references by Justin on Facebook that he is out getting new tattoos, traveling with his girlfriend to water parks and taking other unsupervised adventures. See **Exhibit G.**

Notwithstanding the foregoing, **payment for Justin's care has been sought every single day subsequent to Justin's accident**. Louise stated as much:

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Q. Has there ever been a day where you did not charge Meemic for 24/7 care since you started charging for attendant care?

A. No, because either I would be there or Richard would be there.

See Exhibit D, p 37. Louise's delusion and/or fraudulent convictions went one step further as she argued Justin was never outside the Fortsons' presence, *despite being confronted with evidence to the contrary*:

Q. **So one or two of you is always with Justin?**

A. **Always.**

Id. Justin, over the past nearly five years, has only been outside of the Fortsons' presence, according to Louise, when he walks down to "Dunkin Donuts, Subway, Wendy's, [or] McDonalds" all of which are within eyesight of the Fortsons' residence. *Id.* at 17.

Richard was at least truthful enough to admit that Justin was not always with the Fortsons, but nonetheless admitted that payment for attendant care services was sought even when Justin was in rehabilitation or jail:

Q. Is there a reason that you were submitting claims to Meemic when he's in rehab or he's in jail?

A. We were still responsible for him and everything.

(See **Exhibit L** – EUO Transcript of Richard Fortson, p 14). Even more galling, neither Richard, nor Louise, informed Meemic that Justin was incarcerated or in rehabilitation when they sought payment. *Id.* at 15.

Both Richard and Louise had to make a conscious and repeated decision to seek repayment from Meemic for time periods Justin was not in their care. Verification of care provided required that the Fortsons complete an Attendant Care Services Statement each month (the "Services Statement") (See **Exhibit M** – Attendant Care Services Statement). On the Services Statements, executed by either Louise or Richard, the Fortsons indicated that they

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provided Justin with 24/7 attendant care. *Id.* Meemic also indicated to Louise that in order to claim 24/7 care for supervision, Justin needed to be in the Fortsons' presence (See **Exhibit N** – Meemic Correspondence). Clearly marked on each Service Statement, is also a bold fraud warning above the signature line plainly indicating that insurance fraud is a felony. *Id.* Despite this warning, Service Statements were submitted each month, without interruption. See Exhibit E, p 37.

Meemic's liability to the Fortsons is predicated on Policy Number PAP0632676 (the "Policy"), wherein the Fortsons are named insureds (See **Exhibit O – Meemic Policy**). The Policy, under which Meemic is required to make payments for Justin's 24/7 attendant care, includes the following provision:

> **22. CONCEALMENT OR FRAUD**
>
> ***This entire Policy is void if any insured person had intentionally concealed or misrepresented any material fact or circumstance relating to:***
>
> **A.** This insurance;
>
> **B.** The Application for it;
>
> **C.** Or ***any claim made under it.***

Meemic now seeks to void the Policy based on the Fortsons' actions and the plain-language of the Policy.

III. STANDARD OF REVIEW:

Summary disposition is granted pursuant to MCR 2.116(C)(10) where there is no genuine issue as to any material fact. In making its decision under MCR 2.116(C)(10), a court must consider all pleadings, depositions, affidavits, admissions and other documentary evidence to determine whether the moving party is entitled to judgment as a matter of law. *Xu v Gay*, 257 Mich App 263, 266-267; 668 NW 2d 166 (2003). "[A] question of material fact exists when the

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record giving the benefit of reasonable doubt to the opposing party leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW 2d 468 (2003). When the evidence proffered fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999). A "mere pledge" to establish a material fact at some later time is not sufficient to overcome summary disposition. *Id.*

IV. LAW & ANALYSIS:

A. ATTENDANT CARE BENEFITS WERE NOT COMPENSABLE FOR THE TIME PERIODS WHEN JUSTIN WAS IN JAIL OR PARTICIPATING IN IN-PATIENT DRUG REHABILITATION.

The precipice issue for this Motion is whether the Fortsons could claim attendant care benefits even when Justin was in jail or drug rehab. Even assuming *arguendo* that Justin was prescribed 24/7, round-the-clock, attendant care for every day following the accident, payment of benefits is only permissible when 24/7, round-the-clock, attendant care is actually provided. Under no circumstance does the Michigan No-Fault Act contemplate a situation where payment of benefits must be made for services not provided. For the over 310 days that Justin was either in jail or in rehab, the Fortsons were not entitled to receive attendant care benefits. Additionally, when Justin was with his girlfriend alone or other parties, the Fortsons continued to claim reimbursement for attendant care benefits they did not provide.

Pursuant to MCL 500.3107(1)(a), compensable PIP benefits include "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Statutory language in MCL 500.3107(1)(a), was extensively addressed in the recent Michigan Supreme Court case of *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012). The particular facts of *Douglas* are that plaintiff was initially injured when his bicycle was struck

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by a motor-vehicle, requiring extensive hospitalization. *Id.* at 250. For approximately three years, defendant insurer paid PIP benefits, including for attendant care. *Id.* Plaintiff would not seek PIP benefits thereafter until the passage of nearly six years. *Id.* Compensation was sought in particular for attendant care services rendered by plaintiff's wife over those six years. *Id.* Following a bench trial, plaintiff was awarded over $1,000,000 in PIP benefits. On appeal to the Michigan Court of Appeals, the decision was upheld in part and reversed in part. *Id.* at 255.

Following the decision by the Michigan Court of Appeals, the Michigan Supreme Court granted leaved to consider the requirements of MCL 500.3107(1)(a), as they relate to compensation for allowable expenses, including attendant care. *Id.* at 259. After reviewing the statutory language and case law, the Michigan Supreme Court reversed the lower courts and remanded the case for consideration of certain evidentiary issues. *Id.* at 277. While the conclusion is important, the real value in the *Douglas* decision is the extensive analysis undertaken by the court of the requirements set-forth in MCL 500.3107(1)(a).

From the outset the court noted that

> the plain language of this provision imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable.

Id. at 259. As to the first requirement, "expenses for 'recovery' or 'rehabilitation' are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life." *Id.* at 259-60. While expenses for an "insured's care need not restore a person to his preinjury state, the services must be related to the insured's injuries to be considered allowable expenses." *Id.* at 260. **Examples of "ordinary and necessary services" that cannot be considered necessary for "an injured person's care, recovery, or rehabilitation" include**

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"daily organization of family life; preparation of family meals; yard, house, and car maintenance; and daily chores." *Id.* at 262.

In regards to the second requirement, in determining whether an expense is reasonably necessary "an objective standard" must be used. *Id.* at 265. An affidavit of a medical provider with corroborating testimony was sufficient to meet the objective standard in the case. *Id.* The third requirement mandating that "the expense must be incurred" was more extensively addressed. Consequently, **"even if a claimant can show that services were for his care and were reasonably necessary, an insurer is not obliged to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended."** *Id.* at 266-67 (emphasis in added). Delineating the level of proof required, the court noted

> Any insured who incurs charges for services must present proof of those charges in order to establish, by a preponderance of evidence, that he is entitled to PIP benefits.

Id. at 269-70 (internal citations omitted). In underscoring the importance of the proofs necessary to establish that charges were actually incurred the court stated **that just because a prescription is written for a specified time period of care, does not mean that care was actually provided for the entire time period.** *Id.* at 272. For example, anytime spent working outside of the home is not compensable. *Id.* There is no automatic payment pursuant to the prescription; rather the charge must actually be incurred.

The exhaustive review of MCL 500.3107(1)(a) by the court in *Douglas* is particularly informative in this case. Based on objective evidence, there is no genuine issue of material fact that PIP benefits were not payable for the time period of either Justin's rehabilitation or imprisonment. See *Douglas*, 492 Mich at 272. Types of services that qualify as attendant care, including supervision cannot be performed when no individual is present to supervise. When the

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Fortsons were pressed to explain what types of "attendant care" they provided Justin while he was not under their direct supervision, Richard stated they "talk to the lawyers" and Louise indicated they paid Justin's bills. See Exhibit L, p 14; Exhibit D, p 42. Services listed by Richard and Louise are activities of daily-life not compensable under the No-Fault Act. Meemic's payments to the Fortsons, based on the Fortsons' fraudulent conduct, were not required and should be fully reimbursed.

B. By Executing The Service Statements, The Fortsons Committed Fraud on Meemic, Therefore, Allowing Meemic To Terminate The Policy Under The Plain Language of The Policy.

Fraud in this instance is manifest. Louise and/or Richard submitted executed Service Statements on a continuous and uninterrupted basis, seeking payment for 24/7 care, even when they know that they were not providing 24/7 care. See Exhibit L, p 14; Exhibit D, p 37, 42; Exhibit M. Louise denied that Justin was ever confined in jail and Richard admitted that Meemic was never informed about Justin's confinement or overnight rehabilitation. See Exhibit L, p 15; Exhibit D, p 41. Based on the Fortson's unassailable fraud, Meemic is permitted to terminate the Policy and cease making any payments in the future to the Fortsons. See Exhibit O.

The elements of fraud and/or misrepresentation are well-established in Michigan requiring proof that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he knew that it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made the representation with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Mitchell v Dahlberg, 215 Mich App 718; 547 NW2d 74 (1996). Each element is present in this case. Both Richard and Louise represented to Meemic, via the executed Service Statements, that 24/7 attendant care was being provided Justin, even for time periods when Justin was either in

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jail or rehab. Representations concerning the 24/7 attendant were inarguably false when made and were made with knowledge of their falsity. Fraudulently documented Service Statements were then submitted to Meemic with the intent that Meemic would pay the Fortsons. Meemic relied on the Service Statements and its reliance was detrimental. No genuine issue of material fact exists regarding any element of the Fortsons' fraud.

Based on the Fortsons' established fraudulent conduct, Meemic is permitted to void the Policy under the plain language of the Policy. When language in an insurance policy is clear, "'courts are bound by the specific language set-forth in the agreement.'" *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995), quoting *Cottril v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2 179 (1960). Language in the Policy is clear that ***"[t]his entire Policy is void if any insured person had intentionally concealed or misrepresented any material fact or circumstance relating to . . . any claim made under it."*** See Exhibit O. Insured persons under the Policy include both Richard and Louise. *Id.* As well-established previously, Richard and/or Louise not only committed fraud in submitting certain Service Statements, but concealed from Meemic the fact that Justin was not under their direct supervision. See Exhibit L, p 14, 15; Exhibit D, p 37, 41-42; Exhibit M.

No credible argument can now be advanced to the contrary. Louise stated under oath that not one day has passed when Meemic was not being charged for attendant care because "either I would be there or Richard would be there." See Exhibit D, p 37. In reality, the Fortsons were not with Justin for over 300 days and still sought payments from Meemic. The scope and brazenness of the Fortsons' actions cannot be underestimated. Payments were sought for approximately 7,440 hours of "attendant care," during which time the Fortsons at most talked to Justin's lawyers and paid his bills. Further, the Service Statements plainly indicate that insurance fraud is a felony punishable by imprisonment or heavy fines. Even during days when

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Justin was not jailed or in rehab, the Fortsons' "supervision" was subpar, as evidenced by Justin's drug use and apparent ability to get intoxicated with friends.

C. MICHIGAN CASE LAW PERMITS AN INSURER TO VOID A POLICY WHEN FRAUDULENT CLAIMS ARE SUBMITTED IN SIMILAR FACT SCENARIOS TO THE PRESENT LITIGATION, EVEN IF BENEFITS HAVE ALREADY BEEN PAID TO A THIRD-PARTY.

Existing case law permits an insurer: to void a policy for ***uninsured*** motorist benefits based on fraudulently submitted claims; to void a policy after payments have already been made to a third party if there was ***fraud in the application*** for the insurance policy; and to ***refuse making payments*** under a policy based on fraudulently submitted claims. No case, however, appears to address whether an insurer can void a policy based on the fraudulent submission of claims, when statutory PIP benefits are involved. As a potential issue of first impression, however, no further genuine issues of material facts remain. The Policy language is clear and the Fortsons' actions are clear. Cancelling the Policy will be premised on this Court's interpretation of existing law. Any decision reached, however, must contemplate that a number of cases addressing similar scenarios permit insurers to void a policy, even after payments have already been made, and even if payments are made to a putative innocent third party.

i. Insurers Are Permitted To Void A Policy Based On A Fraudulent Claim For Uninsured or Underinsured Motorist Coverage

Case law on voiding an automobile insurance policy based on a fraudulent claim is limited. In *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 533; 620 NW2d 840 (2001), the Michigan Supreme Court reversed the intermediate appellate court's decision that defendant insurer could not void plaintiff's policy based on the fraudulent submission of a claim. Plaintiff was involved in an accident with an uninsured motorist. *Cohen v Auto Club Ins Ass'n*, 238 Mich App 602, 604; 606 NW2d 664 (1999), rev'd 463 Mich at 525 (2001). Subsequent to the accident,

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plaintiff submitted a form seeking wage-loss benefits and indicating that she had been terminated as a result of the underlying automobile accident. *Id.* However, plaintiff's employer signed an affidavit that plaintiff was in fact terminated prior to the accident. *Id.* Based on the employer's affidavit, defendant rejected the claim and voided the entire policy pursuant to an exception allowing the policy to be void "if the insured intentionally conceals or misrepresents facts relating to claims under the policy." *Id.* The Michigan Court of Appeals ruled that voiding the policy was impermissible, even though plaintiff undoubtedly committed fraud, because "[p]ublic policy prevents an automobile liability insurance policy from containing exclusions not specifically authorized by the Legislature." *Id.* at 608.

On appeal to the Michigan Supreme Court, the court noted that reliance on the statutory provisions found in the Financial Responsibility Act, MCL 257.501, was inappropriate because that statutory provision only applies to mandated coverage. *Cohen*, 463 Mich at 530. Because the benefits being sought by plaintiff were made pursuant to *optional* uninsured motorist coverage, and not mandated no-fault coverage, public policy considerations found in MCL 257.520(f)(1) were inapplicable. *Id.* With provisions of MCL 257.520(f)(1) being inapplicable, the plain language of the contractual provision controlled. *Id.* at 532. Therefore, the clause in question "can void uninsured motorist coverage." *Id.*

In *Cohen*, the larger question of whether the entire policy could be voided was left unanswered as the court held "[m]indful of the great protection that the Legislature and this Court have provided for the no-fault benefits required by statute, ***we need not decide today the full extent to which the disputed clause, if applicable, could void the policy.***" *Id.* As applied, therefore, the holding from *Cohen* is of limited utility. Meemic is attempting to void the *entire policy*, including statutory PIP benefits.

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ii. Insurers Are Permitted To Void A Policy Based On A Fraudulent Representation In The Application For Insurance

Aside from the holding from *Cohen*, one recent decision has greatly expanded an insurer's ability to void a policy based on fraud ***in the application*** for insurance. In *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), an insured misrepresented the fact that her license was suspended at the time an application for insurance was completed. *Id.* at 551. After the policy was then in effect, the insured's license was restored. *Id.* Thereafter, the insured was involved in a motor vehicle accident. *Id.* at 552. In anticipation of possible claims, the insurance company voided its policy for fraud in the application, a decision which the insured challenged in court. *Id.* at 553. The lower court agreed with the insured and on appeal, the appellate court held that "once an insurable event has occurred and a third party possesses a claim against an insured arising out of that event, an insurer is not entitled to reform the policy to the third-party's detriment when the fraud by the insured was easily ascertainable." *Id.*

The decision by the Michigan Court of Appeals, to uphold the trial court, and prevent the insurer from voiding the policy was then appealed to the Michigan Supreme Court. Upon consideration of the issue, the Michigan Supreme Court overruled both the trial court and intermediate appellate court. *Id.* Instead the court held that ***"an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party."*** *Id.* at 571.

Titan presents a far more interesting holding. In *Titan*, the insurer was permitted to void the entire policy based on fraud in the application, even when the fraud was ascertainable and the claimant was an innocent third party. Moreover, the benefits sought were statutory PIP benefits. The only difference between the fact scenario in this case and that of *Titan* is that *Titan* involved

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fraud in the application whereas this case involves fraud in submitting a claim. Even more concretely, the difference is one of timing – fraud prior to an accident and making a claim versus fraud subsequent to an accident and making a claim. Timing issues aside, *Titan* permits an insurer, like Meemic, to void an entire policy for fraud. Although of limited legal import, Justin is also far from an innocent third-party. Justin did nothing to dissuade Meemic's impression of his purported cognitive limitations during his deposition when answers given were either one word or "I don't know." Outside of the presence of Meemic's counsel and his parents, Justin has been described as manipulative, has given false information to police officers, and engages in other sorts of behavior, indicating Justin's understanding of moral choices. See Exhibit E; Exhibit G; Exhibit H; Exhibit K.

iii. Insurers Are Permitted To Deny Coverage For Fraudulent Claims

Even more supportive of Meemic's position is another very recent case reaffirming an insurer's ability to ***deny*** PIP benefits to an insured that fraudulently submits a claim. In *Bahri v IDS Property Casualty Ins Co*, No. 316869, 2014 WL 5066518 (Mich Ct App Oct 9, 2014) (approved for publication Dec 9, 2014) (See **Exhibit P** – *Bhari* Opinion), plaintiff was involved in an automobile accident on October 20, 2011. Subsequent to the accident,

> plaintiff sought PIP and uninsured motorist benefits from defendant. With respect to replacement services, plaintiff submitted to defendant "Household Services Statements" which indicated that multiple replacement services were provided daily to plaintiff from October 2011 through February 29, 2012. The document indicates that plaintiff was receiving replacement services for the entire month of October. However, **surveillance video during this time period captured plaintiff bending, lifting, driving, and running errands.**

In relevant part, defendant denied plaintiff's request for PIP benefits, prompting plaintiff to file a lawsuit. Prior to trial, defendant successfully filed a motion for summary disposition getting plaintiff's complaint dismissed based on the fraud of plaintiff. On appeal, the court upheld the trial court's decision.

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In determining whether PIP benefits were appropriately denied for plaintiff's fraud, the court reviewed the plain language of the applicable policy, stating

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

Based on the above-cited policy language and plaintiff's fraud, PIP benefits were appropriately denied. In buttressing its decision, the court further noted

> We agree with the trial court that the fraud exclusion applied in the instant case. In order to substantiate her claim for replacement services, plaintiff presented a statement indicating that services were provided by "Rita Radwan" from October 1, 2011 to February 29, 2012. **Because the accident occurred on October 20, 2011, on its face, the document plaintiff presented to defendant in support of her PIP claim is false, as it sought recoupment for services that were performed over the 19 days preceding the accident.**
>
> **Moreover, defendant produced surveillance evidence depicting plaintiff performing activities inconsistent with her claimed limitations.** Plaintiff was observed bending, lifting, carrying objects, running errands, and driving—on the dates when she specifically claimed she needed help with such tasks.

Exactly as in *Bhari*, in this instance there is ironclad proof of fraud committed in submitting a claim to an insurer. The only difference is again one of timing. In *Bhari*, the insurer was able to determine the insured's fraudulent intent prior to making any payments. Unfortunately for Meemic, determining the Fortsons' fraudulent intent was not possible as the Fortsons' fraud only arose after Meemic had already made certain payments. Meemic should not be limited or punished in seeking its remedy based on the actions of the Fortsons. Meemic should be permitted to void the Policy.

iv. Timing is the Sole Difference Between The Present Litigation and The Holdings From Titan and Bhari; One Example Highlights Why Timing Should Not Be Considered

If this court were to accept an argument that an insurer is prohibited from voiding a policy for on-going fraud after an insurer has already made payments then absurd results would

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arise. All an insured would have to do is make sure that he or she received at least one payment and then the insured would be free to commit fraud on the insurer. An insurer could possibly *deny* future payments for fraud, assuming the insurer discovered the fraud in time, but the insurer could never void the policy. Prohibiting Meemic from voiding the Policy would create a perverse incentive for insureds to commit fraud. From the insured's prospective, the worst that could happen would be a denied payment or potentially a long and drawn out reimbursement action, but the insured would continue to be free to seek payments in the future. This Court should void the Policy and terminate Meemic's future liability towards the Fortsons under the Policy.

V. CONCLUSION:

7,440 hours. 310 days. Ten months. Whatever timeframe this Court wishes to use it is manifest that the Fortsons have committed fraud over an extended period of time. Attendant care, particularly 24/7 attendant care, is only compensable when said care is actually being rendered. Neither Louise nor Richard could have provided attendant care while Justin was in jail or drug rehab, alone or with his friends, much less on a 24/7 basis; however, the Fortsons continued to submit executed Service Statements. Louise, who asserted that Justin was barely out of her sight, even went so far as lying about Justin's incarceration, and neither Richard nor Louise informed Meemic of Justin's whereabouts. Plain language in the Policy permits Meemic to void the Policy when the Fortsons' submit a fraudulent claim, which the Fortsons did repeatedly. Case law does not change the outcome.

Plaintiff/Counter-Defendant respectfully asks this Court to grant this Motion and enter an order: (1) voiding the Policy; (2) terminating any future liability to the Fortsons to make payments for Justin's care; (3) requiring the Fortsons to reimburse Meemic for fraudulently

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submitted Service Statements; and (4) granting any other relief as is equitable, including attorney fees and costs.

Respectfully submitted,

KREIS, ENDERLE, HUDGINS & BORSOS, P.C.

Dated: April 9, 2015

By: _____
Mark E. Kreter (P35475)
Robb S. Krueger (P66115)
Stephen J. Staple (P77692)

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant/Appellee,

v

Court of Appeals No.: 337728
Circuit Court Case No. 2014-260-CK
HON. JOHN M. DONAHUE
(P38669)

LOUISE M. FORTSON, RICHARD A. FORTSON, individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs/Appellants,
_____/

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DEFENDANT/COUNTER-PLAINTIFFS BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCR 7.203(A)(1).

STATEMENT OF QUESTIONS PRESENTED

I

HAVE THE DEFENDANTS/COUNTER-PLAINTIFFS/APPELLANTS RAISED A GENUINE ISSUE OF MATERIAL FACT PURSUANT TO MCR 2.116(C)(10) ON THE ISSUE OF WHETHER LOUISE FORTSON AND/OR RICHARD A. FORTSON COMMITTED FRAUD?

Trial Court answered "No"
Defendants/Counter-Plaintiffs/Appellants answers "Yes"
Plaintiff/Counter-Defendant/Appellee answers "No"

II

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY APPLYING BAZZI V SENTINEL INS. CO, _____ MICH APP _____ (2016); lv gtd SC #15442 (5-17-17) TO GRANT SUMMARY DISPOSITION?

Trial Court would answer "No"
Defendants/Counter-Plaintiffs/Appellants answers "Yes"
Plaintiff/Counter-Defendant/Appellee answers "No"

III

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY APPLYING THE PROVISIONS OF THE MEEMIC POLICY CONCERNING FRAUD TO THE ACTIONS OF LOUISE AND/OR RICHARD FORTSON WHEN THEY WERE NOT INSUREDS AT THE TIME THAT ALLEGED FRAUD TOOK PLACE?

Trial Court would answer "No"
Defendants/Counter-Plaintiffs/Appellants answers "Yes"
Plaintiff/Counter-Defendant/Appellee answers "No"

STATEMENT OF FACTS

On September 18, 2009, Justin Fortson was sitting on the back of a friend's car. He and a group of other kids, generally ages 16 or 17, were goofing around on Highland Avenue in St. Joseph, Michigan. The kids started pushing the car and the driver of the car started the engine and drove with Justin on the trunk. Justin fell off when the car went around a corner and Justin struck the side of his head on the pavement. Justin suffered an open head injury. He was on life support for an extended period of time with severe brain damage. Attached as **Exhibit C** is a photo of Justin at the intensive care unit. He had a portion of his skull removed above his ear on the right side of his head and he had a persistent tumor that continues to put pressure on his brain. He had a permanent severe traumatic brain injury resulting in his need for constant supervision. His doctors have prescribed 24 hour care, seven days per week. At the time of the accident, MEEMIC Insurance Company provided No-Fault coverage to Justin Fortson. **Exhibit G** Declaration Page. MEEMIC does not claim that the policy was obtained fraudulently or that there was any fraud at the inception of the policy. The policy was in effect at the time Justin Fortson was injured and provided Justin with No-Fault benefits. MEEMIC terminated insurance coverage of Louise and Richard Fortson on 7-29-10 prior to the occurrence of the alleged fraud. **Exhibit F** Termination Letter.

Louise Fortson is disabled as a result of her own medical issues. She suffered strokes causing her mental and physical difficulties. She has defects in her spine. She has Lupus. She had hip replacements and knee problems apparently related to serious arthritic

problems. She had surgeries related to intestinal issues. She left school in the ninth grade with failing grades. MEEMIC Insurance Company never had any discussions or contact with Richard Fortson. None of the adjusters have ever met any of the Fortsons in person.

Since Justin returned home from the hospital, Louise Fortson has been unable to sleep in her bed. She has a La-Z-Boy chair that she has placed in front of her son's bedroom door because Justin regularly awakes at night. He has dreams, he has nightmares, and he does not have complete control of his bladder or his bowels. His bed has to be changed due to both urinating and defecation in his bed on occasion. Even during the daytime Justin loses control of his bladder and his bowel requiring that Louise help clean him up. Justin suffers from seizures. Christina D. Pareigis, MD has provided treatment to Justin since 11/17/09. **Exhibit D** records of Dr. Pareigis. She has consistently found that Justin requires anti-seizure medication. Dr. Pareigis has recommended that Justin requires 24-hour supervision due to his impaired problem solving and limited deficit awareness.

Justin has severe cognitive deficits. The MEEMIC Insurance Company's adjuster, Meredith Valko, admitted that a traumatic brain injured person's susceptibility to trouble with the law including drugs and alcohol was "predictable". **Exhibit A** Deposition of Meredith Valko at pages 27 and 49. In this case MEEMIC has not produced any admissible evidence challenging Justin Fortson's need for medical services. The only medical evidence that exists supports Justin's need for continued treatment. MEEMIC's claims adjuster testified that she recognized Justin's continued need for medical treatment. Id at, pages 23-27, 30-40, 45, 48. Justin Fortson has a severe behavioral disorder from his

traumatic brain injury including typical sequelae like impulsivity, poor judgment, lack of appreciation of the significance of certain issues like safety issues, and is easily influenced. **Exhibit D** supra.

Justin Fortson did spend some time in jail and also spent about six weeks in drug rehabilitation during the time period that MEEMIC continued to pay attendant care services to Richard Fortson based on attendant care services forms that were completed by Justin's mother, Louise Fortson. Richard Fortson never submitted any attendant care services forms, yet he was paid by MEEMIC Insurance Company for caring for Justin 24 hours a day, seven days a week as a result of their son's brain injury. Ms. Velko acknowledged that there was never any intent to deceive or commit a fraud on the insurance company by any of the Appellants. **Exhibit A**, supra at pages 44, 55, 67-72. **Exhibit B** are attendant care services forms submitted by Louise Fortson. No payments for attendant care services were made to Louise Fortson. All payments for attendant care services have been paid to Richard Fortson, even though Richard Fortson works at least 40 hours per week and sleeps about eight hours per day. It was customary for MEEMIC Insurance Company to handle attendant care services claims in this fashion. **Exhibit A**, supra at pages 29-31, 46-48, 76. Louise Fortson did not understand how the attendant care services form was to be completed. This was confirmed by the claims adjuster for MEEMIC Insurance Company. The adjuster even acknowledged in her deposition that Louise Fortson never attempted to describe the services provided, she just simply put "24" in every square on the form, dated it, and signed it. Id at pages 29-30, 44, 67. This was what Louise Fortson was told to do from the inception of the claim and MEEMIC Insurance Company kept paying without

question and with no other instructions. Louise Fortson at one point faxed the forms to MEEMIC and simply changed the date of the form and submitted it again each month. MEEMIC even got ahead of themselves and were paying attendant care services for a month in advance – another indication that Louise Fortson simply did not know what she was doing.

Claims adjuster, Cynthia Temple, told Louise Fortson that all she had to do was put "24" in each box on the attendant care services form, sign it, date it, and fax it to her, which Louise did every month. There was never any explanation and no instruction sheet. Often times the number of days on the form did not match the number of days in the month. MEEMIC just made the adjustment. It was MEEMIC Insurance Company that offered to pay Richard Fortson $11.00 per hour, 24 hours per day, seven days a week for attendant care services for Justin to be cared for by Louise Fortson in her home rather than pay an institution to care for Justin Fortson. MEEMIC Insurance Company has paid 24 hour care to Richard Fortson even though the requests for payment were made by Louise Fortson. Richard Fortson has a 40 hour per week job and the insurance adjusters at MEEMIC Insurance Company acknowledge that that does not create a problem. They understand and know that Richard Fortson and Louise Fortson have to sleep and that Richard is away at his job 40 hours per week and that on occasion others would be assisting with the supervision. It was sufficient for MEEMIC to know that Justin needs 24 hour care and supervision for them to simply write a check to Richard Fortson based on Louise's form. Id at pages 23, 29-30, 46-48.

Justin Fortson made no misrepresentation and did not defraud MEEMIC Insurance Company. No payment for attendant care services benefits was made to Justin Fortson. The "providers" of the attendant care services were Louise and Richard Fortson. MEEMIC set up the attendant care so that they would make payment to the conservator, Richard Fortson, and Louise would submit the paperwork. If MEEMIC was paying an agency like Hope Network to take care of Justin, they would have been paying at least three times the amount they were paying Richard Fortson. This was confirmed by Meredity Valko in her deposition. Id at pages 62-64. MEEMIC saved a lot of money by contracting with Louise Fortson at $11.00 per hour to keep Justin at home.

PROCEEDINGS IN THE CIRCUIT COURT

The parties were before the Trial Court on cross motions for summary disposition brought pursuant to MCR 2.116(C)(10). The Court originally denied MEEMIC's motion based upon the "innocent third-party doctrine". After this Court issued Bazzi v Sentinel Insurance Company, ____Mich App___(2016); lv gtd SC #15442 (5-17-17) which is attached as Exhibit I, the Trial Court reconsidered its position and granted Meemic Insurance Company's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) for the reasons stated on the record on February 13, 2017. At that time the Cross Motion for Summary Disposition brought by Appellants was denied. Exhibit H.

ARGUMENT

I

HAVE THE DEFENDANTS/COUNTER-PLAINTIFFS/APPELLANTS RAISED A GENUINE ISSUE OF MATERIAL FACT PURSUANT TO MCR 2.116(C)(10) ON THE ISSUE OF WHETHER LOUISE M. FORTSON AND/OR RICHARD A. FORTSON COMMITTED FRAUD?

A. STANDARD OF REVIEW

This Court review Trial Court decisions on Motions for Summary Disposition brought pursuant to MCR 2.116(C)(10) de novo. Associated Builders & Contractors v Wilbur, 472 Mich 117, 123 (2005); Maiden v Rozwood, 461 Mich 109, 118 (1999); and Old Kent Bank v Kal Kustom, Inc, 255 Mich App 524, 528 (2003). When the review is de novo this Court evaluates the issue "anew". A motion brought pursuant to MCR 2.116(C)(10) tests the factual basis underlying a claim or defense. Rozwood, supra 461 Mich at 119-120, and Radtke v Everett, 442 Mich 368, 374 (1993). In ruling upon this motion, the Trial Court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence submitted by the parties. MCR 2.116(G)(5) and (6); Universal Underwriter's Group v Allstate Ins Co, 246 Mich App 713, 720 (2001); and SSC Assoc Ltd Part v Gen'l Retirement System of the City of Detroit, 192 Mich App 360, 364 (1991). The Trial Court must consider any admissible evidence in favor of the party opposing the motion. Cowles v Bank West, 476 Mich 1, 32 (2006); Rosewood, supra; and Bertrand v Alan Ford, Inc, 449 Mich 606, 617-618 (1995). Giving the benefit of all reasonable doubt to the opposing party, the Trial Court must determine whether a record might be developed that would leave open an issue of material fact upon which reasonable minds could differ. Rosewood, supra; and Bertrand, supra; and SSC Assoc Ltd Part,

supra, 192 Mich App at 364. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mitchell v Dahlberg, 215 Mich App 718, 725 (1996). On review, the Appellate Court must also make all reasonable inferences in the nonmoving party's favor. Bertrand, supra.

B. GENUINE ISSUE OF FACT EXISTS PRECLUDING SUMMARY DISPOSITION

Attached and marked hereto as **Exhibit E** is a letter from Susan Rumford at Hope Network. Recently, Hope Network was contacted hoping that they would accept Justin Fortson in-patient based on the recommendations made by Dr. Cynthia Pareigis, **Exhibit D,** and based upon the circumstance that they would get paid when this litigation is finalized. Because of the fact that MEEMIC Insurance Company alleged fraud and are seeking to terminate any future No-Fault coverage, Hope Network refused to accept Justin at their agency. Louise and Richard Fortson are better equipped now to take care of Justin than they were back in 2009. Louise and Richard have learned to better manage Justin in their home. They, in fact, are owed for attendant care services dating from September 1, 2014 through the present. (For purposes of this Motion, calculation will be available at the hearing.) If credit is afforded for the 94 days that MEEMIC Insurance Company believes was an overpayment, a balance will be owed by MEEMIC. There is no question that attendant care has actually been rendered by Mr. and Mrs. Fortson in their home. Meredith Valko testified that she knows of no other days other than those 94 days set forth in the Complaint where Justin was not present in their home with his parents. **Exhibit A** supra at page 68. These are the days that MEEMIC believes Justin was in jail or rehabilitation.

Contrary to MEEMIC Insurance Company's lawyer's statement in his brief that Louise was "lying", Meredith Valko, the adjuster for MEEMIC testified that she has no evidence that Louise nor Richard, nor Justin, intended to defraud, intended to steal, engage in willful and wanton activity, or otherwise committed a fraud. Id at **Exhibit A**, page 44, 51, 66-72. She simply terminated Personal Injury Protection Benefits because Richard Fortson accepted the checks.

In fact, Richard Fortson never sent a request to MEEMIC. His wife, Louise, directed the attendant care services forms based on the instructions given by Cynthia Temple and as had been certified, ratified, and accepted by MEEMIC Insurance Company since 2009! MEEMIC Insurance Company was well aware by the receipt of the forms that Louise was not well versed in how the forms were supposed to be prepared. They were deficient and incomplete but MEEMIC paid anyway. Louise Fortson simply did not know what attendant care services are and was told by the insurance company that they would pay her $11.00 an hour, 24 hours per day, seven days a week to take care of their son. MEEMIC Insurance Company was avoiding paying three to four times that much money to an agency like Hope Network. Hope Network instructed the Fortsons that Justin could not be kept there against his will and if he did not want to go there he could walk out any time. Justin told his mother, that if she dropped him off at Hope Network, he would kill himself. Dr. Cynthia Pareigis put in her office notes that she was pretty sure that if Justin was placed in an agency like Hope Network that he would "elope". (**Exhibit H.**)

II

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY APPLYING BAZZI V SENTINEL INS. CO, _____ MICH APP _____ (2016); lv gtd SC #15442 (5-17-17) TO GRANT SUMMARY DISPOSITION?

A. STANDARD OF REVIEW

This Court reviews the Trial Court's determinations of law and statutory construction de novo. People v Babcock, 469 Mich 247, 253 (2003); and Veenstra v Washtenaw Country Club, 466 Mich 155, 159 (2002). This Court also reviews interpretations of statutory language de novo. Casco Twp v Sec of State, 472 Mich 566, 571 (2005) and Heritage Resources, Inc v Caterpillar Financial Services, Corp, 284 Mich App 617, 632 (2009). Whether a statute applies in a particular case is also reviewed de novo. Alex Wildfong, 460 Mich 10, 21 (1999) and Heritage Resources, supra.

B. BAZZI IS DISTINGUISHED FROM THE INSTANT CASE

Bazzi v Sentinal Ins Co, ___ Mich App ___ (2016); lv gtd SC #15442 (5-17-17) is distinguishable from the instant case and does not require that Justin Fortson's benefits be terminated. The factual basis for the claim of fraud in Bazzi related to an insured's procurement of insurance by fraud. See, Bazzi, Slip Opinion, pp. 2-3 attached as **Exhibit I.** This case did not involve an attempt to terminate an insured's statutorily required benefits because of a fraud committed by a healthcare provider. Similarly, the Michigan Supreme Court case reviewed in these cases and found to be the basis for Bazzi, Titan Ins Co v Hyten, 491 Mich 547 (2012) involved a claim involving fraud in the application for insurance. 491 Mich at 560 and 564. In both cases the insurer claimed that a policy of insurance never existed. The factual basis for each

of these decisions is distinguishable from the facts that are present in the instant case. In the instant case, a policy of insurance existed at the time of the accident and for years after the accident. In both cases, benefits were found to be unavailable because no policy existed due to the fraud on procurement. The majority in Bazzi noted:

> "We now turn to the other question posed in this case, whether the holding in *Titan* extends to mandatory no-fault benefits. We conclude that it does. *Titan* did, in fact, involve optional benefits not mandated by statute. But this was not the basis of the Court's decision. And it makes the rather unremarkable observation that, where insurance benefits are mandated by statute, coverage is governed by that statute. It is also true that 'because insurance policies are contracts, common-law defenses may be involved to avoid enforcement of an insurance policy, *unless those defenses are prohibited by statute*.' The Court ultimately holds 'that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party.' And it does so without qualification regarding whether those benefits are mandated by statute. Thus, if there is a valid policy in force, the statute controls the mandated coverages. But what coverages are required by law are simply irrelevant where the insurer is entitled to declare the policy void ab initio. The situation would be akin to where the automobile owner had never obtained an insurance policy in the first place; they would have been obligated by law to obtain such coverage, but failed to do so." Bazzi Slip Opinion, p. 5, citing Titan, 491 Mich at 554 and 571. Footnotes omitted.

As noted in Bazzi, because there was a valid policy in force in the instant case, the no-fault statute controls mandated coverages. Bazzi, Slip Opinion p. 5. The majority in Bazzi noted specifically "…if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void ab initio and rescind it, including denying the payment of benefits to innocent third-parties." Bazzi, Slip Opinion p. 10. In the instant case, no factual basis exists for claiming that the policy at issue was obtained through fraud. In the instant case,

the policy existed at the time of the accident as noted by the majority in Bazzi, "…[T]hus, if there is a valid policy in force, the statute controls the mandated coverages…"

The Michigan No-Fault Act is a compulsory insurance system that requires most motorists operating motor vehicles in Michigan to purchase mandatory no-fault coverage or face fine or imprisonment. See, MCL 500.3101(1) No-fault coverage, unlike uninsured motorist coverage, is mandatory and required by the terms of the Michigan No-Fault Act. The Legislature has chosen to require every Michigan No-Fault Insurance policy to contain Personal Protection Insurance coverage. Hyten, supra did not address an insurer's responsibility for personal protection coverage under Michigan statutory required No-Fault Act. In Rohlman v Hawkeye – Security Ins. Co, 447 Mich 520, 524-525 (1993) the Michigan Supreme Court noted that when the provisions of an insurance contract are mandated by statute, the statute applies to control the rights and limitations of the coverage required by statute. The entitlement to Personal Protection Insurance benefits is statutory and not contractual. MCL 500.3101(1), MCL 500.3107, and MCL 500.3114(5). The existence of No-Fault coverage from the date of the accident makes this case different from Hyten and Bazzi.

The Michigan No-Fault Insurance Act should be construed liberally as it is remedial in nature. Putkamer v TransAmerica Ins Corp of Amer, 454 Mich 626, 631 (1997). This rule of construction is intended to apply to payment of benefits to injured parties who were intended to benefit from the adoption of the No-Fault Legislation. The Act should be broadly construed to effectuate coverage. McMullen v Motors Ins Corp, 203 Mich App 102, 107 (1993). The Act provides that an insurer is liable to pay benefits for accidental bodily injury arising from the

operation, ownership or use of a motor vehicle as a motor vehicle. See, Douglas v Allstate, 492 Mich 241 (2012); and MCL 500.3105. Personal Protection Insurance is a mandatory coverage required by MCL 500.3101(1) and are provided regardless of fault. MCL 500.3107(1)(a) establishes medical benefits that an insurer must provide within the mandatorily required insurance coverage. It is Justin Fortson's medical benefits Plaintiff/Counter-Defendant wishes to avoid.

MCL 500.3112 provides that:

> Personal protection insurance benefits are payable to or for the benefit of an injured person…

In the instant case the benefits at issue were not paid to Justin Fortson, but were paid directly to Richard Fortson for the benefit of Justin Fortson. Plaintiff/Counter-Defendant does not argue or offer any proof that Justin Fortson's coverage was not in effect at the time of the accident. MEEMIC does not claim that coverage was procured though fraudulent activities. The allegations of Plaintiff/Counter Defendant focus completely on the actions of the health care provider, Louise Fortson, but seek to punish Justin. It is the medical mandatory benefits required by the Michigan No-Fault Act that MEEMIC seeks to bar. MCL 500.3112 requires that Justin's medical benefits are payable to him. The statute does not provide or allow a claim against Mrs. Fortson to extinguish or limit in any way other medical benefits due her son.

The Michigan Legislature has set forth specific provisions in the Michigan No-Fault Act to limit and/or disqualify mandated No-Fault benefits. At no point in the Michigan No-Fault Insurance Act did the Legislature allow an innocent insured's Personal Protection Insurance benefits to be limited by alleged misrepresentation and fraudulent activity by a health care provider. Several of the limitations that the Legislature has chosen to place upon no-fault

coverage are contained within MCL 500.3106 (Parked Vehicle and Worker's Compensation Exclusion) and MCL 500.3145 (the 1 year Statute of Limitations). MCL 500.3113 sets forth specifically activities that the Michigan Legislature has chosen to disqualify an injured person's right to Personal Protection Insurance benefits. Again, no portion of §3113 provides for an innocent insured to lose his/her Personal Protection Insurance benefits due to misconduct by a health care provider. The Michigan Legislature provided in MCL 500.3112 a means that would allow an insurance company or any other interested person or organization to come to Circuit Court and to answer doubts that may exist about the proper persons to receive payments and/or the proper apportionment amount of persons entitled to payment. The provision provides, in part:

> If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate.

Thus if there is question concerning a person's right to payment, any interested party could seek answer or protection in the Circuit Court. Plaintiff/Counter-Defendant may seek to test Mr. and Mrs. Fortson's right to receive payment under this provision. This provision does not allow MEEMIC to cancel Justin's medical benefits because of his healthcare provider's conduct.

The rules of statutory construction apply to the application of the Michigan No-Fault Insurance Act as it relates to MEEMIC's motion. When interpreting a statute, the Court must first and foremost give affect to the intent of the Legislature. Ferguson v Pioneer State Mut Ins Co, 273 Mich App 47, 51 (2006); Trye v Michigan Veteran's Facility, 451 Mich 129, 135

(1996); People v Hawkins, 181 Mich App 393, 396 (1989); and Joy Management Co v Detroit, 176 Mich App 722, 730 (1989). The Court must ascertain the legislative intent that may be inferred from the statutory language. Satelo v Grant Twp., 470 Mich 95, 100 (2004). The first criterion in determining intent is the specific language of the statute. Saint George Greek Orthodox Church v Laupmani Assoc, 204 Mich App 278, 282 (1994); and Hawkins, supra at 396. The Legislature is presumed to have intended the meaning it plainly expressed. Trye, supra; and Fraiser v Model Coverall Service, Inc, 182 Mich App 741, 744 (1990). Courts may not speculate with respect to the probable intent of the Legislature beyond the words expressed in the statute. People v Breidenbach, 489 Mich 1, 10 (2011); and Mich Ed Assn'n v Secretary Of State (On Rehearing), 489 Mich 194, 218 (2011). If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted. Koentz v Ameritech Services, Inc, 466 Mich 304, 312 (2002); Trye, supra; and Nat'l Exposition Co v Detroit, 169 Mich App 25, 29 (1988).

The Michigan Legislature set forth its intentions concerning limitation and disqualifications allowed with regard to claims for Personal Protection Insurance benefits. The Legislature did not provide for the relief requested by MEEMIC. The Court cannot assume that for some reason this was an oversight by the Legislature. The coverage at issue was not created through fraud. This coverage existed for a number of years. The fraud in this case involved a health care provider and occurred many years after Justin's insurance coverage was activated. Nowhere in the Act is there any suggestion that the Legislature intended to allow the termination of statutorily mandated no-fault benefits held by an innocent insured based upon the misconduct

of a health care provider. MEEMIC's request for a termination of Justin Fortson's Personal Protection Insurance benefits should be denied.

III

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY APPLYING THE PROVISIONS OF THE MEEMIC POLICY CONCERNING FRAUD TO THE ACTIONS OF LOUISE AND/OR RICHARD FORTSON WHEN THEY WERE NOT INSUREDS AT THE TIME THAT ALLEGED FRAUD TOOK PLACE?

A. STANDARD OF REVIEW

This Court reviews the Trial Court's contract interpretation de novo. Schmalfeldt v North Point Ins Co, 469 Mich 422, 426 (2003); Archambo v Lawyer's Title Ins Corp, 466 Mich 402, 408 (2002); and Smith v Globe Life Ins Co, 460 Mich 446, 454 (1999).

B. LOUISE AND RICHARD FORTSON WERE NOT INSUREDS AT THE TIME THE FRAUD WAS COMMITTED

It is admitted by all parties that Justin Fortson was injured on September 18, 2009 and at that time was covered by policy number PAP0632676 issued by MEEMIC. See Declaration Page of the insurance policy in effect at the time of the accident and contained within Exhibit G. The policy period covered was from 7/29/09 through 1/29/10. Id. The named insureds on the policy were Louise Fortson and Richard A. Fortson. It is admitted by all parties that Justin Fortson was covered by this insurance policy at the time he was injured and that the injury involved the operation and maintenance or use of a motor vehicle as a motor vehicle. It is admitted by all parties that Justin Fortson did not commit fraud and that MEEMIC's declaratory action and the basis of the motion at issue rests solely upon the conduct of Louise Fortson, a healthcare provider in September 2012, December 2012 through March 2013, April 2013,

August 2013 through December 2013, July 2014 and August through September 2014. Louise and Richard Fortson's coverage under policy number PAP0632676 was terminated effective 7/29/10 by way of a Notice Of Termination Or Declination Of Insurance by MEEMIC Insurance Company. See, Exhibit K. MEEMIC mailed the notice of termination on June 14, 2010. Id. It is to be noted that it was MEEMIC that terminated the policy effective 7/29/10. MEEMIC noted:

> "This is to notify you that for the reason(s) stated in the "Important Notices" section the insurance provided in the above-indicated policy will be terminated at and from the hour and date stated above. This notification is in compliance with law and the provisions in your policy relating to the termination of insurance. "

According to the notice of termination, the policy termination date and time was 7/29/10 at 12:01 a.m. **Exhibit F**. The form notes that this policy became effective 1/29/10 and thus was a renewal of the policy in effect at the time of Justin Fortson's injuries.

In the instant case, law of contract applies. See, Eghotz v Creech, 365 Mich 527.530 (1962). The contract should be viewed from the standpoint of the insured. See, Fresard v Michigan Millers Ins Co, 14 Mich 686, 694 (1982). In reviewing the contract language, a Court must attempt to determine the intent of the parties and effectuate that intent. See, Auto Owners v Churchman, 440 Mich 560, 567 (1992); and Auto Club Group Ins Co v Marzonie, 447 Mich 624, 630 (1994). If the language is clear and unambiguous, the terms should be applied as written. See, Churchman, supra at 567. The entire policy must be read as a whole in order to determine what provisions actually mean. Id; and Boyd v General Motors Acceptance Corp, 162 Mich App 446 (1987); Parrish v Paul Revere Life Ins Co, 103 Mich App 95 (1981).

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. See, Churchman, supra at 566-567. Any question regarding the application of policy language is construed against the insurer who drafted the contract under review. See, State Farm Mut Automobile Ins Co v Enterprise Leasing Co, 452 Mich 25, 38 (1996); Arco Industries Corp v American Motorist Ins Co, 448 Mich 395, 402-403 (1995); and Raska v Farm Bureau, 412 Mich 355 (1982); reh den 412 Mich 119 (1982).

In reviewing the insurance contract, the Court must apply the terms set forth in the contract. It is important to remember that ambiguity is defined broadly. See, Marzonie, supra, 447 Mich at 631; Henderson v State Farm Fire & Casualty Co, 225 Mich App 703, 709 (1997); GAF Sakes and Service, Inc v Hastings Mutual Ins Co, 224 Mich App 259, 261 (1997); and Cavalier Mfg Co v Employers Ins of Wausau, 222 Mich App 89, 94 (1997). Ambiguous terms of the insurance policy should be construed in favor of the insured. See, Frankenmuth Mut Ins v Masters, 460 Mich 105, 111-112 (1999).

The insurance contract at issue contains provisions referring to an insured's concealment or fraud. See, Exhibit G at page 22, section 22. This provision reads as follows:

22. CONCEALMENT OR FRAUD

> This entire Policy is void if any Insured person has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;
> B. The Application for it;
> C. Or any claim made under it.

This provision clearly provides that it applies to "any Insured person". In the instant case only Justin Fortson was an insured person and there is no argument that he acted to conceal or

committed any fraudulent act. In the instant case MEEMIC's claim is that healthcare provider Louise Fortson misrepresented the amount of time she spent providing attendant care to Justin Fortson. Louise Fortson was not an insured with MEEMIC after July 29, 2010. Louise Fortson was not an insured at the time she allegedly committed fraud or made misrepresentations. MEEMIC itself acted to terminate policy number PAP0632676 by way of Notice of Termination Or Declination Of Insurance mailed June 14, 2010. **Exhibit F**. By the terms of the notice itself the insurance coverage under the policy was ended by MEEMIC. According to MEEMIC, Louise Fortson and Richard Fortson were not insureds after July 29, 2010. It was MEEMIC that cancelled Louise and Richard Fortson's insurance effective July 29, 2010. This was long before the alleged fraud. Reading the cancellation provision as written, it applies solely to insured persons. Thus the provision drafted by MEEMIC does not apply to the conduct of non-insured persons. By the very terms of the insurance policy at issue, the conduct of a healthcare provider does not activate Section 22 Concealment or Fraud.

Bazzi, supra is distinguishable from the instant case in that each of the policy arose from an insured's procurement of insurance by fraud. In this case the insurance at issue was in effect at the time of the accident and coverage questions did not arise until 2012-2014. MEEMIC acted to terminate the coverage of Louise and Richard Fortson on July 29, 2010 long before the alleged fraud took place. Bazzi does not apply to instances where the person committing the fraud was a healthcare provider and not an insured. In each case the policy at issue was being applied to an insured. By the language of the contract at issue and by way of the notice of termination, Louise and Richard Fortson were not insureds at the time the alleged misconduct took place. Bazzi does not apply to the facts presented in the instant case.

In the instant case Justin Fortson's position is also supported by the priority provisions of the Michigan No-Fault Act contained within MCL 500.3114(1). This provision applies personal protection insurance to those persons suffering accidental bodily injury and establishes what insurance coverage is to provide the benefits. In this case the coverage for Justin's medical benefits were provided by MEEMIC. This statutorily required coverage has not been cancelled by Justin Fortson's conduct and is still in effect. To the extent that MEEMIC has canceled the insurance policy held by Louise and Richard Fortson, section 3114 (1) applies only to Justin Fortson and does not apply to Louise or Richard Fortson. Louise and Richard Fortson were not injured in the accident and any coverage they had under policy number PAP0632676 was terminated by MEEMIC. Pursuant to the terms of the priority provisions of the Michigan No-Fault Act, the alleged conduct of Louise Fortson cannot terminate Justin Fortson's right to receive medical benefits. The right to receive medical benefits was created at the time of the accident, by the coverage that was in effect through MEEMIC. This coverage continues to provide Justin Fortson with No-Fault benefits while the coverage itself has been terminated for Louise and Richard Fortson. Louise and Richard Fortson were not insureds of MEEMIC at any point following July 29, 2010.

RELIEF REQUESTED

For the reasons set forth above, the Defendants/Counter-Plaintiffs/Appellants request that this Court reverse the ruling of the Trial Court and allow this matter to proceed to trial.

Dated: 6-4-2017

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