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

_____/

KREIS, ENDERLE, HUDGINS & BORSOS, PC
BY: MARK E. KRETER (P35475)
ROBB S. KRUEGER (P66115)
Attorneys for Plaintiff/Counter-Defendant/Appellant
1 Michigan Avenue, West
Battle Creek, MI 49017
(269) 966-3000
mkreter@kreisenderle.com

CHASNIS, DOGGER & GREIERSON, PC
BY: ROBERT J. CHASNIS (P36578)
Attorneys for Defendants/Counter-Plaintiffs/Appellees
155 North Plymouth Road, P.O. Box 6220
Saginaw, MI 48608
(989) 793-8300
bchasnis@cdglaw.com

JAMES G. GROSS, PLC
BY: JAMES G. GROSS (P28268)
Attorneys of Counsel for Plaintiff/Counter-Defendant/Appellant
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

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

_____/

PLAINTIFF-APPELLANT MEEMIC INSURANCE COMPANY'S BRIEF ON APPEAL

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS cont'd

PAGE

INDEX OF AUTHORITIES

CASES **PAGE(S)**

INDEX OF AUTHORITIES cont'd

CASES **PAGE(S)**

STATUTES & COURT RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTIONAL BASIS

The Court of Appeals' judgment from which MEEMIC appeals was issued May 29, 2018. The timely filed Motion for Reconsideration was denied in an order entered July 12, 2018. This Court has jurisdiction to decide this appeal pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. DOES THE INNOCENT THIRD-PARTY RULE EXEMPT JUSTIN FROM THE EFFECT OF THE "CONCEALMENT OR FRAUD" PROVISION OF THE POLICY UNDER WHICH HE CLAIMS BENEFITS?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

I.A. IS THERE MICHIGAN AUTHORITY SUPPORTING AN INNOCENT THIRD-PARTY RULE IN ANY CIRCUMSTANCE?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

I.B. IS MEEMIC SEEKING EQUITABLE RELIEF?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

STATEMENT OF QUESTIONS cont'd

II. DOES MICHIGAN LAW EXEMPT SPOUSES AND RESIDENT RELATIVES FROM THE UNAMBIGUOUS TERMS OF THE POLICY UNDER WHICH THEY ARE CLAIMING BENEFITS?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

III. DID THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY ALTER THE PARENTS' STATUS AS NAMED INSUREDS SUBJECT TO THE ANTI-FRAUD PROVISION OF THE POLICY UNDER WHICH RECOVERY IS SOUGHT IN THE INSTANT CASE?

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

III.A. DID THE PARENTS' STATUS AS NAMED INSUREDS SURVIVE CANCELLATION OF THE POLICY?

The trial court did not address this issue.

The Court of Appeals answered, "No".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "Yes".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"No".

STATEMENT OF QUESTIONS cont'd

III.B. DID THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY HAVE ANY EFFECT ON A PREVIOUS POLICY?

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

III.C. EVEN IF THE MAJORITY'S ANALYSIS WAS OTHERWISE CORRECT, WERE JUSTIN'S PARENTS CLAIMANTS OF BENEFITS UNDER THE POLICY, WHO, THEREFORE, UNDER THE MAJORITY'S REASONING, REMAINED SUBJECT TO THE ANTI-FRAUD CONDITION?

The trial court did not address this issue.

The Court of Appeals answered, "No".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "Yes".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"No".

STATEMENT OF FACTS

This is a first-party no-fault case. MEEMIC sought to void the policy it issued to RICHARD and LOUISE FORTSON due to their misrepresentation of material facts pertaining to their claim for attendant care allegedly rendered to their son, JUSTIN.

MEEMIC discovered that MRS. FORTSON claimed 24/7 attendant care at $11/hour for 233 days during which JUSTIN was in jail, at least 66 days during which he was in drug rehabilitation, and an undetermined number of days when he was indisputedly not available for attendant care. MEEMIC sought to void the policy, invoking its anti-fraud provision.

MEEMIC successfully obtained a decision from the trial court that the policy was void. The Court of Appeals reversed. MEEMIC now seeks relief from this Court. The pertinent facts follow.

Historical Facts

MEEMIC issued a no-fault auto insurance policy (1a) to LOUISE M. FORTSON and RICHARD FORTSON. The policy period was 7/29/09-1/29/10. (1a).

On September 18, 2009, JUSTIN was seriously injured in a motor vehicle accident. (25a; 37a, ¶11). From October 16, 2009, through October 9, 2014, JUSTIN's parents submitted statements for 24/7 attendant care for JUSTIN. (52a, 55a). MEEMIC paid at a rate of $11/hour. (88a, 94a).

MEEMIC subsequently issued a renewal policy effective 1/29/10-7/29/10. (100a). MEEMIC cancelled that policy effective 7/29/10 due to JUSTIN's driving record. (Id.).

In May 2013, JUSTIN's treatment notes indicated that he had been in jail. (90a). An investigation revealed that between September 2012 and July 2014, JUSTIN had been jailed for

233 days, and in drug rehabilitation for another 78 days. (55a, 23a - 25a, and Exhibits I, J, K[1]). His Facebook page showed him with friends and unsupervised on numerous occasions. (51a, Exhibit G).[2]

MEEMIC terminated benefits and voided the policy (84a, 85a, 86a, 88a, 93a), pursuant to the following provision:

> "**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."

(24a).

The policy defined "insured persons" as follows:

> "5. **Insured Person(s)** means:
>
> "A. **You**, if an individual;
>
> "B. **Your Spouse**;
>
> "C. **Your Resident Relative**:"
>
> * * * *

[1]The Exhibits attached to the Motion for Summary Disposition are in the record, but are not attached hereto as Appendices.

[2]Because the Court of Appeals affirmed the trial court finding of fraud, MEEMIC will not document it here in any detail. It was extensively demonstrated in the trial court pleadings and exhibits.

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

* * * *

"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."

(8a, 6a, 5a) (emphasis in original).

The Litigation -- Trial Court

On October 19, 2014, MEEMIC filed the Complaint in the instant case seeking, *inter alia*, a declaration that it owed no further benefits under the policy because it was void. (31a - 32a).

On April 19, 2015, MEEMIC filed a Motion for Summary Disposition on the ground that in the circumstances, the plain language of the policy entitled it to void the policy. (52a, 53a, ¶¶8, 10; 238a, ¶¶8, 10; 104a, ¶4, 110a - 111a). In their Response, Defendants argued that there was no evidence that JUSTIN was involved in any fraudulent activity. (70a).

At the August 17, 2015, hearing on the motion, the trial court denied that relief on the ground that the innocent third-party rule precluded terminating JUSTIN's benefits due to his parents' fraud. (117a).

On June 14, 2016, the Court of Appeals issued its opinion in *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 781-82; 891 NW2d 13 (2016), in which it held that the innocent third-party rule did not survive this Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), even as to no-fault claims.

Accordingly, on August 22, 2016, MEEMIC filed a Renewed Motion for Summary Disposition (119a), on the ground that the plain language of the policy allowed it to be voided, and that there is no innocent third-party rule in Michigan.

In their Response (132a), Defendants argued, *inter alia*, that *Bazzi* was facially distinguishable (141a - 142a) and that the No-Fault Act did not provide for rescinding the policy in these circumstances (144a - 147a).

In supplemental briefs (150a - 156a, 157a - 164a), the parties argued as to whether the July 10 cancellation of the renewal policy eliminated the parents' status as insureds under the policy, thereby rendering the anti-fraud provision inapplicable.

At the March 13, 2017, hearing, the trial court ruled that "reasonable minds 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". (167a, 168a). The court did not address the effect of the cancellation.

On March 14, 2017, the trial court entered an order (170a) granting summary disposition in favor of MEEMIC.

The Court of Appeals' Opinion

Defendants appealed to the Michigan Court of Appeals. On May 29, 2018, that Court issued a published opinion (172a) authored by Hon. M.J. Kelly and subscribed by Hon. Jane Markey, which affirmed the finding that JUSTIN's parents had made material misrepresentations as to the attendant care claim. However, the majority reversed the trial court and held that the parents could nevertheless recover attendant care benefits on the following grounds:

(1) Because the fraud was not in the procurement of the policy, the Court of Appeals decision in *Bazzi v Sentinel Ins Co*, 315 Mich 763; 891 NW2d 13 (2016), was factually distinguishable. Therefore, JUSTIN's claim for the attendant care provided by his parents was preserved by the innocent third-party rule;

(2) Because JUSTIN would have been statutorily entitled to benefits if the policy had not defined him as an insured, the policy's anti-fraud provision did not apply to him under *Shelton v Auto-Owners Ins Co*, 318 Mich App 648; 899 NW2d 744 (2017); and

(3) Because MEEMIC cancelled a subsequently issued renewal policy, JUSTIN's parents were no longer insured persons under the policy he was claiming benefits under. Therefore, their fraud did not allow MEEMIC to void the policy.

Judge Cameron dissented. He would have held:

(1) The innocent third-party rule is abolished even where the fraud occurs in the course of making a claim;

(2) The anti-fraud provision applied to JUSTIN because he was defined as an insured under the policy. *Shelton* does not apply to a resident relative of a named insured; and

(3) Because the no-fault policy was an "occurrence" policy, even after it was cancelled, JUSTIN's claim was subject to its terms, which included the declarations page, which denoted his parents as named insureds.

On August 23, 2018, MEEMIC filed an Application for Leave To Appeal to this Court.

On May 22, 2019, this Court entered an order (226a) granting leave to appeal.

STANDARD OF REVIEW

A decision on a motion for summary disposition is reviewed *de novo*. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Questions of statutory and contract interpretation are also review *de novo*. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).

I. MICHIGAN LAW DOES NOT RECOGNIZE THE INNOCENT THIRD-PARTY RULE IN ANY CIRCUMSTANCE. THEREFORE, THE INNOCENT THIRD-PARTY RULE DOES NOT EXEMPT JUSTIN FROM THE EFFECT OF THE "CONCEALMENT OR FRAUD" PROVISION OF THE POLICY UNDER WHICH HE CLAIMS BENEFITS.

The Court of Appeals majority opinion's discussion of the innocent third-party rule consisted of:

(1) Distinguishing *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), *aff'd*, 502 Mich 390; 919 NW2d 20 (2018), on the ground that it is limited to fraud in the application, and concluding that the innocent third-party rule applies in the instant case; and

(2) Ruling that in any event, because rescission is an equitable remedy, it is not automatic, but is subject to equitable principles, which favor JUSTIN in the instant case.

(174a - 175a).

Neither proposition is legally tenable because:

(1) Distinguishing *Bazzi* does not create an innocent third-party rule where one otherwise does not exist; and

(2) This Court's decision in *Bazzi* is inapplicable, because MEEMIC seeks to enforce a contractual provision allowing it to void the policy.

MEEMIC will discuss those matters in separate sub-issues.

A. THERE IS NO MICHIGAN AUTHORITY SUPPORTING AN INNOCENT THIRD-PARTY RULE IN ANY CIRCUMSTANCE.

The necessarily implicit premise for the Court of Appeals' holding is that *Bazzi* overruled a legitimate rule of law, so that if *Bazzi* does not apply, the rule remains. That is a false premise.

As will be demonstrated below, under Michigan law there never was an innocent third-party exception to an insurer's remedy for fraud. That doctrine was an invention of a rogue Court of Appeals panel, which created the rule in defiance of extant Michigan Supreme Court authority.

In *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959), the insured was sued for injuries caused by his negligent operation of a motor vehicle. Four months after suit was filed, the insurer discovered that in his application, the insured falsely denied that his license had been suspended within the previous five years. The insurer promptly rescinded the policy *ab initio* and withdrew its defense.

The tort plaintiffs took a default judgment, and garnished the policy. The garnishment testimony was that if the insurer had known of the license suspension, it would not have issued the policy. The trial court nevertheless ruled that the insurer had not advanced a cognizable defense to the garnishment.

This Court reversed, holding that the insurer was entitled to rescind the policy because the insured was guilty of "misrepresentation material to the risk and hazard". *Id.* at 83. This Court went on to reject the argument that the insurer had an obligation to investigate the insured's driving record prior to issuing the policy. *Id.* at 83 - 84.

State Farm v Kurylowicz, 67 Mich App 568; 242 NW2d 530 (1976), was a factual carbon copy of *Keys*. Despite the clear and unequivocal holding in *Keys*, the Court of Appeals panel refused to follow it because "no Michigan appellate court has seen fit to cite [that] case since it was released in 1959". *Id.* at 572. The panel cited an insurance treatise for the proposition that:

> '"The liability of the insurer with respect to insurance required by the act becomes absolute whenever injury or damage covered by such policy occurs *** No statement made by the insured or on his behalf and no violation of the policy

> provisions may be used to defeat or void the policy' 1 Long, The Law of Liability Insurance, §3:25 pp. 3-83-84."

Id. at 574.

The panel then pointed to amendments to the cancellation provisions of the Insurance Code enacted subsequent to *Keys*; to the enactment of the Motor Vehicle Claims Act; and to the No-Fault Act, and concluded:

> "When these statutes are read in pari materia, the policy of the State of Michigan regarding automobile liability insurance and compensation for accident victims emerges crystal clear. **It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery**. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void ab initio after injury covered by the policy occurs."

Id. (emphasis added).

Having said all that, the panel then announced "[T]hat issue is not before this Court and we need not decide it". *Id.* The opinion then cited some sister state cases, and concluded that rescission was improper because the insurer could easily have discovered the insured's driving record:

> "In the case at bar, State Farm could have obtained a copy of the insured's driving record for $2.00. We hold that, **in light of** the intervening legislation and the **public policy of the state of Michigan which such legislation imply**, Keys v. Pace, supra, is inapplicable to the case at bar."

Id. at 577 (emphasis added).

In *United Security Ins Co v Comm'r of Insurance*, 133 Mich App 38; 348 NW2d 34 (1984), the Court of Appeals first addressed the issue in the context of a claim for first-party no-fault benefits. The opinion cited *Kurylowicz* and two other cases, but noted that those decisions concerned third-party tort claims. As to no-fault claims, the Court of Appeals said:

> "Michigan's comprehensive scheme of compulsory no-fault automobile insurance arguably requires **as a matter of policy** that the insurer rather than innocent third parties bear the risk of intentional material misrepresentations by the insured."

133 Mich App at 43 (emphasis added). The opinion cited no Michigan case law, only sister state decisions.

Finally, in *Darnell v Auto-Owners Ins Co*, 142 Mich App 1; 369 NW2d 243 (1985), and *Katinski v ACIA*, 201 Mich App 167; 505 NW2d 895 (1993), the Court of Appeals denied rescission on the basis of the "innocent third party" doctrine in the context of a claim for first-party no-fault benefits.

This Court put an end to that nonsense in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012) by expressly reaffirming *Keys*. The holding in *Keys* was that an insurer can avoid liability **to an innocent third party** by rescinding its policy, rendering it void *ab initio*. **That** is the common law rule promulgated in *Keys*. 491 Mich at 560 - 61. *Keys* also rejected the *Kurylowicz* "easily ascertainable" exception to that rule, holding that the insurer had no obligation to investigate the insured's driving record. 358 Mich at 83 - 84.

If this Court's inclusion in *Titan* of a section called "*Keys* Reaffirmed", *id.* at 570, was not enough, the following passages should have put to rest any doubts as to the scope and impact of the opinion:

> "Not only did *Kurylowicz* clearly err by disregarding *Keys*, it also clearly erred by concluding that its purported justification for the 'easily ascertainable' rule warranted **departing from the common law rule articulated in *Keys***."

* * * *

> "We believe that the policy of the no-fault act is better understood in terms of its actual provisions than in terms of a judicial effort to identify some overarching public policy and effectively subordinate the specific details, procedures, and

> requirements of the act to that public policy. . . . **Third-party victims of automobile accidents have a variety of means of recourse under the no-fault act, and it is to those means that such person must look, not to a judicial articulation of policy that has no specific foundation in the act itself and was designed to supplant and modify the details of what was actually enacted into law by the Legislature**."

Id. at 564, 565 (emphasis added).

In *Bazzi*, the Court of Appeals did no more than recognize that *Titan* did, in fact, overrule *Kurylowicz*, because that opinion ignored this Court's decision in *Keys v Pace*. 315 Mich App at 781, 767. The Court of Appeals in *Bazzi* also held that neither the No-Fault Act nor any other provision in the Insurance Code mandated an innocent third-party rule in the context of a first-party no-fault claim. *Id.* at 774 - 78.

In its opinion in *Bazzi*, this Court affirmed the Court of Appeals' holding that *Titan* abrogated the rule created by *Kurylowicz*. *Bazzi*, p 5 - 13. As noted above, *Kurylowicz* chose to ignore *Keys v Pace*.

To summarize:

(1) In *Keys v Pace*, this Court ruled that there is no innocent third-party exception to an insurer's remedy for fraud.

(2) *Kurylowicz* created that exception in the face of contrary authority from this Court.

(3) *Kurylowicz* has been overruled and abrogated by this Court in *Titan* and *Bazzi*.

So as of the time the Court of Appeals rendered its decision in the instant case, there was no Michigan case law recognizing the innocent third-party rule in **any** context. Consequently, "distinguishing" *Bazzi* did not create any legal basis for such a rule. The Court of Appeals' opinion in the instant case noted that the *Kurylowicz* rule was abolished by this Court. But the

panel could point to no authority in its place to support the existence of such a rule. The innocent third-party rule does not exist in Michigan law.

B. MEEMIC IS NOT SEEKING EQUITABLE RELIEF.

The Court of Appeals was correct in observing that equitable rescission is subject to equitable considerations. Indeed, this Court reaffirmed that principle in *Bazzi*, p 14 - 18. However, the relief being sought by MEEMIC is not equitable, nor is it rescission. Rather, it seeks to enforce an unambiguous provision of its insurance contract.

In *Cohen v ACIA*, 463 Mich 525; 620 NW2d 840 (2001), this Court recognized that policy coverage could be voided pursuant to a policy provision, as opposed to common law fraud. In *Cohen*, the insured made a claim for uninsured motorist (UM) coverage. ACIA denied the claim on the ground that the plaintiff had submitted false documentation with regard to her PIP claim. *Id.* at 526.

In doing so, ACIA relied on a policy provision identical to the one in MEEMIC's policy. *Id.* at 527. This Court unanimously held that the provision was enforceable, and upheld ACIA's right to rely on the provision. However, this Court reserved judgment as to the full extent to which the clause could vacate the policy:

> "In the present case, we believe that the proper application of these principles is evident. Ms. Cohen seeks uninsured-motorist benefits. ACIA denied those benefits under a clause that, if applicable to this case, voids the entire policy. 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. It can. **A contractual provision that plainly governs the facts alleged to exist in this case is enforceable to the extent that it is not contrary to law**."

463 Mich at 532 (emphasis added).

In *Bahri v IDS Property Casualty Co*, 308 Mich App 420; 864 NW2d 609 (2014), the Court of Appeals answered the question left open by *Cohen*. In *Bahri*, the insured misrepresented the extent of her disability in connection with her claim for replacement services. *Id.* at 422. The plaintiff sued for UM and PIP benefits. The insurer moved for summary disposition, invoking the following policy provision:

> "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."

Id. at 423 - 24.

The Court of Appeals affirmed the trial court's grant of summary disposition in favor of the insurer, observing that, "When the policy language is clear, a court must enforce the specific language of the contract." 308 Mich App at 424. The Court held that the plaintiff's claim for both PIP and UM coverage were barred. *Id.* at 426 - 27.

A number of unpublished Court of Appeals' cases have applied *Cohen* to enforce contractual provisions voiding coverage for material misrepresentation. *Secura Ins v Thomas*, unpublished per curiam opinion of the Court of Appeals, rel'd 12/1/15 (No. 322240) (186a); *Stoops v Farm Bureau Ins Co*, unpublished per curiam opinion of the Court of Appeals, rel'd 3/23/06 (Nos. 260454, 261917) (194a); *Jones v ACIA*, unpublished per curiam opinion of the Court of Appeals, rel'd 8/23/05 (No. 261089) (210a).[3] In none of those cases, was equitable relief sought. Rather, the insurers were held to be **legally entitled** to enforce their policy

[3]MEEMIC cites the unpublished cases merely as illustrations of how *Cohen* has been applied. MCR 7.215(C)(1).

language. Indeed, the *Thomas* case expressly noted the distinction between enforcing the terms of the policy and seeking common law rescission:

> "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 . . . 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**. . . . **This provision is clear and unambiguous: Secura was entitled to void the policy if an insured, at any time, made false statements relating to the policy**."

(189a) (emphasis added).

The foregoing analysis demonstrates that equitable principles are irrelevant in the instant case, because MEEMIC is not seeking equitable relief, nor is it even seeking rescission. Those principles therefore cannot be invoked to justify a result facially at odds with the unambiguous terms of the policy.

II. MICHIGAN LAW DOES NOT EXEMPT SPOUSES AND RESIDENT RELATIVES FROM THE UNAMBIGUOUS TERMS OF THE POLICY UNDER WHICH THEY ARE CLAIMING BENEFITS.

The majority's next contribution to Michigan jurisprudence was its holding that the terms of a no-fault insurance policy are binding only on the named insured. Its reasoning was as follows:

(1) If JUSTIN were not defined as an insured under the policy, he would be entitled to benefits pursuant to MCL 500.3114(1), which provides that a no-fault policy applies to "the person named in the policy, the person's spouse, and the relative of either domiciled in the same household".

(2) Where a person's entitlement to benefits is solely by statute, he is not subject to the terms of the policy issued by the responsible insurer, citing *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 653-54; 899 NW2d 744 (2017).

(3) Because §3114(1) mandates coverage for a resident relative, the anti-fraud provision is invalid as applied to JUSTIN.

This Court should note that under that reasoning, the spouse of a named insured would also be entitled to coverage under §3114(1) if she were not defined as an insured by the policy, so under the majority's reasoning **the only person bound by the policy's terms would be the named insured**.

The linchpin of the majority's reasoning was its reliance on *Shelton* to remove JUSTIN from the reach of the provisions of the policy under which he is claiming benefits. That reasoning should be rejected for two independent and alternative reasons: (1) *Shelton* was wrongly decided; and (2) in any event, *Shelton* is distinguishable.

Shelton was wrongly decided.

In *Shelton*, the plaintiff was a passenger who was injured in a one-car accident. 318 Mich App at 651. She did not own a motor vehicle, nor did she reside with anyone who did. Accordingly, she sought no-fault benefits from the defendant, because it had issued a policy of insurance to the owner of the vehicle that the plaintiff occupied, MCL 500.314 (4)(a). *Id*.

The insurer denied the plaintiff's claim; the plaintiff sued. The insurer filed a motion for summary disposition on the ground that the plaintiff had made fraudulent statements in connection with her claim for no-fault benefits. The insurer relied on the following policy provision:

> "We will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct with respect to procurement of this policy or to any **occurrence** for which coverage is sought."

Id. at 652 (emphasis in original).

In an opinion authored by Judge Shapiro and subscribed by Judge Gleicher, the Court of Appeals held that because the plaintiff was not a party to, nor an insured under[4] the policy, she was not a "person seeking coverage under the policy" that the defendant had issued — and by virtue of which it was obligated to pay the plaintiff's benefits.

> "In this case, however, Shelton 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, defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement."

[4] The *Shelton* opinion does not quote the policy definition "insured", so we do not know whether the panel based its conclusion that the plaintiff was not "insured" on the language of the policy itself, or whether it was simply the panel's unfounded opinion. MEEMIC makes this point because some policies — including the one issued in the instant case — would define as insureds passengers in the covered vehicle. (8a, ¶5. D.).

Id. at 652.

Given that the insurer could have had no liability to the plaintiff but for the fact that it issued the policy, that holding is suspect on its face. Reasoned analysis of the authority on which the panel relied will demonstrate that it does not support that holding.

First, the opinion cites *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524 - 25 (1993), for the proposition that "the [no-fault] statute is the 'rule book' for deciding the issues involved regarding awarding those benefits". *Id.* at 653. To the extent that that means that a policy may not include provisions which are inconsistent with the requirements of the No-fault Act, *e.g., Cruz v State Farm Mutual Automobile Ins Co*, 466 Mich 588, 599 (2002), it is accurately cited. But the panel relied on *Rohlman* for much more.

Given the context in which *Rohlman* was cited, the panel's implication is that the provisions of the policy can be ignored, regardless of whether they conflict with the act. That is, after all, the conclusion toward which the panel is taking us. However, *Rohlman* does not support ignoring policy language. Rather:

> "**The policy and the statutes relating thereto must be read and construed together** as though the statues 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 carry out its purpose."

442 Mich App 523 n3 (emphasis added).

In order to bolster its holding that the provisions of the policy can be totally ignored, the panel also cited *Harris v ACIA*, 494 Mich 462 (2013) as an example of that "principle". 318 Mich App at 653. The passage from *Harris* quoted by the panel was *obiter dictum*.

In *Harris*, the claimant was struck by a motor vehicle while riding a motorcycle. ACIA had issued a policy of no-fault insurance to the owner of the motor vehicle, and was, accordingly, the insurer in the highest order of priority. MCL 500.3114(5)(a). 494 Mich App 465 - 66.

The claimant had a health insurance policy with BCBSM. That policy contained a provision that:

> "[we] do not pay for the following care and services: those for which you legally do not have to pay or for which you would not have been charged if you did not have coverage under this certificate."

Id. at 464.

BCBSM mistakenly paid approximately $20,000 in medical bills, but then retracted those payments. ACIA reimbursed BCBSM, and continued to pay the plaintiff's medical expenses. The plaintiff then claimed that ACIA owed him the same amount that ACIA had reimbursed BCBSM. When ACIA refused to make such a payment, the plaintiff filed suit. *Id.* at 466.

The trial court enforced the BCBSM coordination of benefits provision, ruled that ACIA was primarily liable for payment of a benefits, and granted summary disposition in favor of ACIA and BCBSM. **Plaintiff appealed, challenging only the order dismissing his claim against BCBSM.** *Id.* at 467.

The Court of Appeals reversed. The majority accuratley characterized the dispute as whether the BCBSM coverage coordinated with the no-fault policy. However, rather than apply the language of the provision, the majority looked to its cases defining the term "incurred", and

concluded that BCBSM was required to pay.[5] It reversed the grant of summary disposition in favor of BCBSM. 494 Mich App 468 - 69.

This Court granted BCBSM's application for leave to appeal, and reversed. This Court summarized its holding as follows:

> "We conclude that, regardless of when Harris incurred expenses arising from the motor vehicle accident, he simply did not legally have to pay these expenses. When Harris sought treatment for his injuries under MCL 500.3114(5)(a), the legally assigned insurer, defendant Auto Club Insurance Association (ACIA), became liable for all of Harris' PIP expenses. **Because BCBSM's policy plainly provides that BCBSM is not liable for expenses that Harris does not legally have to pay, Harris cannot collect expenses from both ACIA and BCBSM**."

Id. at 465 (emphasis added).

That holding recognized that the sole and dispositive issue was whether BCBSM was liable for the plaintiff's medical expenses. If not, then the plaintiff had no basis for seeking additional payment from ACIA. However, this Court's discussion strayed beyond that issue.

The complete paragraph from which *Shelton* extracted its quotation reads as follows:

> "However, in this case, Harris' claim is fundamentally at odds with those cases. Unlike the claimant in *Shanafelt* [v *Allstate Ins Co*, 217 Mich App 625 (1996)], and other in cases in which double recovery of insurance benefits was awarded, Harris is not claiming benefits under a no-fault insurance policy that he or anyone else procured. Harris is neither a third-party beneficiary no a subrogee of a no-fault policy issued to the person that struck him and thus he is not eligible to receive benefits under that policy. Rather, Harris' right to PIP benefits arises solely by statute."

---

[5] The irony of *Shelton*'s reliance on *Harris* should not be lost. In *Shelton*, the Court of Appeals panel made no effort to determine whether the policy language defined the plaintiff as an "insured". Instead, it leapt directly into some case law, which it cited at the basis for ignoring the operative policy language in the anti-fraud provision. *Shelton*'s analysis parallels the mistake made in *Harris*.

Id. at 472.

The first two sentences of the quotation are legally accurate. They are also all that was necessary to the resolve of the case. Unlike the plaintiff in *Shanafelt*, on appeal Mr. Harris was not seeking benefits from his no-fault insurer. No more need have been said.

First, ACIA's exposure was not even at issue. The only issue before this Court was whether BCBSM was liable to the plaintiff for benefits under its policy.

Second, the basis for the naked pronouncement that the plaintiff had no coverage under ACIA's policy is not explained. The passage on which *Shelton* relied was a simple fiat, and was facially inconsistent with the fact that the only basis for ACIA's exposure under the statute **was the policy it issued**. The *dicta* was thus both unexplained and inaccurate.

In short, to the extend that *Harris* can be viewed as standing for the proposition that a claimant may ignore the terms of the policy under which he claims coverage, it is simply inaccurate. Fortunately, the relevant passage is, as demonstrated, *dicta*.

Shelton is decisively distinguishable.

Even if *Shelton* were not wrongly decided, it would be inapplicable in the instant case because it is materially distinguishable.

First, unlike the plaintiff in *Shelton*, Justin was a contractually and statutorily defined insured under the MEEMIC policy.

In *Shelton*, the panel noted that under the No-Fault Act, the policy in question did not apply to the plaintiff. Here, in terms, the No-Fault Act defines Justin as a person to whom the policy does apply:

> "Except as provided as subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) **applies to accidental bodily injury to** the person named in the policy, the person's spouse, and **a relative of either domicile in the same household**, if the injury arises from a motor vehicle accident."

MCL 500.3114(1) (emphasis added).

Likewise, the MEEMIC policy defines Justin as an "insured person":

> "**Insured Person(s)** means:
> A. **You**, if an individual,
> B. **Your Spouse**;
> C. **Your resident relative**;"
>
> * * * *
>
> "**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."

(8a, ¶5, 5a, ¶16). (emphasis in original).

Second, it is undisputed the Justin is claiming benefits under the policy.

All that being so, Justin is subject to the policy's terms and conditions. Accordingly, pursuant to Condition 22, the MEEMIC policy is void due to the parents' fraud.

III. THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY DID NOT ALTER THE PARENTS' STATUS AS NAMED INSUREDS SUBJECT TO THE ANTI-FRAUD PROVISION OF THE POLICY UNDER WHICH RECOVERY IS SOUGHT IN THE INSTANT CASE.

As its final contribution to the new Michigan jurisprudence of insurance law, the majority held that despite the fact that no-fault policies are "occurrence" policies, cancellation of a subsequent renewal policy eliminated JUSTIN's parents' status as insureds, thereby rendering the anti-fraud provision inapplicable.

The majority's reasoning and holding are fatally defective for three independent and alternative reasons:

(1) Once an occurrence has taken place triggering coverage, a subsequent cancellation cannot affect the rights and obligations of the parties.

(2) The cancellation of a subsequent policy cannot affect any rights or obligations under a previous policy.

(3) JUSTIN's parents were persons claiming coverage under the policy and, therefore, remained insureds subject to the terms and conditions of the policy under the majority's own reasoning.

Those propositions will be discussed in separate sub-issues.

A. THE TERMS AND CONDITIONS OF AN OCCURRENCE POLICY CANNOT BE ALTERED BY A POST-OCCURRENCE CANCELLATION. THEREFORE, THE PARENTS' STATUS AS NAMED INSUREDS SURVIVED CANCELLATION OF THE POLICY.[6]

Under an occurrence policy, coverage attaches once the "occurrence" takes place. *E.g.*, *Stine v Continental Casualty Co*, 419 Mich 89, 97; 349 NW2d 127 (1984). The rights and

[6]As will be demonstrated in Issue II.B., *infra*, the policy that was cancelled was not the one under which JUSTIN was claiming benefits. Nevertheless, this sub-issue attacks the major premise of the majority's argument, which is an issue of great significance to the jurisprudence of this State.

obligations of the parties are fixed at that point, and cannot be retroactively affected by a subsequent cancellation. *E.g., Olmstead v Farmers Mutual Fire Ins Co*, 50 Mich 200, 203; 15 NW 82 (1883); *Hobby v Farmers Ins Exchange*, 212 Mich App 100, 104; 537 NW2d 229 (1995); *Madar v League General Ins Co*, 152 Mich App 734, 742; 394 NW2d 90 (1986); 2 Couch on Insurance, §30.25. The majority opinion conceded that no-fault policies are occurrence policies. (176a).

The General Insuring Agreement of MEEMIC's policy reads in pertinent part as follows:

> "**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**."

(3a) (emphasis added).

The Declarations Page denotes JUSTIN's parents as Named Insureds. (1a). JUSTIN was an "insured person" because he was a "resident relative" of a "named insured". (8a, No. 5; 5a, No. 16). It was those statuses that gave rise to MEEMIC's contractual obligation to pay PIP benefits. (10a, ¶1).

If the majority opinion's conclusion were correct, then JUSTIN would also have ceased to be a "resident relative" when his parents retroactively became non-insureds, and his coverage would have been terminated by the cancellation of the policy. But we know that cannot be the case.

The problem with the majority's reasoning is that it fails to appreciate the ramifications of the fact that "Cancellation will not affect any claim that originated prior to the cancellation."

(177a). Even if the claim is solely JUSTIN's[7], holding that the cancellation retroactively nullified the parents' status as named insureds would dramatically affect his claim by nullifying his status as a resident relative, thereby depriving him of coverage. That result is forbidden by both the case law and the policy language.

In sum, the majority's reasoning was ultimately self-defeating. After correctly noting that the cancellation could not affect JUSTIN's claim, the majority posited a retroactive nullification of the very terms of his coverage, i.e., his parents' status as named insureds, which would eliminate the contractual basis for his claim.

B. THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY HAD NO EFFECT ON A PREVIOUS POLICY.

In Michigan, the renewal of an insurance policy involves the creation of a **new contract**. *Michigan Mortgage-Investment Co v American Employers Ins Co*, 244 Mich 72, 74; 221 NW 140 (1928); *Ladies of Modern Macabees v Illinois Surety Co*, 196 Mich 27; 163 NW 7 (1917). The offer is the notice to renew; the acceptance is the payment of the premium. *Hagerl v ACIA*, 157 Mich App 684, 687; 403 NW2d 197 (1987). So we have two separate policies here.

The policy under which JUSTIN was receiving benefits was effective 7/29/09-1/29/10. (1a). That policy was never cancelled. The policy that was cancelled was effective 1/29/10-7/29/10. (100a).

Cancellation is the termination of a policy before its expiration date. *Collins v Franken-muth Mutual Ins Co*, 193 Mich App 716, 719; 484 NW2d 783 (1992). The cancellation was effective July 29, 2010, which was six months after the expiration of the policy under which

[7]But see Issue III.C., *infra*.

JUSTIN is claiming benefits. The cancellation could therefore have had no conceivable effect on the previous policy. The Court of Appeals erred in holding otherwise.

C. EVEN IF THE MAJORITY'S ANALYSIS WAS OTHERWISE CORRECT, JUSTIN'S PARENTS WERE CLAIMANTS OF BENEFITS UNDER THE POLICY, WHOSE CLAIMS ORIGINATED PRIOR TO THE DATE OF CANCELLATION. THEREFORE, UNDER THE MAJORITY'S REASONING, THEIR STATUS AS INSUREDS WAS UNAFFECTED, AND THEY REMAINED SUBJECT TO THE ANTI-FRAUD CONDITION.

Even if the majority's analysis did not violate the above-discussed tenets of insurance law, its analysis was otherwise fatally flawed. The majority relied upon the policy language which provided:

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

(177a) (emphasis in original).

The majority then defined "claimant" as:

> "The person who makes a claim, i.e., one who asserts a right or demand, esp. formally."

(177a).

That definition unquestionably includes JUSTIN's parents. LOUISE submitted the claims for attendant care beginning in 2009, prior to the cancellation; RICHARD received and cashed the checks. (86a). Both are Counter-Plaintiffs in the instant case. (45a). It is difficult to imagine a more graphic example of two persons "asserting a right or demand".

Yet, after setting forth the above-quoted definition, the majority averred -- without analysis or any kind of explanation -- that a claimant had to be "the person insured":

> "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."

(178a) (italics in original) (other emphasis added).

At no point did the majority explain why only an insured can be a claimant. Nor did it explain why the persons actually making the claim for attendant care were not claimants, and the person who Defendants insist had nothing to do with the claim (JUSTIN) is the only claimant.

Thus, the majority's conclusion that the parents were not claimants is irreconcilable with the discussion that led up to it. The only conclusion that follows from the majority's analysis is that the parents were claimants. Given that the parents were claimants, the majority's basis for nullifying their insured status evaporates. They thus remained subject to the terms and conditions of the policy.

SUMMARY

The majority's holding that the cancellation of the renewal policy eliminated the parents' status as insureds under the policy JUSTIN was claiming under should be rejected for three independent and alternative reasons:

(1) The terms and conditions of the policy could not be altered by a post-occurrence cancellation. Therefore, the parents' status as insureds subjected them to the anti-fraud provision.

(2) The cancellation of a subsequent policy could have no effect whatsoever on the policy applicable to the instant case.

(3) The parents were claimants under the policy, so the majority's convoluted attempt to demonstrate that they were not insureds falls with its premise.

RELIEF REQUESTED

Plaintiff-Appellant, MEEMIC INSURANCE COMPANY, asks this Court to issue an opinion holding that:

(1) There is no innocent third-party rule even where the fraud occurs in the claim for benefits, as opposed to in the application for insurance;

(2) A person's status as an insured person under a policy may not be ignored in order to avoid the application of an anti-fraud provision; and

(3) The cancellation of a no-fault policy after a loss occurs does not nullify the policy's terms and conditions applicable to the loss.

KREIS, ENDERLE, HUDGINS & BORSOS, PC
BY: MARK E. KRETER (P35475)
ROBB S. KRUEGER (P66115)
Attorneys for Plaintiff/Counter-Defendant/Appellant
1 Michigan Avenue, West
Battle Creek, MI 49017
(269) 966-3000
mark.kreter@kreisenderle.com

JAMES G. GROSS, PLC
BY:/s/James G. Gross
JAMES G. GROSS (P28268)
Attorneys of Counsel for Plaintiff/Counter-Defendant/Appellant
615 Griswold Street, Suite 723
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

Dated: July 15, 2019