

**STATE OF MICHIGAN**  
**IN THE 14<sup>TH</sup> CIRCUIT COURT**

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SECURA INSURANCE,  
v  
Plaintiff,

HON. TIMOTHY G. HICKS  
File No. 12-048218-CK

JOY B. THOMAS, and  
DELORES SWINGLER-REID  
Defendants.

\_\_\_\_\_/

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Joy Thomas  
Defendant In Pro Per  
2771 Pierce Brennen Court  
Lawrenceville, GA 30043

Delores Swingler-Reid  
Defendant In Pro Per  
1039 Hidden Creek  
Muskegon, MI 49441

**OPINION AND ORDER REGARDING PLAINTIFF'S MOTION  
FOR SUMMARY DISPOSITION WITH RESPECT TO DAMAGES**

**INTRODUCTION**

The court of appeals affirmed the trial court's decisions about summary disposition, but remanded the case to re-evaluate the award of attorney fees.

This judge issued a scheduling order in March of 2017 which established procedures for concluding the case. The parties have submitted briefs and supporting materials. Neither side has requested the opportunity to present "live" testimony in this court.

## ANALYSIS AND DECISION

### Fraud

This Judge's predecessor, the Hon. Neil G. Mullally, allowed Secura to file an amended complaint which added counts of fraud and conspiracy to commit fraud. He then, on October 18, 2013, granted summary disposition on "all counts that were set forth involving fraud and misrepresentation, as well as the [request for] rescission." (Transcript, p 12.) The court of appeals found "(a)gain, we note that the trial court made no findings as to whether an award of attorney fees was appropriate in light of this exception." (Opinion, page 6.)

This is not a technical distinction. On page 9 of the transcript of the June 7, 2013 hearing, defense counsel distinguished between the level of scienter needed to establish breach of a policy provision versus that necessary to establish the independent tort/fraud claim.

Judge Mullally made these findings when he granted summary disposition on June 7:

Consistently throughout the case, until the discovery of the other case in Oakland County, the statement of facts of both Delores and Joy were that Joy had-I'm sorry, that Delores has driven the car there; that the car was there in back of the other—or blocked in Joy's car because of it being a single-car garage. And that Joy, therefore, had to take the Impala, which of course resulted in the accident. And yet, the documentation and the records show uncontroverted (sic) that Delores was actually here in Michigan at all pertinent times related to the accident. (Pages 14-15.)

The defendants' (then) counsel had argued, at the hearing, that his clients simply had some confusion or imprecision about the dates, and that it did not rise to the level of deception giving rise to any remedies.

This is simply not the case. The medical records recited at the June 7th hearing clearly establish that Swingler-Reid was receiving substantial medical treatment here in

Muskegon. She received physical therapy on six occasions in January of 2010. She was admitted to the emergency room here in Muskegon on February 7, 2010, and had an x-ray the same day. She completed paperwork for a new patient evaluation with a doctor here in Muskegon on February 4, 2010.

Her testimony in the Oakland County case (pages 167-169) was that she did not drive after “her second accident,” allegedly December 22, 2009 (Court of Appeals opinion, page 2), until April of 2010.

**Yet, both she and her daughter steadfastly maintained that both she and her daughter were in Georgia on February 8.** Such bald-faced lying is breath-taking. And the detail with which Thomas recites this caper makes it clear that she and her mother conspired to present these lies.

Their agreement required them to agree on a host of subsidiary lies- Swinger-Reid went to bingo, blocked in Thomas when she returned, Thomas needed to run errands so she took the Impala-that make it clear that this was not simply a mistake or confusion about particular times. This behavior is fraudulent and entitles Secura, in a global sense, to recover its attorney fees under *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d (2006).

The court allows the attorney fees to be recovered because Secura has prevailed on its fraud and conspiracy to commit fraud counts.

#### Jurisdictional and Allocation Factors

Secura presented itemized records prior to the October 18, 2013 hearing. He allowed defendants 30 days to challenge the amounts. He allowed defendants much longer than that, and eventually signed an order on June 9, 2014. He approved the

entire amount sought- \$68,787.24. This total amount included Secura's work in Oakland County and in Georgia.

The *Spectrum Health* court, at 270 Mich App 253, found that the fraud/attorney fees exception allowed the prevailing party to recover "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 at 253. (Bold added.)

Whether Secura is entitled to recover attorney fees, costs, and expenses incurred in defending Thomas's Georgia action is a separate issue. It must be remembered that exceptions to the doctrine that attorney fees are not recoverable are narrowly construed. *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991).

The case Secura relies upon, *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286 (2008), allowed an award of attorney fees incurred in the action itself, not attorney fees incurred in another action. This court does not read *Kircher* to stand for the proposition that attorney fees incurred in another action, in another state, are recoverable in this litigation. In addition, that decision likely invokes Georgia's laws about attorney fees and the so-called fraud exception.

The court lacks information about the facts in the Oakland County case which would allow it to make such a decision in this case.

This judge stresses that the decision to deny this relief only means that this court is not the forum in which to press this issue. It does not bar Secura from pursuing relief in the other courts.

The **Amount** of Attorney Fees

Judge Mullally (pages 12-13 of the transcript of that hearing) referenced several of the factors to be evaluated, even though he did not cite the then-controlling case of *Smith v Khouri*<sup>1</sup>, 481 Mich 519; 751 NW2d 472 (2008).

The court orders Secura to submit records which (1) updates the work on this file to the current date, (2) excludes any work on the Oakland County and Georgia files, and (3) provides sufficient detail for the court to conduct its *Pirgu* analysis. The court does not require any additional argument or testimony. The court will allow 14 days for the defendants to respond and will enter an order which concludes this matter.

Joint and Several Liability

Michigan has abolished joint and several liability for these types of claims. MCL 600.2956. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 641; 734 NW2d 217 (2007). It appears that that these two defendants participated equally in this plan, so the court will allocate the attorney fees equally when it enters a final judgment.

**IT IS SO ORDERED.**

Date: August \_\_\_\_, 2017

\_\_\_\_\_  
Timothy G. Hicks, P35198  
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_ day of August, 2017, I personally mailed copies of this order to the parties above named at their respective addresses, by ordinary mail.

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Susan K. Orrison, Circuit Court  
Legal & Scheduling Secretary

<sup>1</sup> *Pirgu v United Servs Automobile Ass'n*, 499 Mich 269; 884 NW2d 257 (2016) would be the controlling case now.