STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GUY T. ALFANO, SR., a legally incapacitated Individual, by and through his duly Appointed guardian, RENE ALFANO, and RENE ALFANO, individually,

Plaintiffs,

Case No. 13-014755
HON. KATHLEEN MacDONALD

-vs-

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant.
_______________________________________/

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PLAINTIFFS' RESPONSE TO DEFENDAN CITIZENS INSURANCE COMPANY OF AMERICA'S MOTION FOR SUMMARY DISPOSITION PURUSANT TO MCR 2,116(C)(10) AND MCL 500.3173a(2)

NOW COME the Plaintiffs, by and through their attorney, Bret A. Schnitzer, and for their response to Defendant Citizens Insurance Company of America's ("Defendant's") motion for summary disposition, state:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted. Mr. Alfano's treating doctors and psychologist have all confirmed and prescribed that, due to serious closed-head injury sustained in the January 11, 2006 accident, Plaintiff requires 24/7 attendant care.

5. Admitted that Rene Alfano has submitted forms verifying her attendant care services for Plaintiff. Denied that she submitted forms for services performed "every day." As demonstrated below, Ms. Alfano did not claim performance of attendant care services for several days in May 2013 after she suffered temporary injuries in a vehicular accident. During those dates, other family members performed all or part of Plaintiff's attendant care – a fact Defendant not only contemporaneously knew about, but fully assessed and paid each person separately for their share of the services rendered.

6. Denied. Defendant's surveillance photos, which are unauthenticated and not admissible evidence under MCR 2.116(G)(6), show only that on one date, December 28, 2012, Ms. Alfano left home for approximately 22 minutes. During this brief time, Ms. Alfano's son watched Plaintiff – and she compensated him for the time. Absolutely no "fraud" occurred.

7. Once again, the photos are unauthenticated and not admissible evidence. Even more, Defendant omits that, when Plaintiff briefly walked his dog outdoors on four dates in July 2011, he was immediately next to the house and remained under Ms. Alfano's observation. Moreover, Defendant omits that, despite securing this surveillance footage in July 2011, it

waived any fraud defense by continuing to pay Plaintiffs' PIP benefits until November 6, 2013 – and then terminating without raising any allegations of "fraud."

8. Denied.

9. Denied.

10. Admitted.

11. Denied.

12. Admitted.

13. Denied. Absolutely no fraud occurred. Defendant's motion for summary disposition deliberately omits substantial evidence proving that no fraud occurred. The motion constitutes a frivolous, and sanctionable, pleading under MCR 2.114(D).

14. No contest as to the general grounds for summary disposition under MCR 2.116(C)(10).

15. Denied.

16. Denied.

17. Denied that Defendant is entitled to attorney fees. Instead, Plaintiffs are entitled to costs and attorney fees under MCR 2.114(D) for having to respond to Defendant's frivolous motion. Plaintiffs will also be entitled to attorney fees under MCL 500.3148 at the end of this case based on Defendant's patently unreasonable termination of benefits.

18. Denied.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court deny Defendant Citizens Insurance Company of America's motion for summary disposition and assess sanctions against Defendant under MCR 2.114.

Respectfully submitted,

LAW OFFICES OF
BRET A. SCHNITZER, P.C.

By: ______________________________
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Dated: May 1, 2015

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDAN CITIZENS INSURANCE COMPANY OF AMERICA'S MOTION FOR SUMMARY DISPOSITION PURUSANT TO MCR 2,116(C)(10) AND MCL 500.3173a(2)

INTRODUCTION

Defendant moves for summary disposition, arguing that Plaintiffs committed fraud disqualifying them from PIP benefits under MCL 500.3173a(2) and MCL 500.4503. Defendant's motion is a frivolous pleading under MCR 2.114(D). Defendant deliberately omits substantial evidence not only proving that Plaintiffs did not commit any fraud, but that it contemporaneously knew about all the allegations it now raises but continued to pay PIP benefits until terminating, for grounds totally unrelated to "fraud," on November 6, 2013. Defendant's motion constitutes nothing more than a frivolous, last-ditch attempt to leverage a lower settlement in this second lawsuit involving a catastrophically injured person who unquestionably requires 24/7 attendant care. Defendant's motion must be denied with imposition of Rule 2.114 sanctions.

COUNTERSTATEMENT OF FACTS

Although Defendant moves for summary disposition under MCR 2.116(C)(10), requiring consideration of all material evidence and reasonable inferences in the light most favorable to Plaintiff, Defendant deliberately omits substantial evidence confirming that (a) absolutely no fraud occurred and (b) that Defendant waived any fraud defense.

Plaintiff was catastrophically injured in the January 11, 2006 accident and has continued to require 24/7 attendant care.

On January 11, 2006, the principal Plaintiff, Guy Alfano, Sr., while a pedestrian walking to his car, was catastrophically injured in a collision by a hit and run vehicle. (**See**, Ex A – police report). Plaintiff lost consciousness in the accident. (**See**, Ex B – Oakwood Annapolis ER report).

Mr. Alfano suffered numerous, severe injuries in this accident. Of particular importance for the purposes of Defendant's motion for summary disposition, Plaintiff suffered a disabling closed-head injury. After a series of abnormal EEGs and neuropsychological examinations, doctors diagnosed Plaintiff with a closed-head injury, post-traumatic seizures, post-traumatic cognitive difficulties, psychological deficits (specifically, a "major depressive disorder and personality change secondary to (the) closed-head injury"), and tremors. (**See**, Ex C – EEGs; Ex D – Dr. Nisan 3/5/07 report; Ex E – Blase 7/31/06 report; Ex F – Spectrum 11/6/06 report; Ex G, Newman 6/12/07 report; Ex H – Mercy Memorial Hosp. 6/08 note; Ex I – Murshed reports).[1]

Due to Plaintiff's extensive injuries, especially the conditions and limitations arising from his accident-related close-head injury, since 2006, doctors have prescribed 24/7 attendant care. (**See**, Ex M – attendant care prescriptions; Ex G – Newman 6/12/07 report, p 3). In her

[1] Plaintiff's additional injuries include severe damage to his right knee, requiring surgery in March 2006, (**See**, Ex J – 3/8/06 MRI and 3/30/06 operative report), a herniation and disc bulge injury at L3-L4, L4-L5, (**See**, Ex K – 3/14/06 MRI & 4/12/06 EMG), and injuries to his right shoulder and right hip, (**See**, Ex L – Awan 5/1/08 & 4/8/09 reports).

testimony from the first lawsuit, Plaintiff's wife, Rene Alfano, established that Guy needs attendant care because he "has seizures," "has memory problems," and sometimes "shakes" with his "whole body." (**See**, Ex N, Rene Alfano dep 1, pp 7-8). Plaintiff's cognitive, seizure and physical problems require that he have constant monitoring. (Id). Ms. Alfano also has to assist Plaintiff with personal hygiene, grooming, feeding and household chores. (Id, pp 25-30).

Defendant's IME doctor Samet confirmed Plaintiff's severe, disabling neurological injuries.

At Defendant's request, on April 18, 2007, neurologist and psychiatrist, Norman T. Samet, M.D., performed an IME on Plaintiff. (**See**, Ex O – Samet report). Dr. Samet's diagnoses included: "Major depression with significant physical problems secondary to head injury and recent occurrence of increasingly serious seizure-like activity," and "[l]imited activities of daily living, chronic severe." (Id, p 4). Samet concluded:

> "From a psychiatric standpoint, it is my opinion that his gentleman is disabled at this time, having sustained a closed-head injury that lately has been causing seizures of unknown origin and type. . . .
>
> I do not feel that he is able to work at this time. According to his wife, his activities of daily living are very limited, being barely able to look after himself." (Id, pp 4-5).

Defendant's original claims adjuster, Julie Rawlins, conceded that Dr. Samet concluded that Plaintiff is disabled due to a closed-head injury sustained in the January 11, 2006 accident. (**See**, Ex P, Rawlins dep, pp 14-16). Ms. Rawlins further admitted that the IME completed by Dr. Furgison similarly found that Plaintiff has "moderate to severe" cognitive difficulties related to the motor vehicle accident. (Id, pp 20-23).

After Rene Alfano is appointed Plaintiff's Guardian, Defendant settled the first lawsuit.

On August 25, 2008, Plaintiffs filed, in this Court, the first complaint against Defendant for unpaid PIP and UM benefits. (Docket No. 08-121556-NF). In June 2009, due to Plaintiff's

worsening cognitive disabilities, the Monroe County Probate Court appointed his wife, Rene Alfano, Plaintiff's guardian. (**See**, Ex Q – Probate Court order). A Guardian Ad Litem report recommended appointment of Ms. Alfano as Plaintiff's permanent guardian as "necessary" due to "deficits caused by a 'closed head injury' . . . suffered in the . . . accident." (Id, Report and recommendation).

On September 22, 2009, Defendant and Plaintiffs settled the previous lawsuit. (**See**, Ex R – Settlement). The agreement, in pertinent part, required Defendant to pay Plaintiff's attendant care "for two years . . ., at which time payments for attendant care will be subject to review . . ." (Id, p 2).

Defendant's allegations of "fraud" are unsupported by admissible evidence and frivolous.

Eschewing its obligation under MCR 2.114(D) to completely and accurately present the facts, Defendant falsely alleges that surveillance videos from July 2011 and December 2012 establish that Plaintiffs submitted a fraudulent claim disqualifying them from PIP benefits under MCL 500.3173a(2). At the outset, in violation of MCR 2.116(G)(6), Defendant cites no admissible evidence verifying the foundation and accuracy of the 13 photographs or video still-frames, attached as Exhibit D to its motion.

Rene Alfano kept Plaintiff under observation when he walked the dog on four occasions in July 2011. Despite contemporaneous knowledge of these four dog walks, Defendant continued to pay PIP benefits for another year and a half, until terminating on November 6, 2013 for reasons that did not include "fraud".

Considered on the merits, absolutely no fraud occurred. The seven photographs showing Mr. Alfano walking a dog in July 2011 do not establish that Plaintiffs fraudulently claimed attendant care benefits during this period. Each photo shows nothing more than Mr. Alfano, while using a cane, walking a dog next to his home. Apparently, the duration of the dog-walks

on these four days was very short. While Mr. Alfano has several severe accident-related problems, Plaintiffs have never claimed that, in July 2011, he was unable to walk.

Plaintiffs also have never claimed that Mr. Alfano was never able to go outside. (**See**, Ex S – R. Alfano dep 2, p 22). Plaintiff would sometimes take the family dog, Ouija, who died in 2013, for short walks just outside from the house. (Id, p 22; **See**, Ex T – R. Alfano affidavit, § 3; **See**, Ex U – G. Alfano dep, p 19).

Defendant's contention that these photos prove that Plaintiff did not need 24/7 attendant care is patently false. Plaintiff has required attendant care primarily due to his closed-head injury, which has led to unpredictable seizures and cognitive problems. In her May 6, 2014 deposition, Ms. Alfano testified that Plaintiff requires constant monitoring because, without warning, he could go into "absence seizures" where he simply blanks out or "shakes." (**See**, Ex S – R. Alfano dep 2, pp 23-24). The seizures occur nearly every day and last anywhere from seconds to an hour. (Id, pp 23-25). Accordingly, Plaintiff must always be watched, including while he is sleeping. (Id).

Plaintiff's treaters universally confirm that the closed-head injury has disabled him and necessitates 24/7 attendant care. In his January 5, 2015 deposition, Dr. Awan reiterated that Plaintiff suffered a "closed-head injury" which still causes ongoing "confusion," "seizure disorder," "balance problems, dizziness, headaches" and episodes of "incoherent" behavior. (**See**, Ex V – Awan dep, pp 9, 12-13, 34, 38-41). Dr. Awan explains that, at times, Plaintiff "doesn't engage in any intelligent interchange whatsoever." (Id, p 23). Plaintiff "cannot live independently" and, accordingly, continues to require "supervision 24 hours." (Id, pp 30-31).

Plaintiff's treating psychologist reports that Plaintiff has "ongoing seizure activity, especially *absence*," which occurs "throughout the day" and is unpredictable. (**See**, Ex W – Amberg 2/3/14 report). Plaintiff is also now suffering from worsening "memory loss." (Id,

1/6/15 report).[2] Based on these severe neurological and cognitive accident-related conditions, Plaintiff's treaters continue to prescribe 24/7 attendant care. (**See**, Ex M – Attendant care prescriptions).

Defendant falsely argues that the surveillance photographs prove that Ms. Alfano did not monitor Plaintiff while, on the four occasions in July 2011, he briefly walked the family dog. In raising this accusation, Defendant disingenuously omits Ms. Alfano's unrebutted, May 6, 2014 deposition testimony that she would only allow Plaintiff to take their now deceased dog outside for a short walk "as long as (she was) watching him . . ." (**See**, Ex S – R. Alfano dep 2, p 22).[3] Ms. Alfano is clear that, during the times her husband went outside, she would continue to monitor him from the house. (Id; **See**, Ex T – R. Alfano affidavit, §§ 4-5). The surveillance photographs confirm that Plaintiff never walked away from the immediate vicinity of the home or away from Ms. Alfano's ongoing ability to monitor him.

In another deliberate attempt to mislead this Court, Defendant spuriously relies on an excerpt from Mr. Alfano's May 6, 2014 testimony that he doesn't go outside too much and that Ms. Alfano walks the dog. As indicated above, Ouija, the dog Plaintiff briefly walked on the four days in July 2011, died in 2013. (**See**, Ex S – R. Alfano dep 2, p 22; Ex T – R. Alfano affidavit, § 3; Ex U – G. Alfano dep, p 19). The fact that, after 2011, Ms. Alfano occasionally took the family's surviving dog outside (on the rare occasions the dog does not use "pads in the

[2] Plaintiff's memory loss has gotten so worse that he now sometimes forgets the names of his own children. (**See**, Ex X – Dr. Murshed 1/6/15 report).

[3] Ms. Alfano gave this testimony on May 6, 2014, (**See**, Exhibit S – R. Alfano dep, p 1), long before Defendant filed its April 10, 2015 motion raising the "fraud" argument about Plaintiff walking the dog in July 2011.

house," **See**, Ex U – G. Alfano dep, p 19), in no way establishes any "fraud" regarding Ms. Alfano's claim for attendant care in July 2011.[4]

Defendant omits that, despite having this surveillance footage since July 2011, Defendant continued to pay Plaintiff attendant care benefits. Defendant did not terminate attendant care benefits until November 6, 2013. (**See**, Ex Y – 11/6/13 cut off letter). Even then, Defendant's termination did not mention surveillance or any allegation of "fraud," but relied on new IME reports. (Id). Defendant clearly never believed the dog-walking issue was material.

Rene Alfano did not abandon Plaintiff on December 28, 2012, but had her son watch Plaintiff for the approximate 22 minutes she left the house, and compensated her son for this time. Ms. Alfano did not submit any fraudulent attendant care claim. Moreover, despite contemporaneously receiving this surveillance footage, Defendant continued to pay Plaintiffs' benefits for eleven more months.

Defendant's next argument, that surveillance photos from December 28, 2012 prove that Ms. Alfano fraudulently submitted an attendant care claim for that date, is also frivolous. By Defendant's own admission, these photographs[5] merely show Ms. Alfano leaving the home for less than a half hour (about 22 minutes). Even more, again disregarding its duty of a fair presentation under MCR 2.114(D), Defendants omit Ms. Alfano's unrebutted, May 6, 2014 testimony that she never left Plaintiff alone. (**See**, Ex S – R. Alfano dep 2, pp 41-42). On the rare occasions when she had to leave the house, Ms. Alfano had a family member or neighbor fill in and watch Plaintiff. (Id; **See**, Ex T – R. Alfano affidavit, § 7). This includes December 28, 2012 when, during Ms. Alfano's short absence, her son Thor watched Plaintiff. (Id). Ms. Alfano's deposition testimony confirms that, when someone watched Plaintiff during her short

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[4] Indeed, Plaintiff testifies that when Ms. Alfano walks their surviving dog, he remains in view and "always watches" her. (See, Ex T – G. Alfano dep, pp 19-20).

[5] Which, once again, are not authenticated and not admissible evidence under MCR 2.116(G)(6).

absences, such as 22-minute period on December 28, 2012, she would submit her attendant care form and reimburse the person who filled in. (**See**, Ex S – Alfano dep 2, pp 28-30).

Absolutely no "fraud" occurred. Defendant's unfounded allegation against Ms. Alfano is particularly disturbing. Despite knowing, since Ms. Alfano's May 6, 2014 deposition, that someone would fill in watching Plaintiff when she left the home and that she would reimburse this person for the attendant care time, in violation of MCR 2.114(D), Defendant's motion for summary disposition omits any mention of her testimony.

In addition, Defendant possessed this surveillance footage since December 2012, but continued to pay Plaintiff's attendant care benefits. Defendant did not terminate benefits until November 6, 2013 – a termination that never even mentioned surveillance or any "fraud" issue, but exclusively relied on new IME reports. (**See**, Ex Y – 11/6/13 termination letter).

Ms. Alfano did not falsify attendant care forms for May 2013. Defendant's adjuster, Julie Rawlins, contemporaneously knew that Ms. Alfano had been temporarily injured in a vehicular accident and had family members fill in for Plaintiff's attendant care. Defendant omits that Ms. Rawlins properly assessed, calculated, and paid each person their pro-rata share for the attendant care provided during this time. Defendant also continued to pay benefits through the November 2013 termination which, once again, never alleged fraud.

Finally, Defendant incorrectly alleges that Ms. Alfano committed "fraud" by submitting attendant care forms after she was briefly injured in a motor vehicle accident in May 2013. Once again, this allegation violates MCR 2.114(D). Ms. Alfano did not submit any attendant care claim for work she did not perform. Even more, Defendant contemporaneously knew that, from the date of Ms. Alfano's accident until June 2013, family members Carla Trusin, Thor (Jason) Glenn, and Geoff Craig were assisting with Plaintiff's attendant care and submitted affidavits. Defendant additionally omits that its adjuster, Julie Rawlins, after properly assessing and calculating the time each family member provided attendant care to Plaintiff, paid them for this time.

On the evening of May 16, 2013, Rene Alfano was injured in a motor vehicle accident. (**See**, Ex S – R. Alfano dep, p 31). She spent an evening and a day in the hospital. (Id). Defendant disingenuously omits that, from the time of Ms. Alfano's accident on May 16, 2013 until May 20, 2013, Ms. Alfano performed no attendant care for Plaintiff and did not submit any claim for this period. Instead, family members Carla Trusin, Thor (Jason) Glenn, and Geoff Craig performed attendant care and submitted the appropriate forms. (**See**, Ex Z – Trusin forms; Ex AA – Thor Glenn forms; Ex BB – Geoff Craig forms).

On May 21, 2013, Rene Alfano resumed partial attendant care services for Plaintiff. (**See**, Defendant's Ex C). As Ms. Alfano testified in her May 6, 2014 deposition, until about the end of June 2013, Carla, Thor and Geoff continued to help out with Plaintiff's attendant care. (**See**, Ex S – R. Alfano dep, pp 31-35). Because she was still having some physical difficulties from her auto accident, her son Jason (Thor) provided household services. (Id, pp 35-36). Ms. Alfano was clear, however, that from May 21 forward, she continued to monitor Plaintiff, dispense medications, and assist him in the bathroom. (Id). The fact that Ms. Alfano received household services for physical chores did not render her disabled from performing part of Plaintiff's attendant care.

Ms. Alfano did not submit claim forms for time she did not perform. (**See**, Ex T – R. Alfano affidavit, § 10). The claim forms Defendant attaches to its motion are for Ms. Alfano's time on May 21, 22, 24 and 25. (**See**, Defendant's Ex C).[6] Family members Carla, Thor and Geoff provided Plaintiff's attendant care on May 16-20, and 23. (**See**, Ex Z – Carla Trusin forms; Ex AA – Thor Glenn forms; Ex BB – Geoff Craig forms). No double-billing occurred. Ms. Alfano never submitted false information to Defendant and never knowingly or intentionally tried to mislead Defendant. (**See**, Ex T – R. Alfano affidavit, § 11).

[6] Ms. Alfano's May 16, 2013 form represented time she spent before the accident that evening.

In addition to violating MCR 2.114(D) by omitting the fact that Alfano family members provided attendant care when Rene was temporarily off her feet, Defendant also deliberately and astonishingly omits that a) it contemporaneously knew Ms. Alfano was temporarily injured in the May 2013 auto accident, (b) contemporaneously knew that family members Thor, Geoff and Carla were performing attendant care during this time, (c) contemporaneously received attendant care forms each family member, (d) contemporaneously calculated the accurate percentage of time each person performed attendant care, and (e) paid each person the correct amount.

The undersigned counsel notified Defendant's adjuster, Julie Rawlins, that Ms. Alfano was injured in the May 16, 2013 accident and that family members were assisting with Plaintiff's attendant care. (**See**, Ex CC – Schnitzer affidavit, § 2).[7] The undersigned asked Ms. Rawlins whether Ms. Alfano, as Plaintiff's Guardian, should submit attendant care forms for all the services rendered or whether each family member should document his or her individual times. (Id, § 3). Ms. Rawlins indicated that separate forms should be submitted by each family member performing attendant care services. (Id). Based on Ms. Rawlin's instructions, the undersigned did so. (Id; See, Ex EE – Attendant care letters). After duly assessing and calculating each person's time, Citizens tendered pro-rata payments to Ms. Alfano, Carla Trusin, Thor Glenn, and Geoff Craig for their attendant care services to Plaintiff in May and June 2013. (See, Ex CC – Schnitzer affidavit, § 3).

Letters, July 24, 2013 emails between Plaintiff's counsel and Defendant's adjuster, Julie Rawlins, and a July 25, 2013 telephone conference (See, Ex EE – 7/25/13 letter) all verify that Defendant not only knew that family members were performing attendant care during this brief period, but precisely calculated the percentage of time Ms. Alfano, Thor, Geoff and Carla

[7] Indeed, Ms. Alfano's PIP claim was also through Citizens. (See, Ex DD – EUO notice for Ms. Alfano's claim with Defendant Citizens).

performed attendant care and paid each person for that time. (**See**, Ex EE – Attendant care letters; Ex FF – Emails; Ex CC – Schnitzer affidavit, §§ 4, 5). As such, in falsely alleging that Ms. Alfano submitted attendant care forms for work she did not perform, Defendant has violated MCR 2.114(D).

Finally, despite Defendant's contemporaneous knowledge about the family's collective rendition of attendant care in May and June 2013, Defendant continued to pay benefits until November 6, 2013. (**See**, Ex Y – Termination letter). Once again, Defendant did not terminate benefits based on any allegation of "fraud," but due to proffered new IME reports. (Id).

ARGUMENT

PLAINTIFFS ARE NOT DISQUALIFIED FROM RECEIVING PIP BENEFITS UNDER MCL 500.3173a(2).

Absolutely no fraud occurred under MCL 500l.3173a(2) and MCL 500.4503 disqualifying Plaintiffs from PIP benefits in this ACF claim. Defendant's motion for summary disposition constitutes a frivolous pleading under MCR 2.114(D) and should be denied, with assessment of sanctions.

A. Despite its burden as the moving party under MCR 2.116(C)(10), Defendant has not supported its allegations with admissible evidence under MCR 2.116(G)(6).

At the outset, Defendant's motion must be summarily denied for lack of supporting admissible evidence. It is well established that a party moving for summary disposition under MCR 2.116(C)(10) has the burden of producing "admissible evidence" demonstrating that no genuine factual dispute exists. *Smith v Globe Life Ins Co,* 460 Mich 446, 455 (1999); MCR 2.116(G)(6). When the moving party fails to satisfy its initial burden under (C)(10), the nonmoving party has no duty to respond and summary disposition should not be granted. *Meyer v Center Line,* 242 Mich App 560, 575 (2000).

All of the photographs or video still-frames attached to Defendant's motion for summary disposition are unauthenticated. They are, accordingly, not admissible evidence, MRE 901(a), and may not be considered. For this reasons alone, Defendant's reliance on the so-called surveillance photos, and its motion, must be denied.

B. Plaintiffs did not commit any fraud disqualifying them from PIP benefits under MCL 500.3173a(2) and MCL 500.4503.

Grossly failing to present all the material facts, Defendant mistakenly argues that Plaintiffs committed "fraud" disqualifying them from PIP benefits under MCL 500.3173a(2). MCL 500.3173a(2) states that:

> A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

In pertinent part, a claim is fraudulent under MCL 500.4503, and therefore MCL 500.3173a(2), only when a person "w<u>ho knowingly, and with an intent to injure, defraud, or deceive</u> [p]resents or causes to be presented to or by any insurer, any oral or written statement including computer-generated information as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains false information concerning any fact or thing <u>material to the claim</u>." MCL 500.4503(2) (emphasis added).

Defendant has utterly failed to establish that Guy or Rene Alfano knowingly intended "to injure, defraud, or deceive" it by submitted a claim for payment containing false "material" information. As demonstrated above, the four July 2011 dog walks, December 28, 2012 22-minute trip by Ms. Alfano, and the May 2013 claim form submissions did not constitute fraud under MCL 500.3173a(2) and MCL 500.4503 disqualifying Plaintiffs from PIP benefits.

None of Plaintiff's four, brief, cane-assisted dog walks directly next to his home remotely prove that he did not require 24/7 attendant care or that Ms. Alfano was not performing these services. All of Plaintiff's treaters are clear that, due to the accident-related closed-head injury, he required, and continues to require, 24/7 monitoring for unpredictable seizures, confusion and memory loss. (**See**, above).

These walks also do not support Defendant's argument that Ms. Alfano left Plaintiff unsupervised. Mr. and Ms. Alfano are clear that, even during the few dog walks next to the house, she kept Plaintiff in view and continued to watch him. (**See**, Ex S – R. Alfano dep 2, p 22; Ex U – G. Alfano dep, pp 19-20; Ex T – R. Alfano affidavit). Ms. Alfano's attendant care submissions for the July 2011 dates were not inaccurate. Defendant certainly presents no evidence proving that Ms. Alfano knowingly intended "to injure, defraud, or deceive" Defendant under MCL 500.3173a(2) and MCL 500.4503. Defendant also utterly fails to establish how, out of the months it apparently kept Plaintiffs under surveillance, these four short dog walks constituted a "material" issue to the attendant care claim. This is particularly true since, despite conducting this surveillance in July 2011, Defendant continued to pay Plaintiffs' benefits until November 2013 – and even then terminated based on unrelated grounds. (**See**, Ex Y – Termination letter).

Defendant's argument that Ms. Alfano left Plaintiff unsupervised on December 28, 2012, is equally frivolous.[8] Ms. Alfano is clear that she never left Plaintiff unsupervised, including on December 28, 2012 – when, during her short absence from the home, family member Thor watched Plaintiff. (**See**, Ex S – R. Alfano dep 2, pp 41-42; Ex T – R. Alfano affidavit, § 7). Ms. Alfano reimbursed Thor for this time. (Id; **See**, Ex S – Alfano dep 2, pp 28-30). Absolutely no

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[8] Again, it is noteworthy that Defendant kept Mr. and Ms. Alfano under surveillance for months and months, but have come up with nothing more than four brief, innocuous dog walks and one occasion when Ms. Alfano left home for 22 minutes.

misrepresentation – let alone material fraud under MCL 500.3173a(2) and MCL 500.4503 – occurred. Again, although Defendant contemporaneously knew Ms. Alfano briefly left her home on December 38, 2012, Defendant continued to pay PIP benefits for eleven more months and terminated for unrelated reasons – without even mentioning an allegation of "fraud." (**See**, Ex Y – Termination letter).

Finally, as conclusively demonstrated above, Ms. Alfano did not submit any fraudulent attendant care claim forms in May 2013. In attaching Ms. Alfano's claim forms dated May 21, 22, 24 and 25,[9] Defendant frivolously omits that family members Carla Trusin, Thor Glenn and Geoff Craig performed Plaintiff's attendant care while Ms. Alfano was laid up from the accident from May 16 to 20, and 23, (**See**, Exs Z, AA, BB), and subsequently provided attendant care assistance into June 2013. (**See**, Ex FF – Emails). The undersigned's letters and the July 24, 2013 email from Defendant's own adjuster, Ms. Rawlins, establishes that Defendant contemporaneously knew Rene Alfano had been injured in a vehicular accident; that family members performed the attendant care for Plaintiff which Ms. Alfano was temporarily unable to do; assessed and accurately calculated the time each person performed attendant care during this period, and paid each person the correct amount. (**See**, Ex EE – Attendant care letter; Ex FF – 7/24/13 emails). Absolutely no misrepresentation, let alone a knowing and intent to deceive, occurred. (**See**, Ex T – R. Alfano affidavit, §§ 10-11). The fact that Defendant continued benefits until November 6, 2013 and terminated based on grounds totally unrelated to allegations of "fraud," confirms this. (**See**, Ex Y – Termination letter).

Defendant's reliance on *Bahri v IDS Prop Cas Ins*, ____ Mich App ____ (2014) (**See**, Defendant's Ex G) is misplaced. Unlike the case at bar, *Bahri* addressed a no-fault insurance policy and whether the policyholder committed fraud under the common-law standard of *Mina v*

[9] The May 16, 2013 form memorialized time Ms. Alfano provided attendant care before her accident that evening.

Gen Star Indemnity Co, 218 Mich App 678, 686 (1996), rev'd in part on other grounds 455 Mich 866 (1997). *Bahri*, pp 3-4. *Bahri* did not address an Assigned Claims Facility case, like this, where there is no insurance policy, which is governed by the much more stringent statutory fraud standard under MCL 500.3173a(2) and MCL 500.4503.

Even more, *Bahri*, which originated in this Court, involved undisputed, egregious acts of systemic claimant fraud. These included submission of knowingly falsifying claim forms over a period of four months, and deliberately lying about the claimant's inability to bend, lift, carry objects, run errands, and drive. *Id*, p 4. No fraud, and certainly no deliberate, egregious, material fraud, has occurred in this case.

C. Defendant waived any allegations of fraud by continuing to pay Plaintiffs' PIP benefits for months after learning of the acts alleged in its motion, and then not raising any "fraud" defense in its November 6, 2013 termination letter.

Defendant also overlooks the unavoidable fact that it has waived allegations of fraud in this case. Both Michigan and national law are clear that an insurer cannot rescind a policy based on alleged misrepresentations that it previously knew about and did not detrimentally rely upon. *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4 (2012) ("fraud is not perpetrated upon one who has full knowledge to the contrary of a representation"); 46 CJS Insurance § 1174. Despite contemporaneous knowledge about Plaintiff's four dog walks, Ms. Alfano's brief departure from the home on December 28. 2012, and Ms. Alfano's May 2013 auto accident, Defendant continued to pay attendant care until November 6, 2013. Having waived this defense, Defendant cannot now argue that Plaintiffs fraudulently induced it into paying attendant care benefits. Once again, this purported "fraud" could not have possibly been material.

Even more, Defendant waived this belated fraud defense by failing to raise it in the November 6, 2013 letter formally terminating Plaintiffs' PIP benefits. It is well established than an insurer waives or is estopped to raise defenses not included in its formal denial of benefits.

Lee v Evergreen Regency Co-op, 151 Mich App 281, 285 (1986). Despite Defendant's long-prior notice of these purported issues, its 11/6/13 termination letter does not raise any allegations of fraud. (**See**, Ex Y – Termination letter). Instead, the letter only claims that recent IME reports established that Plaintiff no longer requires PIP benefits. (Id).

Defendant's motion for summary disposition constitutes a frivolous pleading under MCR 2.114(D). The motion must be denied with assessment of sanctions.

Respectfully submitted,

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