Approved, Michigan Court of Appeals

LOWER COURT	Electronically Filed	CASE NO.
3rd Judicial Circuit	BRIEF COVER PAGE	Lower Court 12-016946-CB Court of Appeals 323136

(Short title of case)

Case Name: **Sault Ste. Marie Tribe of Chippewa Indians v. Blue Cross Blue Shield of Michigan**

1. Brief Type (select one): ☐ APPELLANT(S) ☑ APPELLEE(S) ☐ REPLY
   ☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
   ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Blue Cross Blue Shield of Michigan**

3. ☑ This brief is in response to a brief filed on **12/30/2014** by **Appellant**.

4. ORAL ARGUMENT: ☑ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
   [See MCR 7.212(C)(1) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]
   - ☑ Table of Contents [MCR 7.212(C)(2)]
   - ☑ Index of Authorities [MCR 7.212(C)(3)]
   - ☑ Jurisdictional Statement [MCR 7.212(C)(4)]
   - ☑ Statement of Questions [MCR 7.212(C)(5)]
   - ☑ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
   - ☑ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
   - ☑ Relief Requested [MCR 7.212(C)(9)]
   - ☑ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: /s/ **J. Adam Behrendt**
   Signing Attorney's Bar No. [if any]: **P58607**

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

Appellant Sault Ste. Marie Tribe of Chippewa Indians' statement of jurisdictional basis is incomplete. On July 21, 2014, the Wayne County Circuit Court entered an order granting defendant Blue Cross Blue Shield of Michigan's motion for summary disposition under MCR 2.116(C)(10). On August 4, 2014, the Tribe filed a motion for reconsideration, which the trial court denied on August 6, 2014. The Tribe filed its claim of appeal of the trial court's order on August 7, 2014. *See* MCR 7.204(A)(1)(b). The Court has jurisdiction over the Tribe's claim of appeal under MCR 7.203(A)(1)(a).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Appellant Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") and appellee Blue Cross Blue Shield of Michigan ("BCBSM") negotiated a contract for health care claims administration services. During the negotiations, the Tribe withheld certain information relevant to BCBSM's estimation of what the Tribe would have likely saved in the previous year had BCBSM administered its claims. The trial court noted this fact on the record, but also stated on the record and confirmed in its written order that its decision was grounded in *all* of the reasons and arguments cited in BCBSM's motion. Should the Court reverse the trial court's grant of summary disposition where the trial court has rejected the Tribe's claim that the trial court misunderstood a fact and, even if it had misunderstood a fact, it was not germane to the dispositive issues between the parties?

The Tribe answers: **Yes.**

BCBSM answers: **No.**

The trial court answered: **No.**

II. The Tribe's complaint alleged that BCBSM committed fraud by making "promises" of future savings to the Tribe. Do the Tribe's allegations regarding future potential savings form the basis of a fraud claim under any of the theories that the Tribe alleged in its complaint?

The Tribe answers: **Yes.**

BCBSM answers: **No.**

The trial court answered: **No.**

III. The Tribe attempted to include a dollar-for-dollar guaranty of BCBSM's projected discounts into the parties' written agreement, but BCBSM rejected this change.

Instead, the parties' contract (a) included a discount guaranty under which BCBSM would refund a portion of its administrative fee if it did not achieve a certain level of savings; (b) "acknowledge[d] that health care provider discounts may be different than [BCBSM's] estimates . . .;" and (c) contained a merger clause, which expressly disclaimed any reliance on prior oral or written representations. Was the Tribe's purported reliance on BCBSM's alleged misrepresentations unreasonable as a matter of law?

The Tribe answers: **No.**

BCBSM answers: **Yes.**

The trial court answered: **Yes.**

IV. The Tribe's complaint sought to rescind the parties' fully performed contract that had no remaining executory provisions. Prior to filing its lawsuit nearly a year later, the Tribe never tendered back any of the amounts that it received under the contract's discount guaranty. Was the trial court's grant of summary disposition under MCR 2.116(C)(10) appropriate where the Tribe did not offer (and could not offer) to tender back the benefits it gained under that contract that was fully performed?

BCBSM answers: **Yes.**

The Tribe answers: **No.**

The trial court answered: **Yes.**

V. The Tribe presented two questions in its brief before the Court: (1) "[d]id the trial court's misunderstanding of the undisputed facts cause its legal error?"; and (2) "[d]id the issues raised by defendant warrant summary disposition?[.]" However, the second section of the Tribe's brief on appeal contains five separate and discrete arguments under one subheading that the Tribe says it has raised "[i]n an abundance of caution . . . ." Brief of Appellant at p. 17. Were the

questions presented by the Tribe in its second argument section beginning on page seventeen of its brief on appeal sufficiently stated and in accordance with MCR 7.212(C)(5) to preserve these issues for appeal?

The Tribe did not address this question.

BCBSM answers: **No.**

The trial court did not decide this question.

INTRODUCTION

In 2010, plaintiff-appellant Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") hired defendant-appellee Blue Cross Blue Shield of Michigan ("BCBSM") to administer the Tribe's self-funded health care plan. Prior to signing a contract, BCBSM estimated, subject to stated limitations, that the Tribe could save nearly $1.9 million a year if it switched from its existing claims administrator to BCBSM. BCBSM also projected that it could have saved the Tribe approximately $2.3 million if BCBSM had administered the Tribe's claims in the prior twelve months. For over a year, the Tribe's insurance benefits department, in-house legal team, and board of directors evaluated BCBSM's proposal. They discussed at length the risk that BCBSM's actual level of savings could be less than its stated estimates.

Although the Tribe's in-house attorney attempted to make these estimates of cost savings a part of the parties' contract, the final agreement did not provide a dollar-for-dollar guaranty of savings. Rather, it reflected that the projections BCBSM made were only "estimates" and that the amount of savings the Tribe experienced could be different than the projections for a variety of reasons:

> [The Tribe] acknowledges that health care provider discounts may be different than [BCBSM's] estimates as set forth in Schedule B due to (but not by way of limitation) provider participation, demographics, utilization, access, settlements or the Claim providing methodology of a [BCBSM] Plan. [BCBSM] shall not be responsible for any difference between the estimated health care provider discounts as set forth in Schedule B and the actual discounts realized and passed through in Amounts Billed.

Instead of giving the Tribe the dollar-for-dollar guaranty, BCBSM agreed to provide the Tribe with a "Discount Guaranty" (appearing as Appendix C to the contract, Exhibit 22, *infra*) for the contract's first year. Under the Discount Guaranty, BCBSM agreed to refund a portion of the administrative fees it would earn under the contract if the Tribe did not achieve the estimated discount percentages on its claims for that year. The parties also agreed under a merger clause

that the written contract represented the parties' entire agreement.

The Tribe terminated the contract before its second anniversary. Approximately one year after the Tribe received all compensation due to it under the Discount Guaranty, it sued BCBSM under three legal theories, all sounding in fraud. Its complaint asked the Wayne County Circuit Court to rescind the parties' fully-performed contract and award it damages for the savings that it believed it should have received. Said differently, it sued to revise the contract to include a dollar-for-dollar guaranty—the very provision BCBSM rejected during the parties' lengthy negotiations.

The trial court did not err in its grant of summary disposition under MCR 2.116(C)(10) of the Tribe's claims. Recognizing the fact that the parties are sophisticated entities that engaged in contract negotiations over a year, the trial court granted BCBSM's motion for summary disposition and, in so doing, "adopt[ed] defendant's arguments and law in support of the motion." It stated, on the record, that it had nothing to add to them.

Without even addressing all of the grounds on which the trial court granted BCBSM's motion, the Tribe devotes the majority of its appeal to the mistaken notion that the trial court erred in its understanding of the facts underlying the parties' dispute when it stated on the record that the Tribe had withheld information. The trial court made no such error and, even if it had, the Tribe fails to explain how the trial court's statement had any bearing on its decision. How could it when it was not a basis on which BCBSM moved for summary disposition? No better are the Tribe's remaining arguments that it raises "[i]n an abundance of caution. . . ." and without similarly explaining how they relate to the trial court's ultimate decision.

As set forth below, the Court should affirm the trial court's grant of summary disposition in all respects. The Tribe's complaint impermissibly attempted to rely upon statements of future conduct in support of its claims of fraud. Even if such allegations were actionable, the Tribe's

purported reliance upon the estimates and projections that it has identified as fraudulent was unreasonable as a matter of law because the express terms of the parties' contract contradicted the alleged misrepresentations and the Tribe does not dispute that it had knowledge of the nature of BCBSM's estimates and projections. Further, the Tribe cannot seek rescission without restoring the parties to the status quo and, even if it could, cannot attempt to rewrite the parties' contract after taking full advantage of the Discount Guaranty. Finally, the Tribe's attempt to "cover its bases" by raising a litany of appellate issues "[i]n an abundance of caution" in the remaining pages of its brief on appeal is inconsistent with MCR 7.212(C)(5) and the Court should consider such issues abandoned.

COUNTER-STATEMENT OF FACTS

A. The Sault Ste. Marie Tribe of Chippewa Indians.

The Tribe is a federally-recognized Native American tribe consisting of approximately 42,000 members. **Exhibit 1**, Dep. Tr. of Courtney Kachur ("Kachur Dep."), at 8:10-24; *see also* BCBSM's Motion for Summary Disposition under MCR 2.116(C)(10) ("Summary Motion"), at p. 2. It is the second largest recognized Native American tribe east of the Mississippi River. Kachur Dep. at 12:24-13:2; *see also* Summary Motion at p. 2. The Tribe's gross annual revenues, the majority of which are obtained through its casino and hotel holdings throughout Michigan, total between $150 and $160 million. **Exhibit 2**, Dep. Tr. of William Connolly ("Connolly Dep."), at 7:20-8:11; *see also* Summary Motion at p. 3.

The Tribe's Board of Directors consists of an elected chairperson and twelve elected members. Kachur Dep. at 7:20-21; *see also* Summary Motion at p. 3. The Tribe has, among other departments, a five-person in-house insurance department led by Holly Haapala and a seven-person legal department, led by attorney Courtney Kachur. **Exhibit 3**, Dep. Tr. of Kristin Green ("Green Dep."), at 6:23-7:18; **Exhibit 4**, Dep. Tr. of Holly Haapala ("Haapala Dep."), at 13:16-

18; Kachur Dep. at 24:21-25:2; *see also* Summary Motion at p. 3.

B. The Tribe's self-funded health insurance prior to BCBSM.

Prior to 1999, the Tribe provided health insurance to its employees through a fully-insured plan from BCBSM. Haapala Dep. at 25:8-11; *see also* Summary Motion at p. 3. Sometime in 1999, the Tribe terminated its relationship with BCBSM and began a self-insured plan administered by non-party NGS CoreSource. Compl. at ¶ 5; *see also* Summary Motion at p. 3. Rather than pay insurance premiums under a fully-insured plan, the Tribe "self-insured" its employees' health insurance expense by paying for the cost of the claims itself and hiring NGS to administer the payment of those claims. Compl. at ¶ 4; *see also* Summary Motion at p. 3.

C. The Tribe approached BCBSM in 2008 to see if it could do better than NGS.

In 2008, D.J. Hoffman, a Tribe Board member, called Ron Sober, an insurance broker in Sault Ste. Marie, to obtain a quote from BCBSM to administer the Tribe's self-funded health care plan. **Exhibit 5**, Dep. Tr. of Ronald Sober ("Sober Dep.") at 18:25-19:2 and 19:24-20:4; *see also* Summary Motion at p. 3. Mr. Hoffman and Mr. Sober, along with the Tribe's Chairman, Darwin "Joe" McCoy, the Tribe's Assistant Insurance Manager, Kristin Green, and others, met to discuss a potential switch to BCBSM. Sober Dep. at 18:7-24; *see* Summary Motion at p. 3.

As a part of the quote, the Tribe asked Mr. Sober to obtain a "re-pricing" of the Tribe's health care claims for the last full year. Green Dep. at 22:7-12; *see also* Summary Motion at pp. 3-4. In a re-pricing, a group with a self-funded plan submits its health care claims information for an analysis of what it would have paid for those same claims under a different administrator. Green Dep. at 28:15-17; Haapala Dep. at 47:15-20; *see also* Summary Motion at p. 4.

The Tribe's Insurance Department, however, did not want to provide BCBSM with information on how much it paid on each claim for the prior year. Haapala Dep. at 47:6-14; **Exhibit 6**, Dep. Tr. of Kristi Harwood-Causley ("Harwood Causley Dep."), at 21:15-24; *see also*

Summary Motion at p. 4. Although the Tribe eventually released some information, it was not shared with BCBSM but instead was released directly to a third-party actuarial company in Atlanta called Milliman.[1] Haapala Dep. at 57:11-18; *see also* Summary Motion at p. 4. The Tribe never shared with BCBSM or Milliman its master fee schedule containing its reimbursement rates on all services for all providers. Haapala Dep. at 184:13-16; **Exhibit 7**, 12/18/08 Email ("Don't give [BCBSM] the fee schedules"); *see also* Summary Motion at pp. 5-6. Ms. Haapala testified that she refused to give BCBSM or Milliman the master fee schedule because she thought a "bidding process" was not the place to share that type of information. Haapala Dep. at 51:20-52:24 and 184:13-16; *see also* Summary Motion at pp. 6-7.

D. BCBSM shared the Milliman Report with the Tribe.

BCBSM shared the results of the re-pricing with the Tribe ("Milliman Report"). **Exhibit 8**, 1/16/09 Email and Attachment; *see also* Summary Motion at p. 4. The Milliman Report explained that it gave "*an estimate* of the change in medical costs that *might have been achieved* during the period represented in the historical data had [the Tribe] offered health benefits through [BCBSM]." Exhibit 8 at ST 002976 (emphasis added); *see also* Summary Motion at p. 4.

The Milliman Report estimated that, had the Tribe been a BCBSM customer between July 2007 and June 2008, it likely would have paid $2.3 million less on its claims for that plan year (*i.e.*, a 17% provider-discount savings over NGS). Exhibit 8 at ST 002977; *see also* Summary Motion at p. 4. The Milliman Report, however, warned that the results were estimates of unaudited data and not calculated by using BCBSM's actual discounts on a provider-by-

[1] The shortcomings of the Tribe's statement of facts are highlighted in the Tribe's description of Milliman where the Tribe's counsel offers his opinion that "Milliman is not independent. It is essentially a division of the Blues. 75% of its work involves Blues plans around the country." Brief of Appellant at p. 3, n.1. Nowhere does the deponent state in the cited deposition transcript that Milliman is "essentially a division of the Blues." *Id.* MCR 7.212(C)(6) requires a statement of facts to be, among other requirements, "fairly stated without argument or bias."

provider basis. Rather, the estimated savings were calculated by averaging BCBSM's provider discounts for a certain region based upon zip codes. Exhibit 8 at ST 002978; **Exhibit 9**, Dep. Tr. of Marilyn Smith ("Smith Dep."), at 19:2-15; *see also* Summary Motion at p. 4. The Milliman Report also contained a two-page summary explaining the report's limitations:

> Sault Tribe of Chippewa Indians historical claims data provided to Milliman was the basis for the claims repricing. We did not audit nor did we verify the accuracy of the data . . . As noted previously, the distribution of billed charges of the claims we were provided looks unusual.
>
> * * *
>
> Note that claims were assigned to service categories based on general data observations, and aggregate discounts were used in some cases where detailed categories and/or procedure codes could not be determined from the data.
>
> * * *
>
> ClaimsQuest data and repricing results are not a forecast of projected Sault Tribe of Chippewa Indians costs . . . There are a number of factors, many of which are discussed in this report, which could cause actual financial results to vary from the results presented in this letter.

Exhibit 8 at ST 002980-81; *see also* Summary Motion at p. 4.

E. BCBSM presented a financial proposal to the Tribe.

Following the presentation of the results of the Milliman Report, the Tribe asked BCBSM to prepare a financial proposal. **Exhibit 10**, 3/9/09 Letter; *see also* Summary Motion at p. 5. BCBSM responded to the Tribe's request for a proposal on April 30, 2009. **Exhibit 11**, 4/30/09 Letter and Proposal; *see also* Summary Motion at p. 5. In the cover letter to the financial proposal, BCBSM wrote:

> It is anticipated that implementation of the proposed programs for Sault Ste. Marie Tribe of Chippewa Indians, utilizing Blue Cross Blue Shield networks, will result in overall medical discounts equal to 42.4% combined discount for both in and out-of-network. This represents $1,981,400 in savings over the incumbent carrier.

Exhibit 11 at ST 003808; *see also* Summary Motion at p. 5. Although it estimated savings of $1.9 million in the future, BCBSM's proposal advised that these were only estimates: "we *project* you will save 42.4 percent or $1,981,400 in claims dollars over your current carrier and *project* a $12,271,300 savings over a 5-year forecast." Exhibit 11 at ST 003820 (emphasis added); *see also* Summary Motion at p. 5. It also warned the Tribe that the provider discounts and financial projections from BCBSM were "based on current demographics and assumptions." Exhibit 11 at ST 003823; *see also* Summary Motion at p. 5. These assumptions included: (1) the in-network discount under BCBSM was 42.6% compared to NGS's discount of 28.7%; (2) the out-of-network discount under BCBSM was 33.3% compared to NGS's discount of 0.0%; (3) the in-network utilization under BCBSM would be 98.6% compared to 98.0% utilization under NGS; (4) the Tribe's estimated annual non-Medicare claims charges were $13,852,900; and (5) the number of active Tribe employees was 1,042. Exhibit 11 at ST 003825; *see also* **Exhibit 12,** 5/19/09 Presentation; **Exhibit 13**, 6/30/09 Presentation, at ST 002997; Summary Motion at p. 5.

F. The Tribe reviewed BCBSM's proposal over the course of a year after which its Insurance Department did not recommend a switch to BCBSM.

Between the Tribe's initial call to Ron Sober in the summer of 2008 to the execution of the contract in the fall of 2009, the Tribe continued to review BCBSM's proposal. Ms. Haapala testified as to why the process took more than a year:

> **Q.** What was the reason or the cause of that prolonged period of time before the contract was signed?
>
> **A.** We wanted to make sure we were diligent in reviewing the information that was given to us and that we understand their process.
>
> **Q.** So you spent a lot of time wanting to make a careful choice?
>
> **A.** Yes.

Haapala Dep. at 64:6-13; *see also* Summary Motion at pp. 5-6. Ms. Haapala explained in her

deposition—both individually and as the Tribe's MCR 2.306(B)(5) representative—that the Tribe was skeptical of both BCBSM's estimates of savings and the Milliman Report. Haapala Dep. at 91:15 ("I recall being skeptical of the repricing because it talks about averages"); *see also* Summary Motion at p. 6.

Ms. Haapala had concerns because BCBSM's estimates and the Milliman Report did not reflect the actual price discounts that the Tribe had negotiated with its health care providers.[2] She also was concerned that BCBSM was presenting estimates of future cost savings that the Insurance Department thought were wrong because BCBSM was working from the averages across the zip codes identified in the Milliman Report and not the provider-specific discounts that the Tribe had negotiated:

> **Q.** So every one's radar was up or cockles were up on this and --
>
> **A.** That was Holly's point over and over again was *I've got numbers, you've got estimates.*
>
> * * *
>
> **A.** She was very adamant in that point of view.
>
> **Q.** Was that position conveyed to the board?
>
> **A.** Yes.

Kachur Dep. at 57:18-21, 82:5-7 (emphasis added); *see also* Summary Motion at p. 7.

Ms. Haapala's skepticism of BCBSM's proposal led to her recommendation that the

[2] Ms. Haapala eventually ran her own set of estimates of the Tribe's expected health care costs (and correlating discounts) for what would be its first year (2010) under a contract with BCBSM. In that analysis, Ms. Haapala independently calculated that, for 2010, the Tribe faced a projected exposure of $11.2 million in claims costs and fixed costs with BCBSM. Haapala Dep. at 191:8-192:8; **Exhibit 14**, 7/6/09 Email and Attachment, at BCBSM078821; *see also* Summary Motion at p. 6. The Tribe's actual health care costs for the first year were $9,995,020. *See* **Exhibit 15**, 2010 Annual Settlement; *see also* Summary Motion at p. 11 n.10. Thus, Ms. Haapala's own estimate for the Tribe's total health care expenses was higher than what the Tribe actually experienced during the first year with BCBSM.

Tribe stay with its current administrator, NGS. Haapala Dep. at 147:19-21 ("I don't believe I recommended [the Tribe] sign [the Contract]"); **Exhibit 16**, 9/21/09 Email ("[T]hey have only given us estimates of costs and not based it on actuals when calculating our potential savings. . . ."); *see also* Summary Motion at p. 7. Notwithstanding Ms. Haapala's concerns, the Board "wanted to push through the Blue Cross Blue Shield proposal and [the Insurance Department] wanted to do the [due] diligence in looking at everything." Haapala Dep. at 87:17-19; *see also* **Exhibit 17**, Dep. Tr. of Lona Stewart ("Stewart Dep."), at 47:24-25 ("I do remember [Mr. Hofmann] talking about it and I do remember him pushing it"); Summary Motion at p. 7.

The Board voted on August 25, 2009 to negotiate a contract with BCBSM. **Exhibit 18**, 8/25/09 Resolution; *see also* Summary Motion at pp. 7-8. The Board assigned its in-house insurance attorney, Mr. Kachur, to negotiate an agreement with BCBSM. Exhibit 18; *see also* Summary Motion at p. 8. The negotiations over the terms of the Administrative Services Contract ("Contract") took more than one month. *Compare* **Exhibit 19**, 8/27/09 Email and Draft Contract *with* **Exhibit 20**, 9/30/09 Email; *see also* Summary Motion at p. 8.

G. The Contract did not provide a "dollar-for-dollar" guaranty; BCBSM provided a limited "Discount Guaranty."

As relevant to this lawsuit, the eventually-signed Contract expressly disclaims any reliance on BCBSM's estimates of provider savings. In the section on "Health Provider Discounts" (Article II.K.2.):

> [The Tribe] acknowledges that the health care provider discounts may be different than BCBSM's estimates as set forth in Schedule B due to (but not by way of limitation) provider participation, demographics, utilization, access, settlements or the Claim-pricing methodology of a BCBS Plan. BCBSM shall not be responsible for any difference between the estimated health care provider discounts as set forth in Schedule B and the actual discounts realized and passed through in Amounts Billed.

Exhibit 21, Executed Administrative Services Contract, at BCBSM 213-214; *see also* Summary

Motion at p. 8. It also contains a merger clause in Article VI.A.:

> This Contract includes and incorporates any Schedules, Addenda, Exhibits, and Amendments and represents the entire understanding and agreement of the parties regarding the matters contained herein. This Contract supersedes and prior verbal or written agreements and understandings between the parties and shall be binding upon the parties, their successors or assigns.

Exhibit 21 at BCBSM 220; *see also* Summary Motion at p. 8.

The Tribe tried to change the merger clause during negotiations. In a draft sent by Mr. Kachur on August 27, 2009, the Tribe proposed a revision to the merger clause to incorporate BCBSM's prior representations of cost savings:

> This Contract supersedes any prior verbal or written agreements ~~and~~ but incorporates those understandings set forth in BCBSM's prior finalist proposals ~~between the parties~~ and shall be binding upon the parties, their successors or assigns.

Exhibit 19 at BCBSM379447;[3] *see also* Summary Motion at p. 8. This suggestion was not adopted. *Compare* Exhibit 19 at BCBSM379447 *with* Exhibit 21 at BCBSM 220; *see also* Summary Motion at p. 8.

Rather than accept the Tribe's change, BCBSM eventually agreed to a Discount Guaranty to address the estimated discounts. Although not a dollar-for-dollar guaranty, the Discount Guaranty entitled the Tribe to a refund of a portion of the administrative fees if BCBSM did not meet the projected provider discount of 42.4 percent or greater. **Exhibit 22**, 2010 Discount Guaranty; *see also* Summary Motion at pp. 8-9.

H. During contract negotiations, the Tribe continued to deliberate, and BCBSM made one more presentation; the parties signed the Contract.

During contract negotiations between the Tribe's legal department and BCBSM in

[3] The drafts of the contracts exchanged by the parties suggested changes to the language through "redlining" and comments. The Tribe's proposed text appears as being underlined text in the redlining process and the deletions as stricken text.

September 2009, Ms. Haapala and Ms. Green (from the Insurance Department) and Mr. Kachur (from the Legal Department) continued to voice concerns about switching from NGS. They co-authored a memorandum to the Board regarding BCBSM's proposal. **Exhibit 23**, 9/15/09 Memorandum; *see also* Summary Motion at p. 9. The authors presented a "pros" and "cons" discussion of the switch from NGS to BCBSM. In the "Pros" section, they advised the Board that, if BCBSM's "*estimates* are accurate, *potential* discounts for hospital utilization will result in substantial savings." Exhibit 23 at ST 003270 (emphasis added); *see also* Summary Motion at p. 9. In the "Cons" section, the authors warned that the estimates may not be accurate because the Milliman Report used estimates of BCBSM's provider discounts and cautioned the Board that the Milliman Report's estimates could not be independently "validated." Exhibit 23 at ST 003271; *see also* Summary Motion at p. 9.

Several days later, Chairman McCoy's assistant, Lona Stewart, circulated a memorandum throughout various tribal departments stating that the Chairman was aware of "several concerns related to the BCBS[M] contracts." Exhibit 16; *see also* Summary Motion at pp. 9-10. The Chairman, however, asked that all concerns be voiced prior to the Board's vote on the approval of the Contract. Exhibit 16; *see also* Summary Motion at p. 10. In her email, Ms. Stewart highlighted Ms. Haapala's concerns with the Contract:

> Holly has previously provided information to the board, on a number of occasions, with her concerns. One concern she and I just discussed was, if it turns out that BCBS[M], because they have only given us estimates of costs and not based it on actuals when calculating our potential savings, does not in fact turn out to be a savings for the Tribe, I asked Holly if there was an out clause in their contract.

Exhibit 16; *see also* Summary Motion at p. 10. Ms. Stewart sent this email two weeks before the Contract was executed. *See* Exhibit 21 at BCBSM 222; *see also* Summary Motion at p. 10.

BCBSM made a final presentation to the Board on September 29, 2009. **Exhibit 24**,

9/29/09 Presentation; *see also* Summary Motion at p. 10. Ms. Haapala requested the presentation because she wanted to make sure that the Board again heard her concerns and BCBSM's response. Haapala Dep. at 141:4-14; *see also* Summary Motion at p. 10. The Tribe's meeting notes reflect that the parties had negotiated the Discount Guaranty to address Ms. Haapala's concerns: BCBSM was "willing to guarantee 45.2%," and "if savings comes in higher, ours to keep"; but if it did not, "20% back of admin fee at end of year." **Exhibit 25**, 9/29/09 Meeting Minute Notes; *see also* Summary Motion at p. 10.

One week later, the Board authorized Chairman McCoy to sign the Contract. **Exhibit 26**, 10/6/09 Board Resolution; *see also* Summary Motion at p. 10. He did and it went into effect January 1, 2010 for annual, one-year renewable terms. Exhibit 21 at BCBSM 207; *see also* Summary Motion at p. 10.

I. The Tribe terminated its relationship with BCBSM before year three.

By late 2011, the Tribe became dissatisfied with BCBSM. **Exhibit 27**, 9/28/11 Email; *see also* Summary Motion at p. 11. It terminated the Contract on October 26, 2011. **Exhibit 28**, 10/26/11 Letter; *see also* Summary Motion at p. 11. In its termination letter, the Tribe exercised its rights under the Discount Guaranty and demanded payment of approximately $57,000 as a result of BCBSM not achieving the projected percentage of savings for the Contract's first year. Exhibit 28 at BCBSM 005 ("[P]lease process through the refund, which is slightly in excess of $57,000. . . ."); *see also* Summary Motion at p. 11. BCBSM credited the Tribe with this amount. Haapala Dep. at 165:20-166:6; *see also* Summary Motion at p. 11. Approximately one year later, the Tribe sued.

J. Procedural history.

The parties engaged in lengthy discovery over the course of a year. *See* 10/29/2013 Order (amending scheduling order to extend discovery to February 2014). For its part, BCBSM

produced to the Tribe over 400,000 pages of discovery material. The Tribe produced thousands of pages. In addition, the parties took depositions of the respective representatives, employees, experts, and third parties involved in the case.

On March 4, 2014, BCBSM filed a motion for summary disposition under MCR 2.116(C)(10). BCBSM argued that any alleged promises of future benefits were contractual in nature and could not form the basis for a claim of fraud. Summary Motion, at pp. 12-13. In addition, the Tribe's reliance on BCBSM's alleged misrepresentations would have been unreasonable as a matter of law because: (1) those alleged misrepresentations were directly contradicted by the express terms of the Contract; and (2) the undisputed testimony showed that the Tribe knew of the nature (and shortcomings) of BCBSM's estimates and projections prior to the Contract's execution. *Id.* at pp. 13-19. Finally, BCBSM argued that it was entitled to summary disposition because, as a party claiming fraud, the Tribe was not entitled to rescind an already-terminated and fully-performed services contract after waiting to see if the benefits under the Contract materialized, let alone without returning the consideration it already received under the Contract. *Id.* at pp. 19-20.

On July 18, 2014, the trial court heard arguments on BCBSM's motion. Following presentations by the parties, it stated:

> Since the last ruling of the court, considerable discovery has taken place and what jumps out at the court and it can't be overstated is that the parties are sophisticated corporate entities.
>
> The contract was the result of months of due diligence by both parties. The savings involved here were projected estimates based on what plaintiff provided to the defendant in this negotiation; due diligence phase.
>
> Further, plaintiff according to Ms. Haapala . . . intentionally withheld cost information from the third-party Milliman . . . and the . . . defendant.
>
> This affected the estimates and projections of savings. She said as

much in her deposition testimony.

> We are granting the motion and we will adopt the defendant's arguments and law in support of the motion. It was very aptly prepared and I can't add anything to it.

Exhibit 29, 7/18/14 Hearing Tr., at 22:2-22. Following the hearing, the trial court entered an order granting BCBSM's motion. *See* 7/21/14 Order. It granted BCBSM's motion "in its entirety" for the reasons stated on the record and those "set forth in defendant's motion for summary disposition. . . ." *Id.* at p. 2. On August 4, 2014, the Tribe filed a motion for reconsideration, which the trial court denied. 8/6/14 Order. This appeal followed.

ARGUMENTS ON APPEAL

A. Standard of review.

The Court reviews the grant of summary disposition *de novo*. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). The Court also reviews issues of law *de novo*. *Kocher v Dep't of Treasury*, 241 Mich App 378, 380; 615 NW2d 767 (2000). "'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.* (quoting *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999)). "[W]hen reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists." *Dextrom v Wexford Cnty*, 287 Mich App 406, 430; 789 NW2d 211 (2010). "The reviewing court should evaluate [the] motion . . . by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden*, 461 Mich at 121.

For its part, the Tribe does not explain whether it is also appealing the trial court's denial of its motion for reconsideration when it rejected the Tribe's argument that the trial court had "misunderstood" the facts. A denial of a motion for reconsideration is reviewed for an abuse of

discretion. *Macomb Cnty Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

With respect to whether the Tribe adequately set forth its questions presented for appellate review, the Court of Appeals reviews *de novo* questions of jurisdiction. *Barnard Mfg Co v Gates Performance Eng'g, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009) (citing *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008)). Specifically, the Court reviews *de novo* the proper interpretation of the Court Rules. *Id.*

B. The trial court did not misunderstand the facts of the case; even if it did, such facts were not material to the trial court's stated decision.

The Tribe devotes the majority of its brief to its incorrect—and ultimately unsupported—contention that the trial court misunderstood the facts of the case. It cites the trial court's statement that "plaintiff according to Ms. Ha[a]pala . . . intentionally withheld cost information from [Milliman and BCBSM]. This affected the estimates and projections of savings. She said as much in her deposition testimony." Exhibit 29 at 22:12-18; *see also* Brief of Appellant at p. 11. The trial court, however, did not get the facts of the case wrong.

The Tribe's own testimony and emails attached to BCBSM's briefing demonstrate that the Tribe refused to share its own master "fee schedule" with BCBSM. BCBSM presented this testimony to the trial court in its motion for summary disposition. Summary Motion at pp. 3 and 6-7. Ms. Haapala's testimony was clear that she "did not want to provide BCBSM with pricing information on how much it paid on each claim for the prior year" and that she only "released some information" to Milliman. Summary Motion at p. 4 (citing testimony of Holly Haapala and Kristi Harwood-Causley).

> **Q.** Were the fee schedules that we just talked about, what we see here in Exhibit 28 and the schedules, ever provided to Blue Cross Blue Shield of Michigan?
>
> **A.** I don't believe we gave them the fee schedule.

Haapala Dep. at 184:13-16. The Tribe did not attach to its response to BCBSM's motion evidence that would tend to contradict Ms. Haapala's testimony or otherwise contend that her testimony presented a material question for trial. *See* MCR 2.116(G)(4) ("[A]n adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial"). Instead, the Tribe argued that the trial court should deny the motion on other grounds. *See generally* the Tribe's Opposition to BCBSM's Motion for Summary Disposition; *see also* Exhibit 29. To the extent that the Tribe believed that it had admissible evidence that would refute Ms. Haapala's testimony, the Tribe failed to meet its burden in opposing the motion.

Regardless, the Tribe's argument misses the point. Even if the trial court did misunderstand this fact (which it certainly did not), the Tribe utterly fails to explain why this alleged mistaken fact is material to the trial court's grant of summary disposition. The trial court did not base its decision on whether the Tribe withheld information. Rather, the trial court cited the "considerable discovery [that] ha[d] taken place and what jumps out at the court . . . is that the parties are sophisticated corporate entities." Exhibit 29 at 22:1-6. This fact "can't be overstated. . . ." *Id.* It concluded that, based upon the undisputed facts presented to it by the parties in their written submissions, the "[C]ontract was the result of months of due diligence by both parties [and] [t]he savings involved here were projected estimates based on what plaintiff provided to the defendant in this negotiation. . . ." *Id.* at 22:7-6-11. Based upon the arguments raised in BCBSM's motion (which the trial court "adopted" as its own), it entered a written order granting summary disposition. *See* 7/21/14 Order; Exhibit 29 at 22:2-22.

Tellingly, the Tribe does not direct the Court to facts that it submitted to the trial court in response to BCBSM's motion showing that the parties were not sophisticated business entities that engaged in an extended period of due diligence to negotiate and execute their Contract. Nor,

for that matter, does the Tribe show that the trial court failed to draw any reasonable inference in favor of the non-moving party. MCR 2.116(G)(5). Considering the weight of undisputed facts and the numerous legal arguments in BCBSM's motion for summary disposition that the Tribe ignores, it appears the Tribe is trying to make an issue were none exists.

C. The trial court did not err when it concluded that, under Counts I and III of the Tribe's complaint, alleged promises of future savings cannot form the basis of a fraud claim.

Nor did BCBSM argue, as the Tribe suggests, that the Tribe's complaint was improperly pleaded. *See* Brief of Appellant at p. 17. Instead, BCBSM argued to the trial court that the Tribe's claims of common law fraud (Count I) and innocent misrepresentation (Count III) were premised, in part, on statements of a future promise or benefit (*i.e.*, future cost savings), which cannot form the basis of fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) ("Future promises are contractual and do not constitute fraud"); *Webb v First of Mich Corp*, 195 Mich App 470, 473; 491 NW2d 851 (1992) (a promise of future interest-rate returns "was nothing more than a promise of future benefit that cannot, by law, constitute fraud"). The trial court, therefore, did not err when it concluded that allegations of fraud based on alleged future promises (*i.e.*, promises of future savings) were not actionable in these two counts as a matter of law.

In Count I (common law fraud), the Tribe alleged that BCBSM "represented to Plaintiff that if Plaintiff would have used Defendant as its administrative service provider instead of NGS, Plaintiff would have saved over $2.3 million. *In addition, if Plaintiff switched to Defendant, Defendant represented that Plaintiff would save over $12 million during the next five years.*" Compl. at ¶ 19 (emphasis added). Count III (innocent misrepresentation) does not contain any specific allegations. To the extent Count III relies upon BCBSM's projections of future savings over NGS, any alleged statement would constitute a promise of future benefits.

Accordingly, the portion of Count I italicized above and any future promises in Count III cannot, as a matter of law, support a claim of fraud. Counsel for the Tribe admitted as much during the hearing before the trial court on BCBSM's earlier motion for summary disposition under MCR 2.116(C)(8): "The allegation is this is not about the future . . . they have repeatedly said a past or an existing fact -- that they would have saved us [$2.3 million]. That is the fundamental basis of the claim." **Exhibit 30**, 4/12/13 Hearing Tr., at 8:21-9:16. Ms. Haapala, as the Tribe's MCR 2.306(B)(5) corporate representative, confirmed that the only representations the Tribe relies upon in support of each of the counts in its complaint are those expressly identified in the complaint at ¶¶ 8-13. Haapala Dep. at 171:6-23. Thus, to the extent that Counts I and III were based on any future promises, the trial court did not err when it granted BCBSM summary disposition under MCR 2.116(C)(10).

D. The trial court did not err when it concluded that any reliance on BCBSM's alleged misrepresentations would be unreasonable as a matter of law.

1. The express terms of the Contract contradicted the alleged misrepresentations.

The Court's holding in *Novak v Nationwide Mutual Insurance Co*, 235 Mich App 675; 599 NW2d 546 (1999), is controlling. For a claim of fraud to prevail under *any of the theories* that the Tribe avers in its complaint, the Tribe must show that it reasonably relied upon the misrepresentation. *Novak*, 235 Mich App at 689-691. It cannot do so here because the Contract's language contradicts the alleged misrepresentations the Tribe alleges form the basis of its claims.

> [The Tribe] acknowledges that the health care provider discounts may be different than BCBSM's estimates as set forth in Schedule B due to (but not by way of limitation) provider participation, demographics, utilization, access, settlements or the Claim-pricing methodology of a BCBS Plan. BCBSM shall not be responsible for any difference between the estimated health care provider discounts as set forth in Schedule B and the actual discounts realized and passed through in Amounts Billed.
>
> * * *

> This Contract . . . represents the entire understanding and agreement of the parties regarding the matters contained herein. This Contract supersedes and prior verbal or written agreements and understandings between the parties and shall be binding upon the parties, their successors or assigns.

Exhibit 21 at BCBSM 213 and 220. The Tribe could not have been misled when the Contract expressly contradicts the alleged misrepresentations of savings on which the Tribe claims to have relied. Further, the nature of the estimates and their limitations were disclosed in the Milliman report itself, as well as other documents, and were repeatedly discussed within the Tribe. *See generally* Counter-Statement of Facts, *supra*.[4]

The unreasonableness of the Tribe's purported reliance is especially evident when the Court considers that the Tribe's attorney attempted to change the Contract's language and incorporate a dollar-for-dollar guaranty. *See* Exhibit 19 at BCBSM37944. Instead of the requested dollar-for-dollar guaranty, the parties settled on the language of the Discount Guaranty, where BCBSM only promised to refund a portion of the administrative fees in the first year if the estimated savings were not achieved. Exhibit 22. Not only does the Contract in this case contain a merger clause that expressly disclaims any reliance on prior oral or written statements, the Contract also states that estimates were not guaranteed. *See* Exhibit 19 at BCBSM379447.

In *Novak*, *supra*, plaintiff alleged that defendant induced him into signing an employment

[4] The Tribe attempted in the trial court to distance itself from the language of the Contract by suggesting that the Contract's use of "discounts" was somehow different from the word "savings," which occasionally appeared in the parties' pre-contract negotiations. The argument, however, is nonsensical. Indeed, the Tribe's complaint used "discounts" (four times) and "savings" (three times) interchangeably. For example: "[h]ad the BCBS network been in place, Sault Ste. Marie Tribe of Chippewa Indians would have achieved a *45.2% combined discount* for both in and out-of-network. *This represents $2,353,375 in savings* over the current carrier." Compl. at ¶ 8 (emphasis added). So do the BCBSM proposals that the Tribe cites in its complaint. *Id.* at ¶¶ 13-14.

agreement by promising, in part, that the "at will" provision in the agreement would not apply to plaintiff. Defendant also promised that plaintiff would be permitted to sell other companies' insurance products. *Novak,* 235 Mich App at 687-688. The Court affirmed the dismissal of plaintiff's complaint under MCR 2.116(C)(10), holding that plaintiff's reliance on defendant's misrepresentations was unreasonable as a matter of law due to the contract's merger clause: "[B]ecause plaintiff's reliance on [the] statements . . . was not reasonable in light of the written contract, the statements, as a matter of law, did not support a misrepresentation claim." *Id.* at 690-691 (citing *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464-465; 517 NW2d 235 (1994)).

The Tribe's position that the reasonableness of its reliance is necessarily a jury question is wrong. There is no question for trial where the Court determines that a party's reliance was unreasonable as a matter of law. *Novak, supra,* concerned the grant of summary disposition under MCR 2.116(C)(10) on the issue of reasonable reliance in light of the at-will provision in the contract and the merger clause. *Novak*, 235 Mich App at 690. Other decisions of the Court are in agreement. *See, e.g., Bev Smith, Inc v Atwell*, 301 Mich App 670, 688-689; 836 NW2d 872 (2013) (affirming dismissal of plaintiff's fraud claim where plaintiff was presented with information that contradicted the alleged fraudulent promises); *Cummins v Robinson Twp*, 283 Mich App 677, 698; 770 NW2d 421 (2009) ("Thus, alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance"); *Nieves*, 204 Mich App at 465 (reversing the trial court and dismissing plaintiff's misrepresentation claim because reliance on defendant's alleged oral promise was unreasonable when it contradicted plaintiff's employment contract). The trial court did not, and did not need to, resolve any disputed facts to reach this decision.

The Tribe's citation to *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004), in support of its argument is misplaced. That case concerned the issue of whether plaintiffs actually

relied on defendants' real estate disclosure statement regarding repairs and defects, not whether the reliance was reasonable. *Bergen*, 264 Mich App at 389 ("We disagree . . . with the trial court that plaintiffs failed to create a factual issue regarding actual reliance"). Moreover, unlike this case (and unlike *Novak*), *Bergen* did not involve the question of whether express language in a merger clause rendered any reliance on past alleged representations unreasonable.

The Tribe also relies on *Mesh v Citrin*, 299 Mich 527; 300 NW 870 (1941), and *Waun v Universal Coin Laundry Mach, LLC*, No. 267954, 2006 WL 2742007 (Mich Ct App Sept 26, 2006).[5] Brief of Appellant at pp. 23-24. Those cases, however, are distinguishable on their facts. Specifically, both cases highlighted the relative lack of sophistication of the plaintiffs claiming fraud. *See Mesh*, 299 Mich at 529 (describing plaintiff as a "young man without experience in the gasoline business"); *Waun*, 2006 WL 2742007, at *6 (stating that defendants were "more suited" to understand the laundry business than plaintiff). Here, on the other hand, the undisputed evidence presented to the trial court demonstrated that the Tribe, with its own insurance department and in-house legal department, spent over one year analyzing and negotiating the Contract with BCBSM. *See, e.g., Fruitman v Rubinstein*, No. 286916, 2010 WL 143478, at *4 (Mich Ct App Jan 14, 2010) ("Plaintiffs next contend that the trial court erred to the extent that it considered plaintiffs' degree of sophistication and lack of due diligence . . . before investing. We again disagree. Under either a common-law or a silent fraud theory, these factors were relevant . . . to determining the reasonableness of their purported reliance. . . ."). Prior to signing the Contract, the Tribe's Insurance Department even conducted its own analysis of BCBSM's proposals and projected future costs to the Tribe (which exceeded what the Tribe actually spent). *See* Exhibit 14. This case bears no resemblance to *Mesh* or *Waun*, and the Court should affirm the grant of summary disposition in favor of BCBSM, because the express terms of the Contract

[5] The unpublished cases cited in BCBSM's brief are attached as **Exhibit 31**.

directly contradicted the alleged promises made by BCBSM.

2. The Tribe does not dispute that it had knowledge of the nature of BCBSM's estimates and projections.

A party cannot reasonably rely on an alleged misrepresentation when it has available to it "the means of knowledge regarding the truthfulness of the representation. . . ." *Webb*, 195 Mich App at 474. The Tribe understood the nature of BCBSM's projections and, in fact, was skeptical of them. The Tribe's argument that its employees' "skepticism is irrelevant" misses the point. *See* Brief of Appellant at p. 20. The fact that Ms. Haapala and other Tribe employees were skeptical is not only relevant, but dispositive, on the issue of reasonable reliance because such skepticism led to the Tribe's further investigation and negotiation of a provision in the Contract to address what would happen if the savings were not realized.

In *Webb*, plaintiffs claimed that they were fraudulently induced into making an oil investment based upon a broker's representation that the deal was, among other things, "risk free." *Webb*, 195 Mich App at 471. The Court affirmed the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendant, concluding that "[e]ven a cursory review of any of [the prospectus] documents would have enlightened plaintiffs that the investment was not 'risk free.'" *Id.* at 475. The Court held that plaintiffs' reliance on the broker's statement was unreasonable because "plaintiffs cannot claim to have been defrauded when they had information available to them that they chose to ignore." *Id.* The same holds true here.

The only statement of existing fact identified in the Tribe's complaint is BCBSM's delivery of the Milliman Report to the Tribe and its statements that BCBSM may have achieved $2.3 million in additional savings between July, 2007 and June, 2008. *See* Compl. at ¶¶ 8-13 ("Specifically, Defendant represented that 'had the BCBS network been in place, [the Tribe] would have achieved a 45.2% combined discount for both in and out-of-network. This represents $2,353,375 in savings over the current carrier"). The Tribe, however, knew these statements

about what it "might have [] achieved during th[is] period" were based upon assumptions and estimates. Exhibit 8 at 002976. Ms. Haapala was aware of the limitations in the Milliman Report and warned the Board of the risks. Kachur Dep. at 57:18-21, 82:5-7. Consequently, the Tribe could not blindly rely on BCBSM's alleged statements that it would have saved the Tribe $2.3 million if it had handled the Tribe's 2007-2008 claims year without looking to the analysis itself and its stated limitations.

In addition, any reliance by the Tribe on BCBSM's alleged misrepresentations about future savings—even if actionable—would have been unreasonable as a matter of law because the Tribe was aware that presentations of future savings were "estimates" and "projections" based upon certain "assumptions."[6] Ex. 13 at ST 003820-003827 (using the word "estimate" fourteen times, the word "project" five times, and the word "assumption" twice). As set forth above, Ms. Haapala articulated this fact as the basis of her concerns to the Tribe and warned the Board against signing the Contract because the estimates may not be realized. *See* pp. 7-9, *supra*.

Unlike the prospectus in *Webb*, *supra*, the Tribe did not ignore the risks associated with BCBSM's estimates. Rather, it negotiated the Discount Guaranty to address the concern that the estimates would not materialize. The Tribe then executed a Contract that not only contained a merger clause, but its "acknowledge[ment] that health care provider discounts may be different than [BCBSM's] estimates. . . ." Exhibit 21 at BCBSM 213-214.

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[6] As set forth above, Michigan law provides that statements of future conduct cannot form the basis of a claim for fraud. *See* Section C, *supra*. The Tribe has argued that Count II of its complaint is one for fraud in the inducement although no variation of the word "induce" appears in its complaint. "Fraud in the inducement occurs where a party materially represents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). "[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, *i.e.*, fraud relating to the merger clause or fraud that invalidates the entire contract, including the merger clause." *UAW-GM Human Res Center v KSL Recreation Corp*, 228 Mich App 486, 503; 579 NW2d 411 (1997).

Although the Tribe may have preferred that the Contract contain a dollar-for-dollar guaranty, Michigan courts have "many times held that one who signs a contract will not be heard to say . . . that he did not read it, or that he supposed it was different in its terms." *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999); *see also UAW-GM Human Resources Ctr*, 228 Mich App at 506, n10 (holding that the court would not use "common knowledge" to "vary the terms of a written contract," which would "improperly place the courts in the position of routinely rewriting contracts instead of honoring the parties' intentions as actually expressed in the contract"). The Tribe cannot escape the weight of Michigan law by claiming that this case is somehow different due to the relative magnitude of the dollars involved or by subjectively explaining that, had BCBSM's estimates been off "by a few hundred thousand dollars," it may not have sued.[7]

The Tribe's argument that any mention of Ms. Haapala's skepticism or concern raises a question of fact is wrong. Rather, the unrebutted factual record of the Tribe's extensive internal discussions regarding the switch to BCBSM and the risks that Ms. Haapala and the Tribe's Insurance Department identified go directly to the conclusion that the Tribe's reliance upon any alleged misrepresentations was unreasonable as a matter of law. Contrary to the Tribe's assertion, the concerns of its Insurance Department and Legal Department as to the nature and accuracy of BCBSM's estimates is critical to the issue of whether any purported reliance on

[7] On multiple occasions in its brief, the Tribe asserts that BCBSM did not challenge its calculation that "the repricing was false" and that "instead of saving Plaintiff more than $2.3 million, it showed Defendant was about $167,000 more expensive." *See* Brief of Appellant at pp. 8, 12. In support, the Tribe simply points to its own interrogatory responses where it unilaterally made that calculation. *Id.* at 12 (referring to Exhibit O). Contrary to the Tribe's assertion, BCBSM disputes this damages calculation in its entirety. Because the trial court granted BCBSM summary disposition, BCBSM never had the chance to challenge the Tribe's damages calculation. *See* MCR 2.116(C)(10) (stating that a motion for summary disposition may be based on certain grounds "except as to the amount of damages"). The issue is irrelevant for purposes of this appeal.

those estimates was reasonable. The Tribe does not dispute Ms. Haapala's stated concerns or that she shared them with the Board and others. Accordingly, the trial court did not err when it granted summary disposition in BCBSM's favor because, as a matter of law, the Tribe's purported reliance was unreasonable.

E. The trial court did not err in granting BCBSM summary disposition where the Tribe's requested remedy was to rescind a fully-performed services contract.

In each of the Tribe's three counts, it sought rescission of the Contract. A party, however, may not rescind a contract that has already been terminated. *See Grabendike v Adix*, 335 Mich 128, 141; 55 NW2d 761 (1952); *Carolin Mfg Corp v George S May, Inc*, 312 Mich 487, 502; 20 NW2d 283 (1945); *Dodge v Tullock*, 110 Mich 480; 68 NW 239 (1896). Even if a party could rescind, the party seeking rescission must restore the benefits it received under the contract to the other party. *Grabendike*, 335 Mich at 140. Thus, the trial court did not err when it granted BCBSM summary disposition on this basis as well.

Directly controlling is *Carolin Manufacturing, supra*. There, plaintiff contracted with defendant for assistance in improving plaintiff's manufacturing methods. Defendant worked under the agreement for several months and plaintiff paid defendant almost $10,000 for the work. *Carolin Mfg*, 312 Mich at 493-494. Plaintiff then sued to rescind the contract and recover the amount it paid because defendant was a foreign corporation not licensed to do business in Michigan. *Id.* at 502. The Court denied plaintiff's request:

> [H]ere we have an executed contract where plaintiff cannot return consideration consisting entirely of personal services. We do not believe that plaintiff can keep all of the benefits of a contract and at the same time recover what it had paid for them. Had defendant furnished plaintiff with tangible property of unquestioned value over which there was no dispute, we do not believe that plaintiff could retain the property and bring suit for all moneys paid for it and preclude defendant from defending the suit.

Id. Here, the Tribe cannot "unring the bell" and return to BCBSM the economic benefits and

administrative services the Tribe received under the Contract. The trial court, therefore, did not err when it granted BCBSM's motion for summary disposition. *McMullen v Joldersma*, 174 Mich App 207, 219; 435 NW2d 428 (1988) (rescission not permitted because "plaintiffs could not restore defendants to the status quo"); *Interstate Automatic Transmission Co v Harvey*, 134 Mich App 498, 502-503; 350 NW2d 907 (1984).

Even if it could overcome this hurdle, the Tribe remains in an untenable position that it should be permitted to rescind a fully performed, already terminated contract under which it obtained all of the economic benefit owing to it including its right under the Discount Guaranty. That is, the Tribe received all of the administration services for which it bargained (and does not allege otherwise) and received the payment that it agreed would constitute its recourse in the event that some of the estimated cost savings were not realized. There is no dispute that BCBSM paid $57,000 to the Tribe under the Discount Guaranty. Having enjoyed the benefit of the bargain from BCBSM (and after both parties have fully performed), the Tribe cannot, under the guise of a claim for rescission, seek to change the parties' agreement.

Barke v Grand Mobile Home Sales, Inc, 6 Mich App 386; 149 NW2d 236 (1967), is of no help to the Tribe. That case involved a dispute over the sale of plaintiff's mobile home. 6 Mich App at 388. The Court concluded that, based on the case-specific facts, plaintiff was not required to tender back the mobile home as a prerequisite to suit. *Id.* at 392 ("The appellant here is a widow beyond the productive years, the house trailer in question is her home. The ends of justice would not be served by requiring her to give up her home in order to satisfy a technicality of the law by tendering back the benefits of the contract. . . .") The Tribe's lawsuit, on the other hand, centers on a contract for already-performed services. Requiring the Tribe to tender back, at a minimum, the $57,000 that BCBSM paid to it under the Discount Guaranty as a prerequisite for suit would not work to erode "the ends of justice," as the Court determined it would in *Barke*. *Id.*

F. The Tribe did not properly preserve all of its issues for appeal.

The Tribe's brief on appeal lists two issues for appeal: (i) "[d]id the trial court's misunderstanding of the undisputed facts cause its legal error" and (ii) "[d]id the issues raised by defendant warrant summary disposition." Brief of Appellant at p. vi; *see* MCR 7.212(C)(5). Under the second question, the Tribe addresses arguments that it states it is raising "[i]n an abundance of caution . . . ."

MCR 7.212(C)(5) requires an appellant to provide a "statement of questions involved, stating concisely and without repetition the questions involved in the appeal." Although the Tribe includes two questions, the second question does not accurately reflect the five different issues that the Tribe attempts to address in its second section of its brief on appeal. *See* Brief of Appellant at pp. 17-25. Instead, this section of the Tribe's brief contains a list of five arguments as to which the Tribe claims the "issues raised by defendant" did not warrant summary disposition. The Tribe, however, does not explain how each of these issues is relevant to the trial court's grant of summary disposition or, for that matter, how they were even addressed at the trial level. For example, the Tribe's brief on appeal contains a subheading entitled "[t]he [c]omplaint [w]as [p]roperly [p]leaded," Brief of Appellant at pp. 17-18, but does not include this issue in its statement of questions presented or explain why, for that matter, it is relevant to the trial court's decision where BCBSM did not challenge the sufficiency of the Tribe's pleadings. *See Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 517; 838 NW2d 915 (2013) (citing *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000)) ("A party abandons an issue when it fails to include the issue in the statement of questions presented in its appellate brief and fails to provide authority to support its assertions").

An appellant, such as the Tribe, should not be permitted to assert a vague question on appeal as some sort of catchall without expressly describing the alleged error below. The Court

should conclude that the issues raised in the second section of the Tribe's brief are abandoned.

RELIEF REQUESTED

For the reasons stated above, BCBSM respectfully requests that the Court affirm the trial court's grant of summary disposition in all respects.

Respectfully submitted,

BODMAN PLC

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February 3, 2015