STATE OF MICHIGAN

IN THE COURT OF APPEALS

Appeal from the Circuit Court for the County of Wayne
The Honorable Susan Borman, Circuit Judge

TAMARA FILAS,

Plaintiff-Appellant,

v

THOMAS K. CULPERT and
EFFICIENT DESIGN, INC.,

Defendants-Appellees.

/

Court of Appeals No. 317972

Lower Court No. 13-000652-NI

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DEFENDANT-APPELLEE THOMAS K. CULPERT'S MOTION TO AFFIRM

Defendant-Appellee Thomas K. Culpert ("Culpert"), for his Motion to Affirm, states the following:

1. On October 14, 2014, this Court issued its opinion in *Filas v MEEMIC,* unpublished per curiam opinion (No. 316822) (Ex. 1).

2. *Filas v MEEMIC* arose out of the same motor vehicle accident that gave rise to the instant appeal (*Filas v MEEMIC* was Ms. Filas' first party suit for PIP benefits whereas the instant case is her tort claim). *Filas v MEEMIC* involved a dismissal by the same Circuit Court judge, for the same reason that the instant suit was dismissed (Ms. Filas refused to sign authorizations, despite putting her medical condition into controversy, and was trying to place her own arbitrary limitations on what would be discoverable). (See Appellant's Brief, p 5; 8/9/13 trans, p 3.)

3. The issues raised by Ms. Filas in her appeal in *Filas v MEEMIC* are identical to the issues raised by Ms. Filas in the instant appeal. Compare Ms. Filas' "Questions Presented" in this appeal (Ex. 2) with her Brief on Appeal in *Filas v MEEMIC* (Ex. 3).

4. This Court's rejection of Ms. Filas' arguments in *Filas v MEEMIC* collaterally estops her from raising the same arguments in this case. "Collateral estoppel, also known as issue preclusion, is a common-law doctrine that gives finality to litigants." *People v Wilson,* 496 Mich 91, 98; 852 NW2d 134 (2014). "In essence, collateral estoppel requires that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* For the doctrine to apply, "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co,* 469 Mich 679, 682–684; 677 NW2d 843 (2004). Mutuality of estoppel exists if the party asserting collateral estoppel would have been bound by the previous

litigation if the judgment had gone against that party. *Id.* at 684–685. However, a "lack of mutuality of estoppel does not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Id.* at 691–692. Therefore, the fact that Culpert was not a party to *Filas v MEEMIC* does not prevent him from invoking the doctrine, since Ms. Filas has now had a full and fair opportunity to litigate the precise issue presented here.

5. "The doctrine of collateral estoppel serves many purposes: it relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *People v Wilson, supra* at 99 (citation omitted). All of these purposes would be advanced by applying the doctrine to bar the instant case.

6. MCR 7.211(C)(3) allows a party to file a motion to affirm "[a]fter the appellant's brief has been filed ... on the ground that (a) it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission; or (b) the questions sought to be reviewed were not timely or properly raised."

7. The issues raised in Plaintiff-Appellant's Brief on Appeal fall squarely within both MCR 7.211(C)(3)(a) and (3)(b), in light of this Court's opinion in *Filas v MEEMIC*.

WHEREFORE, Culpert respectfully requests that this Honorable Court grant his motion, affirm the Circuit Court in all respects, and dismiss Plaintiff's appeal with prejudice.

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Dated: October 17, 2014

STATE OF MICHIGAN

IN THE COURT OF APPEALS

Appeal from the Circuit Court for the County of Wayne
The Honorable Susan Borman, Circuit Judge

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Plaintiff-Appellant,

v

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DEFENDANT-APPELLEE THOMAS K. CULPERT'S BRIEF IN SUPPORT OF HIS MOTION TO AFFIRM

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ARGUMENT

This Court's October 14, 2014 opinion in *Filas v MEEMIC*, affirming the trial court's dismissal of Ms. Filas' suit, collaterally estops the instant case, where Ms. Filas has raised the very same issues in this appeal that she raised – and that this Court rejected – in *Filas v MEEMIC*.

On October 14, 2014, this Court issued its opinion in *Filas v MEEMIC,* unpublished per curiam opinion (No. 316822) (Ex. 1). *Filas v MEEMIC* arises out of the same motor vehicle accident that gave rise to the instant appeal (*Filas v MEEMIC* was Ms. Filas' first party suit for PIP benefits whereas the instant case is her tort claim). *Filas v MEEMIC* involved a dismissal by the same Circuit Court judge, for the same reason that the instant suit was dismissed (Ms. Filas refused to sign authorizations, despite putting her medical condition into controversy, and was trying to place her own arbitrary limitations on what would be discoverable). (See Appellant's Brief, p 5; 8/9/13 trans, p 3.)

The issues raised by Ms. Filas in her appeal in *Filas v MEEMIC* are identical to the issues raised by Ms. Filas in the instant appeal. Compare Ms. Filas' "Questions Presented" in this appeal (Ex. 2) with her Brief on Appeal in *Filas v MEEMIC* (Ex. 3).

This Court's rejection of Ms. Filas' arguments in *Filas v MEEMIC* collaterally estops her from raising the same arguments in this case. "Collateral estoppel, also known as issue preclusion, is a common-law doctrine that gives finality to litigants." *People v Wilson,* 496 Mich 91, 98; 852 NW2d 134 (2014). "In essence, collateral estoppel requires that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* For the doctrine to apply, "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v*

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"The doctrine of collateral estoppel serves many purposes: it relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *People v Wilson, supra* at 99 (citation omitted). All of these purposes would be advanced by applying the doctrine to bar the instant case.

CONCLUSION AND RELIEF REQUESTED

The facts and procedural history of this case are virtually identical to those of Ms. Filas' parallel lawsuit, which arose out of the same motor vehicle accident, *Filas v MEEMIC.* In both cases, Ms. Filas refused to sign authorizations, despite putting her medical condition into controversy, and was trying to place her own arbitrary limitations on what would be discoverable. In this case, although it is unclear whether she ever raised the argument in the trial court,[1] Ms. Filas has argued on appeal that SCAO Form 315 was an acceptable substitute, and that the trial court should have allowed her to execute that in place of what she had been ordered to sign. In *Filas v MEEMIC,* this Court squarely rejected that argument. (Ex. 1, pp 4-6.)

[1] See Culpert's 1/9/14 Brief on Appeal as Appellee, pages 7-8.

Ms. Filas' other arguments in *Filas v MEEMIC* are similarly indistinguishable from the arguments she has raised here. (Compare Ex. 2 with Ex. 3.)

MCR 7.211(C)(3) allows a party to file a motion to affirm "[a]fter the appellant's brief has been filed … on the ground that (a) it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission; or (b) the questions sought to be reviewed were not timely or properly raised." The issues raised in Plaintiff-Appellant's Brief on Appeal fall squarely within both MCR 7.211(C)(3)(a) and 7.211(C)(3)(b), in light of this Court's opinion in *Filas v MEEMIC*. For these reasons, Culpert respectfully requests that this Honorable Court grant his motion, affirm the Circuit Court in all respects, and dismiss Plaintiff's appeal with prejudice.

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Dated: October 17, 2014

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Exhibit 1	Court of Appeals opinion from *Filas v MEEMIC*
Exhibit 2	Excerpts from Plaintiff-Appellant's Brief on Appeal in the instant case
Exhibit 3	Plaintiff-Appellant's Brief on Appeal from *Filas v MEEMIC*

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EXHIBIT
1

STATE OF MICHIGAN

COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

v

MEEMIC INSURANCE COMPANY,
A Michigan insurance company,
Defendant-Appellee.

UNPUBLISHED
October 14, 2014

No. 316822
Wayne Circuit Court
LC No. 12-016693-NF

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

PER CURIAM.

Appellant appeals as of right the trial court order denying her motion for reconsideration and clarification of the final order of dismissal of her case as a sanction for failure to comply with discovery. We affirm.

I. BACKGROUND

Appellant filed her complaint against her insurer, appellee, twice in this case. Both complaints were for personal injury protection benefits based on an automobile accident in the early part of 2010. Appellant's first complaint was filed by her first attorney in 2011. The parties stipulated to dismiss that complaint in 2012 without prejudice after appellant refused to sign authorizations releasing her medical and employment records to appellee. The 2012 order of dismissal provided that if appellant re-filed her lawsuit against appellee before December 22, 2012, the court would regard it as filed on November 15, 2011, "for purposes of the application of the One Year Back rule contained in MCL 500.3145(1)."

Appellant re-filed her complaint utilizing a second attorney on December 18, 2012. It was randomly assigned to a judge other than the judge on the prior case. On January 15, 2013, appellee sent appellant four authorizations from Records Deposition Service (RDS); three were to release medical records and the fourth was to release employment records. Appellant refused to sign them. Appellee motioned the trial court on February 20, 2013, to order appellant to sign the four authorizations. On the same day, the parties stipulated to a protective order regarding the production of plaintiff's medical, employment and educational records. In pertinent part, the order provided

> . . . that Plaintiff's medical, employment and educational records shall not be disclosed to any person, corporation, or other entity except to defense counsel's

staff, designated expert witnesses and insurance company representatives in the ordinary course of adjusting the Plaintiff's claims;

Appellant did not produce the signed authorizations prior to hearing date on the motion to compel. On March 6, 2013, the court, having received no answer to the motion, issued an order to compel which gave appellant fourteen days to comply with production.

On March 11, 2013, appellant, *in propria persona*, filed an emergency motion to substitute different forms in lieu of the RDS authorization forms provided by appellee. The motion requested that the form used comply with the requirements of the No-Fault Act. Appellant also repudiated the stipulated protective order of February 20, 2013, stating her attorney had no authority to sign it and that the protection it offered was inadequate. The court considered appellant's amended motion to substitute as a motion for reconsideration of the March 6, 2013 order to compel which had been granted due to appellant's failure to file a timely response. The court issued an order on March 15, 2013, denying appellant's request to substitute the RDS forms, but ruled it would "grant [appellant] some relief since the parties were attempting to agree on a protective order." The order provided:

> If the parties cannot agree on the order by 3/22/2013, the authorizations are due by 3/28/2013. If the parties can agree, plaintiff has 7 days additional after the entry of the agreed protective order.

On March 19, 2013, appellant's case was reassigned to the judge who presided over the initial filing pursuant to local court rule. Appellant motioned the court for a continuance on March 26, 2013, to retain new legal counsel.

Appellee filed its motion to dismiss on April 4, 2013, pursuant to MCR 2.313(B)(2)(c) and MCR 2.504(B)(1). Appellee argued that appellant had failed to comply with the court's March 15, 2013 order. The motion indicated that as of March 28, 2013, there was no amended protective order and no signed authorizations and requested the court dismiss appellant's case based on her willful violation of the court's previous orders. Appellant answered that the extant protective order did not adequately protect her confidential information from re-disclosure. Appellant maintained that her refusal to sign the RDS authorization forms was justified where the forms requested a broad release of her employment records, were without an accompanying subpoena and mandated disclosure to a third-party.

At an April 12, 2013 motion hearing, the court granted appellant an adjournment of two weeks to retain new legal counsel and held appellee's motion to dismiss under advisement. When the parties returned on April 26, 2013, appellant did not have new counsel, had not signed the authorizations and again asked for a continuance to retain counsel. The court modified the authorizations to include an expiration date which was "until the close of this case." The court then set the case aside to allow the parties to come to some agreement regarding the remainder of the authorization forms. The court recalled the case and inquired as to the reasons why the appellant had not signed the authorizations. The appellant reiterated her issues with the forms. The court dismissed appellant's case again without prejudice after appellant finally said, "No, I can't sign this agreement."

Appellant filed a motion for reconsideration and a motion for clarification on May 17, 2013. The motion for reconsideration requested the court order appellee to substitute the RDS authorization forms with SCAO form MC 315 for the release of appellant's medical information. The motion for clarification asked whether the one-year back rule would apply to appellant's re-filing of her complaint. The trial court denied both motions at a hearing on May 31, 2013.

II. ISSUE PRESERVATION AND STANDARD OF REVIEW

Issues are preserved for appeal when they have been raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009). The issues regarding use of SCAO form MC 315 are not preserved for appeal. The first time appellant argued to substitute the RDS authorizations with different forms was by motion on March 14, 2013, in response to appellee's motion to compel. The court, noting that the appellant failed to file a timely response to the original motion, treated her March 14th filing as a motion for reconsideration. The very first time appellant asked the court to order appellee to use form MC 315 was in a motion for reconsideration after her case was dismissed a second time. Thus the issue of whether appellee could use a form other than MC 315 to request medical information from appellant is not preserved. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose–Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Appellant's argument against dismissal of her case also first appeared in a motion for reconsideration instead of in a timely response to appellee's motion to dismiss. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). "This Court reviews a trial court's discovery orders, such as an order to compel, for an abuse of discretion." *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 676-677; 806 NW2d 353 (2011). "The standard of review for decisions regarding sanctions for discovery violations is abuse of discretion." *Jilek v Stockson* (On Remand), 297 Mich App 663, 665; 825 NW2d 358 (2012) (internal citation and quotation marks omitted). "An abuse of discretion occurs when the decision results in an outcome outside the range of principled outcomes." *Id.*

III. ANALYSIS

Appellant presents two arguments on appeal. The first is that the trial court erred in requiring her to sign authorization forms from RDS because RDS was not a party to this case and MC 315 is the required form for requesting the release of medical information for purposes of discovery under MCR 2.314(C)(1)(d). The second argument is that the trial court erred in dismissing her complaint for failure to comply with discovery when appellee had alternative means, outside of the RDS forms, to discover the information it requested from appellee.

Appellant's unpreserved arguments are reviewed for plain error affecting substantial rights. *Vushaj*, 284 Mich App at 519; *Rivette*, 278 Mich App at 328. "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party,

meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

A. Signing the RDS Authorization Forms

We find that the trial court did not err when it required appellant to sign the RDS authorization forms because it had authority to enforce production of appellant's records pursuant to the parties' stipulated protective order. The parties' stipulated protective order provided that appellant would produce her medical, employment and educational records under agreed upon conditions that protected her information from re-disclosure. Appellant argues that she was not required to comply with the protective order. Appellant first contends that she was not required to disclose her information to RDS because it was not a party to the case. Appellant cites MCR 2.310(C)(5) and (C)(6) as authority for her position. MCR 2.310(C)(5) "addresses [requests for production] served on nonparties for the inspection and copying of documents," *Glover v Ralph Meyers Trucking, Inc*, 224 Mich App 665, 669-670; 569 NW2d 898 (1997), where the documents are in the nonparty's possession. MCR 2.310(C)(5) is inapplicable because the rule addresses production of records from a nonparty and not disclosure to a nonparty. MCR 2.310(C)(6) likewise is irrelevant because it addresses the allocation of the costs of production of materials pursuant to MCR 2.310. Appellant next contends that she was not required to follow the protective order because she never approved it and her attorney approved it without her consent. Nevertheless, appellant was bound to the protective order by her attorney's approval. See *Saltmarsh v Burnard*, 151 Mich App 476, 491-492; 391 NW2d 382 (1986) (an attorney's knowledge is generally imputed to his client). Appellant thus presents no basis for not having complied with the stipulated protective order to produce her records to appellee.

Appellant next argues that the trial court erred in not allowing her to use form MC 315 in place of appellee's RDS authorizations. We disagree. The trial court properly declined to consider argument regarding the substitution of the RDS forms with SCAO form MC 315 in what were multiple mislabeled motions for reconsideration. Notably, MC 315 is the only form authorized by court rule. However, nothing in the rule precludes parties from stipulating to the use of other forms nor does it limit the court's ability to modify such things as the time limit of 60 days which is contained in MC 315 for reasons peculiar to a particular case. However, this was a case where the issue could have been raised in a timely answer to the motion to compel. A trial court has "discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). Also, this Court will "find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Accordingly, the trial court did not commit plain error when it rejected appellant's request to substitute the RDS forms with form MC 315 when those arguments first appeared in appellant's motion for reconsideration after her case had been dismissed.

The trial court's failure to require the use of MC 315 did not prejudice appellant where the court used its discretion in modifying the RDS forms and the protective order addressed appellant's concerns over re-disclosure to third parties. Appellant had two concerns with the RDS forms. The first was that the RDS forms lacked an expiration date and the second was that

they did not protect against re-disclosure. The trial court modified the RDS form and inserted "until the end of the case" as an expiration date of the release which was an expansion beyond the 60 day expiration in form MC 315. Another issue was that the RDS forms specifically shielded RDS from any liability for re-disclosure where form MC 315 merely warned of the possibility of re-disclosure. The protective order in this case limited disclosure to only defense counsel's staff, designated expert witnesses and insurance company representatives in connection with appellant's instant claims. While re-disclosure was still possible, the protective order placed a burden on the named entities not to do so and implicitly shifted all liability to the entities should they re-disclose; thus, appellant is not prejudiced by this modification.

Appellant's next allegation of error was that the trial court erred in ordering her to sign the RDS' authorization form for employment information because the release language of "any and all information which may be requested" impermissibly went beyond the scope of just wage and salary information as required under the No-Fault Act, MCL 500.3101 et seq. She also argues the court erred in failing to require that appellee file a motion for good cause under MCL 500.3159. Appellant's particular concern is that her disciplinary records would be released into the public to be discovered by potential employers, thereby affecting her future employability. This issue was waived by the parties' stipulated protective order. The protective order permitted production of appellant's medical, employment and educational records under certain conditions. The stipulation eliminated the need to file a motion or to demonstrate good cause. *State Farm Mutual Ins Co v Broe Rehab Servs*, 289 Mich App 277, 281-282; 811 NW2d 1 (2010).

B. Dismissal Sanction

Appellant contends the trial court erred in dismissing her case for not signing the RDS authorizations because appellee could have obtained the same discovery under MCR 2.506(B)(1) by subpoena. We disagree, finding the argument to be without merit.

We could consider this issue abandoned. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Nevertheless, a review of the record supports the trial court's decision to dismiss.

The trial court's order of dismissal dismissed appellant's case pursuant to MCR 2.313(B)(2)(c) and MCR 2.504(B)(1). The sanction of dismissal under MCR 2.313(B)(2)(c) for discovery violations "is to be applied only in extreme cases." *Schell v Baker Furniture Co*, 461 Mich 502, 509; 607 NW2d 358 (2000) (citations omitted). The following factors are to be considered by the court in determining the appropriate sanction:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser

sanction would better serve the interests of justice." [*Dean v Tucker*, 182 Mich App 27, 32–33; 522 NW2d 711 (1994) (internal citations omitted).]

The trial court properly ascertained that appellant made a conscious, albeit, principled decision to disobey multiple court orders, despite numerous opportunities to accommodate her. "A party's failure to comply with a court discovery rule is wilful if it is conscious or intentional, not accidental or involuntary." *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 628; 420 NW2d 835 (1987). Appellant willfully violated the court's orders to sign the RDS authorizations for discovery. She failed to obey the stipulated order for production of her records. She ignored the trial court's later order compelling the same information. At last, the court asked appellant multiple times on the record to sign the authorizations and appellant said no. The court considered the adjournments and continuances granted to appellant. It considered her prior case that was dismissed for the same failure. Appellant's attempt to substitute the RDS forms with form MC 315 was untimely. Appellant had over five months to sign the authorization forms or present alternative forms to the court. The trial court did not err in dismissing appellant's case when appellant's complete non-compliance to participate in any part of the court's discovery orders in over the course of a year was a stumbling block to the case proceeding. *Bass v Combs*, 238 Mich App 16, 34-35; 604 NW2d 727 (1999) overruled in part on other grounds by *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Talbot
/s/ Jane M. Beckering

EXHIBIT 2

STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

Court of Appeals No: 317972

Circuit Court No: 13-000652-NI

-vs-

KEVIN THOMAS CULPERT, AND EFFICIENT DESIGN, INC., A Michigan Corporation.

Defendants-Appellees.

TAMARA FILAS Plaintiff-Appellant 6477 Edgewood Rd. Canton, MI 48187 (734) 751-0103 e-mail redacted	MICHAEL C. O'MALLEY (P59108) Attorney for Defendant Efficient Design Vandeveer Garzia 1450 W. Long Lake Rd., Suite 100 Troy, MI 48098 (248) 312-2940 momalley@vgpclaw.com
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APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATUTES AND COURT RULES:

STATEMENT OF JURISDICTION

Jurisdiction in the Court of Appeals is appropriate because on 8-30-13, Appellant filed a timely claim of appeal from the Trial Court's 8-9-13 Order denying Plaintiff's 7-2-13 Objection to Defendant Efficient Design Inc.'s Proposed Order of Dismissal Without Prejudice. The 8-9-13 Order is the final order as it disposes of the claims and adjudicates the rights and liabilities of the parties. MCR 7.202(6)(a)(i); MCR 7.203(A)(1).

QUESTIONS PRESENTED

1. **Did the circuit court err by ordering Plaintiff-Appellant to provide her medical records to Efficient Design without establishing that they were a liable party to the case?**

2. **Did the circuit court err by not permitting Plaintiff-Appellant to use SCAO-mandated form MC 315 to satisfy her obligation to provide discovery materials under MCR 2.314(C)(1)(d), since she also had the choice under MCR 2.314(C)(1)(a) to simply provide the medical records?**

3. **Did the circuit court err when it dismissed Plaintiff-Appellant's case based on her refusal to complete specific authorization forms provided by the Defendant-Appellee, when there were still other means available for the Defendant-Appellee to obtain the medical and employment records they sought (i.e. subpoena to health care provider's custodian of records or use the mandated SCAO form MC 315, obtaining the employment records directly from her employer since Plaintiff-Appellant is a public school teacher whose employment records are publicly available)?**

4. **Did the circuit court err when it ordered Plaintiff-Appellant to release records beyond those requested in the Defendant's Motion to Compel, without requiring the Defendant to file a new Motion to Compel to include the new records requests?**

5. **Did the circuit court err when it dismissed Plaintiff-Appellant's entire case against both Defendant-Appellees, Kevin Culpert and Efficient Design, Inc., when only Defendant-Appellee Efficient Design motioned for the case to be dismissed on the basis that Plaintiff-Appellant used SCAO-approved Form MC 315 to provide her medical records, instead of his personal authorization forms?**

6. **Is the Plaintiff-Appellant in a third-party tort, or in any case where medical records are requested as a part of discovery, justified in refusing to agree to additional language and/or missing information on a medical or employment authorization form that is not included in the SCAO-mandated Form MC 315 (i.e. allowance of photocopies, use of an expiration event instead of a date, allowance of records to be released "for copying purposes")?**

EXHIBIT 3

STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant

-vs-

MEEMIC INSURANCE COMPANY,
A Michigan Insurance Corporation,

Defendant-Appellee

Court of Appeals
Case # 316822

Wayne Circuit Court
Case #12-016693-NF

TAMARA FILAS Plaintiff-Appellant 6477 Edgewood Rd. Canton, MI 48187 (734) 751-0103 e-mail redacted	**CARYN A. GORDON, P68590** GARAN LUCOW MILLER, P.C. Attorney for Defendant-Appellee 1000 Woodbridge Street Detroit, MI 48207-3108 (313) 446-5552 cgordon@garanlucow.com

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case involves a claim for PIP Benefits resulting from Plaintiff-Appellant's January 15, 2010 auto accident.

STATEMENT OF FACTS

Defendant-Appellee's Counsel filed a motion to compel Plaintiff-Appellant to provide signed authorizations pursuant to MCR 2.314(C)(1)(d), to release her medical and employment records to a company called Records Deposition Service, Inc. (RDS), a non-party to the auto case. On April 26, 2013, this case was dismissed without prejudice based on Plaintiff-Appellant's refusal to sign RDS forms.

Plaintiff-Appellant informed the Court that she did not object to signing authorizations releasing any of the information listed on the RDS authorization form. Her objections were to being compelled to release her information to RDS, a non-party to the case, and other issues with the language and form "as is".

The Supreme Court Administrative Office (SCAO) mandates the use of form MC 315 to obtain medical records for discovery pursuant to MCR 2.314(C)(1)(d). Plaintiff-Appellant did not refuse to provide the medical and employment discovery information to the Defendant. Plaintiff-Appellant merely requested to substitute form MC 315 for the RDS forms.

Plaintiff-Appellant motioned the Court for permission on 3-14-13 to use form MC 315 in lieu of the RDS forms. In the event her motion was not granted, Plaintiff-Appellant came to the 4-26-13 hearing with modified RDS forms she presented to

Defendant-Appellee's Counsel. Plaintiff-Appellant wrote in the blank expiration date/event section that the authorization would expire on 7-25-13, allowing for a 90-day expiration, (Exhibit D, sample of modified RDS form presented to Defendant-Appellee's Counsel 4-26-13). Although the Judge would not accept the 90-day expiration date, the Judge was willing to have Defendant-Appellee's Counsel write "*End of Case*" on the form as the expiration event. However, the expiration date was not the only or main objection Plaintiff-Appellant had to using the RDS form "as is."

In addition to Plaintiff- Appellant's main objection to using the third-party authorization form releasing her medical information to a third party because she did not believe she was obligated by law to release her medical information to a third party instead of directly to the Defendant-Appellee, there were other parts of the form that Plaintiff-Appellant would have objected to on any form she would have been asked to sign releasing her medical information directly to the Defendant-Appellee. The "as is" portions of the RDS forms that Plaintiff-Appellate objected to, in addition to authorizing third party RDS to have access to her records to copy them, included, but were not limited to, language that Plaintiff-Appellant was not in agreement with such as: blank spaces not filled in with specified date or event at which time the authorization expired, the use of photocopies deemed valid as the original form, the fact that neither Defendant-Appellee nor Defendant-Appellee's attorney's name was stated on the form to indicate the records would be released only to Defendant-Appellee, and the allowance of re-disclosure by the non-party (RDS) without liability for damages as the result of unauthorized disclosure, and no listing of the specific information requested. The RDS

authorization form provided by Defendant-Appellee to Plaintiff –Appellant included Plaintiff –Appellant's Social Security number already filled in. Plaintiff never provided Defendant- Appellee with her Social Security number. She does not know where the Defendant-Appellee obtained her Social Security number. Plaintiff-Appellant contends that her Social Security number should not have been provided to the Defendant-Appellee and does not have to be provided to the health care provider to obtain her medical records or to her employer to obtain her employment records (Exhibit C, RDS General and Medical Authorizations). SCAO-mandated form MC 315 allows for a specific 60-day expiration date, does not allow photocopies to be deemed valid as the original, specifically states to whom the records will be disclosed, does not have language about no liability for unauthorized disclosures, and does not request a Social Security number (Exhibit B, form MC 315).

Plaintiff-Appellant also modified the RDS forms she presented to Defendant-Appellee's Counsel on 4-26-13 to include the following language to ensure Plaintiff-Appellate that RDS would only re-disclose records to Defendant-Appellee: "*RDS is authorized to exclusively copy records for and re-disclose records to [Defendant-Appellee's attorney] only, and no other entity or person,*" and "*Only an attached subpoena or letter request exclusively from [Defendant-Appellee's attorney] will validate this authorization*" (Exhibit D, sample of modified RDS form presented to [Defendant-Appellee's attorney] 4-26-13). The Court did not allow this language to be included on the RDS form. Plaintiff-Appellant included this language because she didn't want RDS to be able to resell or re-disclose her medical information, which is what could have

occurred had she signed the forms provided to her "as is."

In addition to the clauses in the RDS form Plaintiff-Appellant objects to, Plaintiff-Appellant also objects to the release of her records to any first or third party whose authorization form allows for the re-copying of the authorization form, re-copying her records or re-disclosing her records, including but not limited to, the authorization form of any attorney, law firm, entity or third party records copying service such as RDS, regardless of whether or not they are a commercial enterprise such as RDS that profits from copying, selling and re-disclosing her medical and employment information.

On the four signed authorizations Plaintiff-Appellant attempted to provide to Defendant-Appellee's attorney at the April 26, 2013 hearing, Plaintiff-Appellant redacted her Social Security number in part, that was already written in full on the form Defendant-Appellee's attorney provided (Exhibit D, sample of modified RDS form presented to Defendant-Appellee's attorney 4-26-13). Plaintiff-Appellant's Emergency Motion to Substitute Forms stated Plaintiff-Appellant did not want a records service to have her SS#. Defendant-Appellee's attorney disrespectfully, irresponsibly or deliberately included the RDS form with Plaintiff-Appellant's full SS# as an exhibit with his Answer to her Motion. Plaintiff-Appellant is concerned about identity theft with her SS# in the public record! On March 12, 2013, Plaintiff-Appellant requested Defendant-Appellee's attorney to redact her SS# in the court record. He has not responded. Plaintiff-Appellant contends she is not legally obligated to include her Social Security number on an authorization form requesting her medical records or to provide it to a health care provider from whom she is seeking services.

ADDITIONAL HISTORY AND FACTS

Plaintiff-Appellate hired an attorney on November 3, 2011 to file her PIP lawsuit against Defendant- Appellee MEEMIC Insurance Co. and third-party lawsuit against Kevin Culpert, the driver of the vehicle that caused the accident. A joint lawsuit was filed in the 3rd Circuit Court, Case No. 11-014149-NF, on November 15, 2011, by Plaintiff- Appellate's attorney naming Defendant- Appellee, MEEMIC Insurance Co. and Kevin Culpert as Defendants.

Prior to the November 15, 2010 filing, Plaintiff- Appellant provided her attorney an authorization form she had received from MEEMIC Insurance Co., that she signed and dated 11-4-11, releasing her wage/salary and medical records to MEEMIC Insurance Co., with the understanding that the signed authorization would be forwarded to Defendant MEEMIC Insurance Co by her attorney. A copy of this signed form was included in a CD of her attorney's case file that was provided to her in May of 2012 by her attorney's law firm. (Exhibit G, Medical and Wage/Salary Authorizations signed 11-4-11 for MEEMIC; Exhibit I, Screen shot showing 11-4-11 release is included in attorney's file)

On August 1, 2012, Plaintiff-Appellant made an inquiry to MEEMIC Insurance Co, as to whether or not MEEMIC Insurance Co. had received her signed authorization to release her employment and medical records to MEEMIC Insurance Co. MEEMIC insurance Co. responded August 30, 2013, that they did not receive the form (Exhibit H, 8-1-12 Plaintiff-Appellant's letter to Defendant-Appellee).

Defendant- Appellee, MEEMIC Insurance Co. never informed her, prior to her

request for information regarding whether or not MEEMIC received the 11-4-11 signed release form she gave to her attorney to forward to MEEMIC, that MEEMIC needed or wanted any additional discovery information from Plaintiff-Appellant regarding her wage and salary or medical records. MEEMIC Insurance Co. never made a request for her to sign another release form after reporting they had not received the release form she signed and dated 11-4-11. MEEMIC Insurance Co. never filed a motion to compel Plaintiff –Appellant to provide wage and salary, medical or other employment information prior to the original close of discovery date of 6-17-12, or before dismissal of the case without prejudice on July 20, 2012. (Exhibit F, Scheduling Order for Case #11-014149, showing 6-17-12 close of discovery) and before she was to attend a re-scheduled deposition stipulated by the parties to be held on June 29, 2012.

On June 21, 2012, her attorney "surprised" her and told her that the Judge had ordered her to attend her deposition on June 22, 2012 instead of June 29, 2012 as she had previously been informed. Plaintiff-Appellant told him she would not be able to attend a deposition on June 22, 2012. She explained she was not comfortable attending the deposition without the protective order signed by the Judge that her attorney had promised to provide prior to her deposition, but did not provide. She also explained she had two important medical appointments on June 22, 2012. Her attorney told her that to avoid having her case dismissed permanently by the Judge for not obeying her order to attend the Deposition on June 22, 2012, he could have her case dismissed on June 22, 2012 and then re-file it again on June 22, 2012 and she would not lose any of her no-fault benefits one year back from November 15, 2011, the original filing date of her case.

Plaintiff-Appellate felt backed up against a wall, and agreed to allow her attorney to dismiss and re-file her case the next day to avoid her case from being dismissed by the judge and closed forever. Plaintiff –Appellant's attorney did not make good on the agreement to dismiss and re-file her case on June 22, 2012. The court records never showed the Judge changing the deposition date to June 22, 2012. Plaintiff-Appellant has a copy of those records but was unable to locate the document at the time of this filing.

The MEEMIC case file provided to Plaintiff-Appellant by her attorney's law firm, already had medical information in it, including information from the University of Michigan Health Care System (U of M). Plaintiff-Appellant provided her attorney with these medical records when she hired him 11-3-11, but she ever signed an authorization for U o M to release her medical records to her health care payers.

Plaintiff sent requests for Accounting of Disclosure statements to U of M Health Care System, Henry Ford Health System and St. Joseph-Mercy Health Care System, and received replies dated July 10, 2012, July 3, 2012 and July 11, 2012, respectively, indicating that none of the attorneys, including her own, had ever requested any medical records. Given that none of the attorneys requested any medical information from any of her health care providers after her case was filed on 11-15-11, and Plaintiff-Appellant's attorney only had medical information through April 26, 2011 provided to him by the Plaintiff-Appellant, and none of the attorneys had any medical information from Henry Ford Heath or St. Joseph Mercy that also provided services related to her auto injuries, it is reasonable for the Plaintiff-Appellant to argue that all of the attorneys were negligent and/or acted in bad faith by not requesting all of the medical information to document her

injuries before the case evaluation. Plaintiff-Appellant asks: How could have there been a fair settlement under these circumstances? She cannot help but wonder if this is not the rule, rather the exception of how auto cases are litigated.

On November 3, 2011, the date she hired her attorney, Plaintiff-Appellant ignorantly signed blank authorization forms from Records Deposition Services presented to her by her attorney in his office, which she later expressed her disapproval of, and sent a written request to him to rescind. Plaintiff-Appellant is perplexed by the refusal of the Court and the new attorney she hired to re-file her auto cases, to accept the SCAO-mandated form MC 315 as acceptable discovery material to obtain her medical and wage/salary records. Before Plaintiff-Appellant hired the new attorney, it was agreed she could provide discovery materials herself, without the use of a records copy service. However, he breached this agreement by sending her third-party, Legal Copy Services authorization forms to sign from the third-party Defendant, and refused to stand up for her right not to use the Legal Copy Services forms to meet her obligation to provide discovery material to release her records to the Defendants.

ARGUMENTS

1. **The circuit court erred by ordering Plaintiff-Appellant to provide her medical records to a records copying service that was not a party to the case.**

Standard of Review. Plaintiff-Appellant is only required to provide such privileged records to the parties in the case. Records Deposition Service (RDS) is not a party to the case. MCR 2.310(C)(5) and (6) allow for the party to whom the request is submitted to produce the records. Plaintiff-Appellant, the party to whom the request was submitted, is not required to provide the records to a third-party records copy service.

Plaintiff-Appellant is not obligated under the Insurance Code of 1956 (no-fault law) or any other court rule to provide authorizations to a non-party to a case for the purpose of copying and re-disclosing her medical and employment information to attorneys and insurance companies for discovery purposes.

Plaintiff-Appellant did not refuse to provide the medical and employment discovery information to Defendant-Appellee---she merely objected to releasing her information to RDS, a non-party to the case.

Plaintiff-Appellant contends there is no law or language in the No-fault insurance Act requiring her to provide records to a non-party to the case. Records Deposition Service, Inc., a non-party to Plaintiff's case, is a business that uses the authorizations signed by the Plaintiff-Appellant, to allow RDS to issue subpoenas on Plaintiff-Appellant's health care providers and employer, allowing RDS to obtain Plaintiff-Appellant's health care information and employment information. The signed authorizations allow RDS to view, copy, re-disclose and/or sell the Plaintiff-Appellant's

medical and employment information listed on the subpoena(s) and/or letter request.

The information obtained by RDS is maintained in a digital records depository that can be distributed to attorneys or insurance companies for a fee, by paper copies, CD-ROM, or electronic link. Plaintiff-Appellant also has reason to believe from talking to attorneys that have used services like RDS, that these services also re-sell the information they obtain to any other attorney or insurance company that requests the information and is willing to pay for it. Some of these record collection services also sell subscriptions to attorneys and/or insurance companies allowing them to view records in their repository on any person they want to look up. Plaintiff-Appellant is not certain how secure the electronic links are, but her guess is that they operate similarly to the e-filing system with the circuit court. With the circuit court's e-filing system, anyone with the URL of the link to the e-filed documents can view them. A link to a court filing can be e-mailed and forwarded to others and opened by anyone, whether a party to the case or not. Plaintiff-Appellant does not want her records stored in an electronic database like RDS maintains them. She believes she has a right not disclose her records to RDS or any other non-party record collections service, and protect them from being stored in their electronic data base for re-disclosure electronically or in any other format.

Preservation of error. Plaintiff-Appellant preserved this issue in her 5-17-13 Motion for Reconsideration, pgs. 4, 5; and in her 3-11-13 Emergency Motion to Substitute Forms, pg. 5.

2. The circuit court erred by not permitting Plaintiff-Appellant to use SCAO-mandated form MC 315 to satisfy her obligation to provide discovery materials under MCR 2.314(C)(1)(d).

Standard of Review. MCR 2.314(C)(1)(d) does not allow for the use of authorization forms from Records Deposition Service, Inc. (RDS) as a discovery material to obtain medical records for discovery. The Supreme Court Administrative Office (SCAO) mandates the use of form MC 315 as the discovery material to obtain medical records for discovery pursuant to MCR 2.314(C)(1)(d) (Exhibit A, List of court-mandated forms). Thereby, the Plaintiff-Appellant should not have been faulted for failure to provide signed authorizations on RDS forms not authorized or mandated by the SCAO, as a basis to dismiss her case.

Page 2 of Defendant's February 20, 2013 Motion to Compel Production of Signed Authorizations states that the motion was pursuant to MCR 2.314(C)(1)(d) and MCR 2.119(E)(4). MCR 2.119(E)(4) refers to assessment of costs. MCR 2.314(C)(1) provides that *"[a] party who is served with a request for production of medical information under MCR 2.310 must either:"* Item (d) states, "*furnish the requesting party with signed authorizations* ***in the form approved by the State Court Administrator*** *sufficient in number to enable the requesting party to obtain the information requested from persons, institutions, hospitals, and other custodians in actual possession of the information requested.*" Under MCR 2.314(C)(1)(d), it is mandated that the authorization form to be used is MC 315. The PDF of the list of court-mandated forms, located at http://courts.mi.gov/Administration/SCAO/Forms/Documents/Mandatory%20Use%20List/mandatory_use_lists.pdf, indicates that MC forms are for circuit court use. MC 315

would therefore be used in the circuit court. (See Exhibit A, list of court-mandated forms; and Exhibit B, form MC 315). Plaintiff-Appellant was willing to provide Defendant-Appellee with a signed MC 315 form.

Defendant-Appellee's attorney has stated in court that he would not permit Plaintiff-Appellant to fill out her provider's authorizations and have copies of her records sent directly to him because he wanted certified copies. He gave the impression that he could only get certified copies through the records service. However, form MC 315 contains a certification to be signed by the records custodian that satisfies MCR 2.506(I)(1)(b), which states that "*The copy of the record must be accompanied by a sworn certificate, in the form approved by the state court administrator, signed by the medical record librarian or another authorized official of the hospital, verifying that it is a complete and accurate reproduction of the original record.*" Plaintiff-Appellant also spoke with her health care providers who said that that copies of her records could be authenticated by the person appointed as the custodian of the records and that the authenticated records could be sent to Defendant-Appellee via certified mail.

Plaintiff-Appellant contends she should not have been faulted for her failure to provide signed authorizations not authorized or mandated by the SCAO for Records Deposition Service, a non-party to the case, as a basis to dismiss her case. Plaintiff-Appellant contends she should have been permitted to use form MC 315 to provide records to the Defendant.

Preservation of error. Plaintiff-Appellant preserved this issue in her 5-17-13 Motion for Reconsideration, pg. 4, 8-10.

3. **The circuit court erred when it dismissed Plaintiff-Appellant's case based on her refusal to complete authorization forms for a non-party to the case, when there were still other means available for the Defendant-Appellee to obtain the medical and employment records they sought (i.e. subpoena to health care provider's custodian of records or use the mandated SCAO form MC 315, obtaining the employment records directly from her employer since Plaintiff-Appellant is a public school teacher whose employment records are publicly available).**

Standard of Review. MCR 2.506(B)(1) states, "*A subpoena signed by an attorney of record in the action or by the clerk of the court in which the matter is pending has the force and effect of an order signed by the judge of that court.*" Therefore, Defendant-Appellee's attorney can subpoena the custodian of any medical records he is entitled to under the no-fault law necessary to defend his case, without using a non-party record-copying service.

Plaintiff-Appellant's employment records are public record and do not require any signed authorization from Plaintiff-Appellant for Defendant-Appellee's attorney to view them.

Preservation of Error. Plaintiff-Appellant preserved this issue in her 5-17-13 Motion for Reconsideration, pg. 5, 7-8.

4. **The circuit court erred when it ordered Plaintiff-Appellant to sign the RDS authorization form, releasing any and all of her employment information to third party, RDS, when no good cause was shown by the Defendant-Appellee to obtain employment information beyond wage and salary information as permitted under MCL 500.3158, Insurance Code of 1956 (no-fault law).**

Standard of Review. MCL 500.3158, the Insurance Code of 1956 (no-fault law), states, *"(1) An employer, when a request is made by a personal protection insurer against whom a claim has been made, shall furnish forthwith, in a form approved by the commissioner of insurance, a sworn statement of the earnings since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based."* The RDS General Authorization does not specify the types of records to be disclosed, and simply states for Plaintiff-Appellant's employer to "release any and all information which may be requested..." There was no subpoena or letter of request provided to explain what information will be disclosed. If more than wage/salary information is being requested by Defendant-Appellee, Plaintiff-Appellant asserts that this is privileged information. Defendant-Appellee needs to provide good cause for such requests, as well as disclose what type of information is being requested. In her 3-11-13 Emergency Motion to Substitute Forms, Plaintiff-Appellant requested to use a different form in lieu of the RDS General Authorization, for the Defendant-Appellee to obtain her employment records. Plaintiff-Appellant agreed to disclose to Defendant-Appellee her wage/salary information using a form that does not allow photocopies, specifically requests wage/salary information, clearly indicates Defendant-Appellee is the only entity to whom disclosure will be made, and has a date/event upon

which the authorization expires.

Plaintiff-Appellant objects to the disclosure of her employment records to RDS or any other third-party record copying and distribution company. Plaintiff-Appellant objects to providing records to a company that maintains a database of records since any disciplinary records in Plaintiff-Appellant's employment file would exist indefinitely and thereby could cause irreparable harm to Plaintiff-Appellant's ability to procure employment, in the event she has a reason to search for another job.

Preservation of error. Plaintiff-Appellant preserved this issue in her 3-11-13 Emergency Motion to Substitute Forms, pg. 8, 15-16.

5. The Plaintiff-Appellant in a no-fault auto case for PIP benefits, or in any case where medical records are requested as a part of discovery, is justified in refusing to agree to additional language and/or missing information on a medical or employment authorization form that is not included in the SCAO-mandated Form MC 315 (i.e. allowance of photocopies, use of expiration event instead of date, no listing of attorney or insurance company to whom records will be disclosed, inclusion of SS#, no listing of information requested, etc.).

Standard of Review. With the exception of the addition of an "expiration event", Plaintiff-Appellant was ordered by the Court, to sign the RDS forms "as is" to prevent her case from being dismissed. Plaintiff-Appellant does not believe she is required by law to agree to the language on the RDS forms "as is." This language requires her to agree to clauses and to disclose information above and beyond SCAO-mandated form MC 315, as explained below in items A-E (Exhibit B, form MC 315, and Exhibit C, RDS General and Medical Authorizations):

A. Item 3 of the RDS General and Medical Authorization Forms state:

This Authorization is subject to revocation at any time by contacting Records Deposition Service, Inc. in writing. I understand that the revocation will not apply to information that has already been released in response to this Authorization.

This indicates that once Plaintiff-Appellant's information in her records is released to RDS and/or copied by RDS, RDS can re-disclose and sell that information indefinitely.

B. Item 4 of the RDS General and Medical Authorization Forms state:

Without expressed revocation, this authorization expires on the date set forth: _____ or the following event: Once information is disclosed, no further information can be disclosed pursuant to this authorization.

This wording implies that information already disclosed can still be disclosed indefinitely.

Item 5 on the General Authorization, and item 6 on the Medical Authorization, states:

A photocopy of this document shall be considered valid as if the original were offered. This Authorization is only valid if submitted by Records Deposition Service, Inc. I understand that information used or disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and may no longer be protected by Federal or State Law. Records Deposition Service, Inc. is not liable for damages as the result of an unauthorized disclosure.

By signing this form, pursuant to Items 3 and 4 on the form, one is agreeing that RDS can re-disclose any information they have received prior to the revocation of the authorization form that has already been released to RDS

indefinitely and, without revocation, information released to or disclosed by RDS prior to an expiration date or event can be dis-closed by RDS indefinitely.

Furthermore, the language exempts RDS from damages after doing so, stating, "Records Deposition Service, Inc. is not liable for damages as the result of an unauthorized disclosure."

Plaintiff-Appellant understands that once she has allowed HIPPA-protected records or other protected medical information to be released by her health care providers with her permission to release those records, that they are no longer protected by the Health Care Provider, and the health care provider will no longer be held legally accountable if someone re-discloses them. However, RDS is not a health care provider, but a collector and re-seller of information, and the clause in their contract asking for Plaintiff-Appellant to grant permission for RDS to re-disclose her information and not to be held accountable for the re-disclosure is not acceptable to Plaintiff-Appellant. She does not expect anyone who receives her medical information to release her medical information to others, i.e. just as she would not expect an attorney to whom she has given her private medical information, to release it to another attorney, person or entity without her permission, regardless of whether or not the attorney, person or entity is a party to the case. The RDS clause differs from a simple disclaimer included in medical release forms from health care providers which state that information released *might* be re-

disclosed, thereby acknowledging it is beyond the control of the health care provider's to police any illegal actions of re-disclosure by the parties that receive the medical information. It does not imply that the health care providers condone or promote re-disclosures. On the other hand, RDS language on the RDS authorization form implies that the Plaintiff-Appellant signing the form is giving RDS permission to re-disclose her records and she will not hold them accountable as she might hold a doctor or her attorney accountable for breaching patient/ doctor confidentiality or the attorney breaching attorney/client privilege.

Items 4 and 5 from the RDS form, quoted above, indicate that although each authorization is only used once, RDS can, without expressed revocation, continue to make copies of the authorization and use it over and over again, gathering more and more information up until the expiration date or event, but if there is no date or event written on the form, then RDS can continue to obtain new information, re-disclose and re-sell the information, indefinitely. The allowance of photocopies would also enable RDS to attach different subpoenas and letters to the authorization without Plaintiff-Appellant's knowledge, which is unacceptable. (Exhibit C, RDS General and Medical Authorizations). SCAO-mandated form MC 315 does not allow photocopies to be considered valid.

Although the Court allowed for "end of case" to be written in the blank for item #4 on the RDS authorization form provided by the Defendant-

Appellee, Plaintiff-Appellant argues that it would be unlikely for the health care provider, upon receipt of the authorization form, to determine whether or not the "end of case" has occurred, especially since no case number has been provided by the Defendant-Appellee on the form. The records custodian would likely assume that the case is still in progress, or else they would not be receiving the form. SCAO-mandated form MC 315 does not allow for an "expiration event." Form MC 315, item 4, specifically states an expiration date of 60 days from the date of signature.

C. The authorization form provided by Defendant-Appellee from RDS Services is not transparent to a person, such as the Plaintiff-Appellant, who has no access to the services or policies of RDS. Initially, it was not clear to the Plaintiff-Appellant for whom RDS was collecting the records. Nowhere on the form does it state RDS is collecting the records for its own use as part of its business operation. Plaintiff-Appellant currently has a better understanding and realizes that by signing the RDS authorization form, she would have allowed a third party, RDS, to prepare subpoenas and to release her records to RDS to re-disclose to any party RDS allowed to subscribe to their services, which is generally limited to lawyers and insurance companies.

Defendant-Appellee is not listed anywhere on the RDS Medical Authorization as an entity to which disclosure will be made. Plaintiff-Appellant contends she was not required to provide records without knowing

who was requesting the records. Plaintiff-Appellant was never able to get a "straight " answer from either of the two attorney that she hired to handle her auto accident cases about the copy services forms presented to her to sign. Plaintiff-Appellant contends she has the right to provide authorizations to directly release her records to Defendant-Appellee without using a third-party copying service that specifically authorizes the re-disclosure of Plaintiff - Appellant's records.

D. The RDS forms the Plaintiff-Appellant was ordered to sign requested her Social Security number. Form MC 315 does not require a Social Security number, nor is one required to access records from a health care provider, since patients are not required to provide this information to their health care provider. Plaintiff-Appellant's records can be obtained with her name and birthdate, which is all that is required on form MC 315. Plaintiff-Appellant contends she should not be required to release her Social Security information to a non-party, records copying service.

E. Item #1 on the RDS Medical and General Authorization Forms state:

"Information to be disclosed: Please see enclosed Subpoena or Letter Request for information to be disclosed."

Defendant-Appellee did not provide any Subpoena or Letter Request to Plaintiff-Appellant. Plaintiff-Appellant's former attorney, whom she has

dismissed, told her the Subpoena was out of her control and he did not comply with her request for a copy of the subpoena. Plaintiff now understands that it is RDS that prepares the subpoenas after they receive the signed authorization allowing records to be released to RDS.

MCR 2.310(C)(1) states "The request must list the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place and manner of making the inspection and performing the related acts, as well as the form or forms in which electronically stored information is to be produced, subject to objection." Although the RDS Medical Authorization form lists items and describes them, the General Authorization does not.

Preservation of error. Plaintiff-Appellant preserved issue A in her 5-17-13 Motion for Reconsideration, pg. 11 and in her 3-11-13 Emergency Motion to Substitute Forms, pgs. 7, 14.

Plaintiff-Appellant preserved issue B in her 5-17-13 Motion for Reconsideration, pgs. 7, 8, 11 and in her 3-11-13 Emergency Motion to Substitute Forms, pgs. 14, 16.

Plaintiff-Appellant preserved issue C in her 5-17-13 Motion for Reconsideration, pgs. 7, 11-12.

Plaintiff-Appellant preserved issue D in her 5-17-13 Motion for Reconsideration, pg. 7 and in her 3-11-13 Emergency Motion to Substitute Forms, pg. 14.

Plaintiff-Appellant preserved issue E in her 3-11-13 Emergency Motion to Substitute Forms, pgs. 6, 15.

CONCLUSION

The Circuit Court erred by dismissing Plaintiff-Appellant's case based upon the fact that she did not sign authorization forms for the non-party, Records Deposition Services. Plaintiff-Appellant should have been able to submit SCAO-mandated Form MC 315 to satisfy her obligation to provide discovery materials under MCR 2.314(C)(1)(d).

The exclusionary practices of the private copying services undermines the core democratic principles and values of the United States of liberty and justice for all. The checks and balances one would expect in a democratic system of governance would be absent if Defendants are given preferential treatment over the Plaintiff by the Court, to use these companies and their authorization forms as the discovery materials over the SCAO-mandated discovery material form MC 315, to obtain and review information about the Plaintiff that is not identified on the copy services authorization form, and that Plaintiff cannot obtain access to and review to determine the accuracy and currency of the information released to the copy service.

Plaintiff-Appellant is not an attorney, and cannot avail herself to the use of the record copy services. Thus, there is no way for the Plaintiff-Appellant to review the information to determine if the information received by the record copy service is complete, accurate or timely to reach negotiate and reach a fair settlement of her case, or for the Plaintiff-Appellant to know if the attorneys ever request or receive all of the Plaintiff-Appellant's information in the copying service's database. There is no one that has the greater first-hand knowledge than the Plaintiff herself, to verify the accuracy and

completeness of the records related to her case that will be used to settle it. There are many entities or persons who can benefit from Ms. Filas's information being in the database of a record copying service that would otherwise not be available to these person or entities, who could use the information to her detriment.

REQUEST FOR RELIEF

Plaintiff-Appellant respectfully requests that this Court reverse the decision of the Circuit Court to dismiss her first-party PIP claim, and Order this case to be remanded back to the Circuit Court for further proceedings fully intact and in the same condition it was in prior to the dismissal on April 26, 2013, and to Order Defendant-Appellee to: 1) exclusively accept MC 315 forms provided and mandated by the SCAO "as is," filled out and mailed by Plaintiff-Appellant to her health care providers or employer, as sufficient to meet Plaintiff-Appellant's obligation to provide discovery materials regarding medical and/or employment information to Defendant-Appellee, except for item number 2 on Form MC 315, for which Defendant-Appellee is to provide to Plaintiff-Appellant, a written list of information for Plaintiff-Appellant to include on SCAO form MC 315 discovery material to be mailed by Plaintiff-Appellant to the custodian(s) of her records; 2) show just cause for any request for any discovery information on the list in item number 2 of SCAO Form MC 315 provided by Defendant-Appellee in writing to be added to item number 2 of SCAO Form MC 315 by Plaintiff-Appellant, that is beyond what is normally required in a PIP case, before requiring Plaintiff-Appellant to authorize the release of the information by filling out, signing and mailing the SCAO discovery

materials to her the custodian(s) allowing Defendant-Appellee to receive her records; 3) to inform Plaintiff-Appellant in writing, whether or not the Defendant- Appellee wants the information the Defendant-Appellee requested in item number 2, to be notarized and/or sent by certified mail by the custodian of the records who releases them to the Defendant- Appellee and; 4) to pay for any copying, notary and/or certified mailing/regular mailing costs billed by the custodian of records to process the SCAO MC 315 authorization form and release Plaintiff-Appellants records to the Defendant-Appellee.

signature redacted

10-10-13
Date

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