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

KEVIN THOMAS CULPERT and
EFFICIENT DESIGN, INC.,

Defendants-Appellees.

Court of Appeals No. 317972

Lower Court No. 13-000652-NI

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DEFENDANT-APPELLEE KEVIN THOMAS CULPERT'S ANSWER TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendant-Appellee Kevin Thomas Culpert ("Culpert"), for his Answer to Plaintiff-Appellant Tamara Filas' ("Plaintiff") Motion for Reconsideration, states the following:

MCR 7.215(I)(1) states that motions for reconsideration in the Court of Appeals "are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) expressly states that motions for reconsideration *may not* merely present "the same issues ruled on by the court, either expressly or by reasonable implication...." Moreover, a motion for reconsideration "resting on a legal theory and facts which could have been pled or argued prior to the ... original order" is insufficient to satisfy the "palpable error" standard. *Charbeneau v Wayne Co Gen Hosp,* 158 Mich App 730, 733; 405 NW2d 151 (1987). A motion for reconsideration is used to correct palpable error, not to present new evidence or arguments. *Maiden v Rozwood,* 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). Evidence or arguments "offered ... for the first time in support of [a] motion for rehearing" are "not properly before the court." *Id.* MCR 2.119(F)(3) "taken as a whole, can be interpreted as an expression of great reluctance to entertain or grant motions for reconsideration." *Mich Bank v Reynaert, Inc,* 165 Mich App 630, 645; 419 NW2d 439 (1988). All of the arguments advanced by Plaintiff either were, or could have been, argued in opposition to Culpert's Motion to Affirm.

Moreover, Plaintiff's principal argument for reconsideration is that collateral estoppel should not have been applied while this Court's decision in *Filas v MEEMIC,* unpublished per curiam opinion (No. 316822)[1] could still be appealed to the Michigan Supreme Court. However, under Michigan law, the pendency of an appeal does not suspend the operation of an otherwise final ruling as collateral estoppel. See *City of Troy Bldg Inspector v Hershberger,* 27 Mich App 123, 127; 183 NW2d 430 (1970) (dealing with the related concept of claim preclusion). See also *Temple v Kelel Distrib Co, Inc,* 183 Mich App 326, 328; 454 NW2d 610 (1990) (also dealing

[1] On November 25, 2014 – the same day this Court granted Culpert's Motion to Affirm, in part, in this case – Plaintiff filed an Application for Leave to Appeal to the Michigan Supreme Court in *Filas v MEEMIC,* Case No. 150510.

with claim preclusion); *Eisfelder v Michigan Dept of Natural Resources,* 847 F Supp 78, 83 (WD Mich 1993); and *Eliason Corp v Bureau of Saf & Reg of Mich,* 564 F Supp 1298, 1302 (WD Mich 1983). "It is … clear under Michigan law that the fact an appeal is pending does not affect an order's finality." *Eisfelder,* 847 F Supp at 83. This proposition has ample support in federal precedent as well; in federal court "the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo.*" *In re Weldon,* 397 Mich 225, 315; 244 NW2d 827 (1976), overruled on other grounds by *Bowie v Arder,* 441 Mich 23, 47; 490 NW2d 568 (1992). See also *Bui v IBP, Inc,* 205 F Supp 2d 1181, 1189 (D Kan 2002) ("The pendency of the appeal does not alter the finality of the case for purposes of *res judicata* or collateral estoppel."). To hold otherwise would leave an order "in limbo until affirmed by" a higher court. *In re Albano,* 55 BR 363, 369 (ND Ill 1985).

This approach is founded on the Restatement (Second) of Judgments, as explained in *Checker Taxi Co v Nat'l Prod Workers Union,* 636 F Supp 201, 204-205 (ND Ill 1986):

> Restatement (Second) of Judgments ("Restatement") § 13 comment f (1980) states the familiar general rule: "There have been differences of opinion about whether, or in what circumstances, a judgment can be considered final for purposes of res judicata when proceedings have been taken to reverse or modify it by appeal. *The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo;* finality is not affected by the … taking of the appeal…." (Emphasis added.)

Culpert acknowledges a line of cases suggesting that collateral estoppel cannot apply until "all appeals have been exhausted or when the time available for an appeal has passed." *Leahy v Orion Twp,* 269 Mich App 527, 530, 711 NW2d 438 (2006), citing *Cantwell v Southfield,* 105 Mich App 425, 429-430; 306 NW2d 538 (1981). However, in those cases, the

statement was *dicta*[2] because in both *Leahy* and *Cantwell*, the time available for an appeal had passed before this Court was called upon to apply collateral estoppel.[3] Culpert submits that, if this Court were to squarely consider the issue of whether an order currently being appealed has preclusive effect, it would follow the Restatement approach, which is also the federal approach.

WHEREFORE, Culpert respectfully requests that this Honorable Court deny Plaintiff's Motion for Reconsideration.

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[2] This Court has defined *dicta* as "a principle of law not essential to the determination of the case." *Reynolds v Bureau of State Lottery,* 240 Mich App 84, 95; 610 NW2d 597 (2000). The Supreme Court has expanded upon that definition, defining *dicta* as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Wold Architects and Engineers v Strat,* 474 Mich 223, 233 n 3; 713 NW2d 750 (2006).

[3] *Leahy* cited *Cantwell* for this proposition, and *Cantwell* cited *Gursten v Kenney,* 375 Mich 330, 333-334; 134 NW2d 764 (1965). See *Cantwell,* 105 Mich App at 430. However, *Gursten* did not address the issue; it merely mentioned that the order in question had not been appealed. Moreover, *Gursten* was decided in the very earliest days of this Court of Appeals' existence. Whatever sense an exhaustion requirement would have made then, when there was no intermediate appellate court, is eroded by the fact that there are now at least two levels of appellate review available in most cases, thereby prolonging the period in which an order could he held "in limbo," *In re Albano,* 55 BR at 369, if the approach advanced by Plaintiff were followed.