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 840 W. Long Lake Rd., Suite 600 Troy, MI 48098 (248) 312-2940 momalley@vgpclaw.com
DREW W. BROADDUS (P64658) Attorney for Defendant Culpert Secrest Wardle 2600 Troy Center Drive, P.O. Box 5025 Troy, MI 48007-5025 (616) 272-7966 dbroaddus@secrestwardle.com	JAMES C. WRIGHT (P67613) Attorney for Defendant Efficient Design Zausmer, Kaufman, August & Caldwell, P.C. 31700 Middlebelt Rd., Suite 150 Farmington Hills, MI 48334 (248) 851-4111 jwright@zkact.com

---

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

Plaintiff-Appellant, Tamara Filas, for her Reply to DF-AE's Answer to PL-AT's Motion for Reconsideration, states the following:

Mr. Broaddus's 12-22-14 "Defendant-Appellee Kevin Thomas Culpert's Answer to Plaintiff's Motion for Reconsideration" is fallacious and contains erroneous information not supported by fact, as evidenced by the items discussed below.

I. It would not have been possible for PL-AT to argue that she had filed an Application for Leave to Appeal to the Michigan Supreme Court in her 11-7-14 Answer to DF-AE's Motion to Affirm, because she had not filed it until 11-26-14.

On page 2 of DF-AE's 12-22-14 Answer, it is stated, *"All of the arguments advanced by Plaintiff either were, or could have been, argued in opposition to Culpert's Motion to Affirm."* This statement is not true. PL-AT did argue in her 11-7-14 Answer to DF-AE's Motion to Affirm that the 10-14-14 COA Opinion in *Filas v MEEMIC* (COA Case No. 316822) was not a final order since it could still be appealed to the Michigan Supreme Court ("MSC"). However, contrary to Mr. Broaddus's claim, PL-AT could not have argued in the 11-7-14 filing that she had filed an application for leave to appeal the MEEMIC case to the MSC, since her Application to the MSC was not filed until 11-26-14, after her 11-7-14 Answer to Culpert's Motion to Affirm had been filed.

In reference to the filing of the MSC Application, the footnote #1 on page 2 of DF-AE's 12-22-14 Answer states that PL-AT's Application for Leave to Appeal to the MSC was filed on 11-25-14, the same day as this Court granted Culpert's Motion to Affirm, in part, in this case. This is also untrue. Let it be clear that PL-AT's application for leave to appeal to the MSC was filed on 11-**26**-14, the day <u>after</u> this Court granted Culpert's motion to affirm, in part, on 11-25-14. At the time PL-AT filed her application for leave to appeal to the MSC, she had not yet

received notification that the COA had made any decisions in regard to her case against Culpert and Efficient Design Inc.

II. PL-AT's case is a civil third-party tort case and should be handled according to state and local laws, rules and/or precedents, not federal.

DF-AE claims on page 4 of DF-AE's 12-22-14 Answer that *"if this Court were to squarely consider the issue of whether an order currently being appealed as preclusive effect, it would follow the Restatement approach, which is also the federal approach,"* arguing that even though COA cases exist that have established that collateral estoppel cannot apply until "all appeals have been exhausted or when the time available for an appeal has passed," DF-AE suggests that the Federal definition should apply, whereby "the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel…" PL-AT argues that since her case is a civil case regulated by state and local laws, rules and/or precedents, it would be unjust to apply Federal precedents to her case, especially since Kevin Culpert and Efficient Design are not Defendants in the case being appealed to the MSC. Cases involving auto accidents in Michigan come under the No Fault Auto Insurance Law, the Insurance Code of 1956, and are filed in civil courts in the State of Michigan. Third-party tort cases related to the auto accident are also filed in State civil courts. PL-AT finds no merit in DF-AE's argument that the Federal rule should apply to a State civil case which has its own rules and is not under the jurisdiction of the Federal Court.

III. The Doctrine of Collateral Estoppel is not applicable to the instant case.

PL-AT's 11-7-14 answer to this second Motion to Affirm filed by attorney Drew Broaddus on 10-17-14 hired by Progressive Insurance for Kevin Culpert, provided and argued legal reasons why the Doctrine of Collateral Estoppel did not apply in this case, which included arguments that the facts of the cases were different, and a final judgment did not yet exist, which would have been sufficient to deny the Motion to Affirm for all defendants listed on Mr. Broaddus's 10-17-14 Motion to Affirm if the defendants had been the same in the COA Case No. 316822 against MEEMIC and the instant Case No. 317972 against Kevin Culpert and Efficient Design. However, the fact the defendants were not the same in these cases made DF-AE's claim of collateral estoppel invalid from the beginning.

PL-AT's Motion for Reconsideration filed on 12-16-14 pointed out the fact that the COA Order in the MEEMIC case was not yet final, because she already explained the differences between the facts in the MEEMIC case and the instant case in her 11-7-14 answer replying to Mr. Broaduss's second Motion to Affirm filed on 10-17-14. PL-AT had already explained how the opinion and ruling of the COA in the MEEMIC case was based upon a Protective Order that was non-existent in the case against Culpert and Efficient Design and that there were different circumstances and facts regarding the signing of medical release forms presented by MEEMIC and PL-AT; thereby, making the facts of the MEEMIC case different in regard to the ruling on the use of the SCAO forms, which would rule out the Doctrine of Collateral Estoppel as a reason to grant the Motion to Affirm.

There were no winners or losers in the original combined first-party no-fault auto case against MEEMIC Insurance Co and third-party tort case against Kevin Culpert, because that case resulted in a stipulated dismissal of the combined case in July of 2012, and there was no final

ruling in that case. The separate case refiled against MEEMIC in December of 2012, upon which the Court of Appeals opinion ruled on 10-14-14, had only one defendant, MEEMIC Insurance Co. Kevin Culpert and Efficient Design were not Defendants in that case. Without PL-AT's consent, PL-AT's lawyer entered into another stipulated Protective Order ("PO") with MEEMIC Insurance Co. in the lower court in the presence of another Judge that was improperly assigned to PL-AT's No-Fault Auto Claim. This PO filed in the separate MEEMIC no-fault auto case filed in 2013 was the basis upon which the COA determined PL-AT had to use the medical release forms provided by MEEMIC. There was no PO entered in the separate, Third-Party Tort case filed in January of 2013 against Kevin Culpert and Efficient Design in the instant appeal, and thereby the facts and circumstances surrounding the MEEMIC ruling regarding the signing of medical release forms in the MEEMIC case could not have been the same as those surrounding the signing of medical release forms in the Third-Party Tort Case. Thereby, there is no merit to DF-AE's claim that the Doctrine of Collateral Estoppel applies because there is no PO in the Third-Party case, which deems the facts as different in the MEEMIC case ruling, from the facts in the Culpert and Efficient Design case, especially given the fact that Kevin Culpert and Efficient Design were not defendants in the MEEMIC case. Also, there was not a situation in the MEEMIC case where the DF-AE's attorney did not, as ordered by the Judge, timely produce medical release forms he wanted the PL-AT to sign. For the Doctrine of Collateral Estoppel to apply, both the facts and the Defendants must be the same. Not only are the facts different in the third-party tort case as compared to the first-party No-Fault auto case in regard to the medical release forms, the defendants are different as well. Kevin Culpert was not a party to the separately re-filed MEEMIC Insurance case. Efficient Design was never listed as a Defendant by PL-AT's attorney in the original combined

first-party No Fault auto case and third-party tort case. Even though Mr. Wright, Efficient Design's attorney, without elaborating, indicated he had some involvement with the original combined No-fault and tort case dismissed without prejudice by stipulation of the parties, Efficient Design was clearly never listed as defendant in any auto-accident related case or any other case filed by PL-AT except in the instant third party tort case.

IV. Since granting PL-AT's Motion for Reconsideration will have no effect on the pending case against Mr. Broaddus's client, Mr. Culpert, it is highly unusual for Mr. Broaddus to continue to argue on behalf of Efficient Design Inc. (who is represented by Mr. Wright and Mr. O'Malley), when Mr. Broaddus represents a completely different insurance company that insured Kevin Culpert, not Efficient Design Inc.

As already explained by PL-AT nearly a year ago on page 3 of PL-AT's 1-21-14 Answer in response to Mr. Broaddus's first Motion to Affirm filed 12-30-13, and PL-AT's 1-30-14 Answer to Culpert's 1-9-14 Brief on Appeal, it should be understood that Mr. Broaddus, attorney in this appeal for Kevin Culpert, is replacing Mr. Culpert's trial court attorney, Mr. Hassouna. Mr. Broaddus is not representing Efficient Design, yet throughout his filings, he mentions primarily content regarding Efficient Design, and argues on behalf of Efficient Design. As pointed out in PL-AT's 12-20-13 Brief on Appeal, Mr. Hassouna, Mr. Culpert's trial court attorney, did not have any valid objections to the dismissal of Plaintiff's third-party case against Kevin Culpert. It was Efficient Design's attorney, Mr. Wright, who filed the Motion to Dismiss. In the lower court proceedings, Plaintiff complied with all requests from Kevin Culpert's attorney, Mr. Hassouna, and he did not object to the method by which Plaintiff provided medical records to him. Although Mr. Hassouna did state that he was in concurrence with Mr. Wright's Order to Dismiss, he provided no additional reasons on his own behalf. Further, in the 2011 case, Mr. Hassouna was ready to settle the case without Plaintiff's submission of any medical

records. Therefore, PL-AT has maintained that if the COA upholds the dismissal of her case against Efficient Design Inc., her case against Culpert should still remain intact.

The 11-25-14 Order granting Mr. Broaddus's Motion to Affirm did not dismiss the case against Culpert. The Order states that "*The instant appeal may proceed only with respect to Issue IV, regarding the motion to compel, and Issue V, regarding the dismissal of the case against both defendants Culpert and Efficient Design.*" Issues I – III were in regard only to Efficient Design. Therefore, once again, it is very unusual that Mr. Broaddus would be arguing against PL-AT's Motion for Reconsideration, when it would provide him no benefit to do so since it will not change the fact that PL-AT's case against Culpert, the party he is representing, is still pending in the COA. If Mr. Broaddus wanted to change that outcome, and persuade the COA to rule in his favor on Issue V and dismiss PL-AT's case against Culpert, then he should have filed his own Motion for Reconsideration, rather than filing an answer for the attorneys representing Efficient Design. All three Defendant-Appellees are represented by different law firms, hired by three different insurance companies.

PL-AT also argued in her answer to the 2nd Motion to Affirm that Kevin Culpert's Attorney, Amed Hassouna, accepted the executed, hand-delivered SCAO forms from PL-AT in the courtroom, which satisfied PL-AT's obligation to supply the discovery information as requested from Mr. Hassouna in his Motion to Compel. Thereby, Kevin Culpert's attorney had no grounds to file a Motion to Affirm for Kevin Culpert or anyone else because he was only representing Kevin Culpert, not Efficient Design, Kevin Culpert's employer, who held two liability policies with two separate insurance companies. As indicated on pg. 3-4 of the transcript of the 6-21-13 hearing, Efficient Design had two separate policies: A general automobile liability policy and a commercial general liability policy. Michael C. O'Malley was

hired by Hastings Mutual to represent their policy held by Efficient Design. The name of the insurance company that hired James Wright to represent their policy held by Efficient Design was not revealed to PL-AT.

Conclusion

In conclusion, the DF-AE's Motion to Affirm, claiming the Doctrine of Collateral Estoppel as the basis for the Motion to Affirm, did not apply to the instant appeal for the following reasons:

1) The Defendants were not the same: In COA case number 316822, the Defendant was MEEMIC Insurance Co. In the instant COA Case No. 317972, the Defendants were Kevin Culpert and Efficient Design, Kevin Culpert's employer.

2) The facts that lead to the rulings were not the same. The lone fact that the Defendants were not the same is sufficient to rule out the applicability of the Doctrine of Collateral Estoppel, regardless of whether or not any other facts between the two cases were the same or different or if the MEEMIC ruling by the COA had been finalized or not. As a matter of record, the facts leading to the COA's decision in the MEEMIC case were clearly different from the instant appeal because the COA ruling regarding the signing of medical release forms by PL-AT was based upon a Protective Order that did not exist in the instant appeal. Thereby, although the legal question as to whether or not PL-AT was obligated under the law to sign only medical release forms provided by the DF-AE's attorney to provide discovery information or could supply her medical information using the SCAO forms or any other form as long as the information was provided was essentially the same, the deciding factor in the MEEMIC case was a Protective Order, which is non-existent in the instant case. Other facts regarding the signing of

the medical release forms by PL-AT were also comparatively different between the different defendants in the MEEMIC case and the Culpert and Efficient Design case. The facts in the instant case were disregarded in the COA ruling on the instant case because of DF-AE's claim of collateral estoppel. PL-AT never had a full and fair opportunity to litigate the issue and present oral arguments because the instant COA ruling was incorrectly based upon the DF-AE's attorney's claim of the Doctrine of Collateral Estoppel that did not meet the criteria under the Doctrine of Collateral Estoppel to be a valid claim upon which to file the Motion to Affirm in the first place. On Page 4 of PL-AT's Motion for Reconsideration filed on 12-16-14, she stated: "*For the doctrine [of collateral estoppel] 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."*

As a subgenre of res judicata, collateral estoppel prevents subsequent litigation of legal determinations of fact only when the same lawsuit defined by the same substantive legal issue is brought at another time against the same defendant. The instant appeal is in regard to a case against defendants Kevin Culpert and Efficient Design, not MEEMIC, a different defendant.

3) The Motion to Affirm based upon the Doctrine of Collateral Estoppel filed by the DF-AE's attorney, Mr. Broaddus, was filed despite the fact the Defendants were different and the COA's order and ruling in the MEEMIC case had not been finalized.

4) The COA ruled on the instant case based upon the Doctrine of Collateral Estoppel on 11-25-14 before the order and opinion had been finalized regarding a different defendant in the MEEMIC case and when PL-AT still had time to apply for leave to appeal the MEEMIC case to the Michigan Supreme Court.

5) PL-AT properly filed a Motion of Reconsideration on 12-16-14 to include the new fact that she had timely filed an Application for leave of Appeal to the MSC on 11-26-14, to prove the MEEMIC case had not been finalized which she could not claim as a fact when she answered DF-AE's Motion to Affirm on 11-7-14.

Mr. Broaddus clearly has not met his burden of proof that the Doctrine of Collateral Estoppel applies or that his Motion to Affirm was nothing more than a frivolous filing in an attempt to confuse the court and delay the case so that important discovery material important to the PL-AT may no longer be available if and when the case is remanded to the lower court.

WHEREFORE, Plaintiff-Appellant, Tamara Filas, respectfully requests this Court to grant her 12-16-14 Motion for Reconsideration and deny DF-AE's Motion to Affirm in its entirety, so that the proceedings in the instant appeal for issues for issues I – V as presented in PL-AT's Brief on Appeal, can continue, and oral arguments can be scheduled and heard as soon as possible.

Respectfully submitted,

Signature redacted

12-31-14
Date

Tamara Filas
6477 Edgewood
Canton, MI 48187
(734) 751-0103
e-mail redacted