STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Michael J. Riordan, Christopher M. Murray and Karen M. Fort Hood

TAMARA FILAS,

Plaintiff-Appellant,

v

KEVIN THOMAS CULPERT and
EFFICIENT DESIGN, INC.,

Defendants-Appellees.

Supreme Court No. 151463

Court of Appeals No. 317972

Lower Court No. 13-000652 NI

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DEFENDANT-APPELLEE KEVIN THOMAS CULPERT'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Defendant-Appellee Kevin Thomas Culpert ("Culpert") suggests that this Court may not have jurisdiction to hear the most recent Application for Leave to Appeal filed by Plaintiff-Appellant Tamara Filas ("Plaintiff"). As Plaintiff acknowledges, this is the second Application to this Court filed from Court of Appeals Case No. 317972. In her first Application (Supreme Court Docket No. 151198), Plaintiff represented to this Court that the Court of Appeals' November 25, 2014 Order in this case effectively ended this appeal, leaving her with nothing to argue when the Court of Appeals subsequently held oral argument on March 3, 2015. That position cannot be reconciled with the position Plaintiff now takes: that the Court of Appeals erroneously rejected her remaining arguments in its March 10, 2015 Opinion. As Plaintiff repeatedly asserts, "[o]nce a case is dismissed … the Court [of Appeals] cannot dismiss the same case again…." (4/21/15 Application, pp ii, 6.)

Plaintiff's own averments indicate that only one of the two Court of Appeals decisions in this case (the November 25, 2014 Order and the March 10, 2015 Opinion) can coherently be appealed from. Plaintiff has already elected her remedy by filing the first Application. A litigant "may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." *Thompson v Howard,* 31 Mich 309 (1875). "One who makes a settled and deliberate choice of one of two inconsistent remedies cannot thereafter go back and elect again. … But to make an election, one must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent

remedies." *Brucker ex rel. Haggerty v State Savings & Loan Co,* 290 Mich 212, 214; 287 NW 438 (1939). Plaintiff elected her remedy in her first Application to this Court and "cannot thereafter go back and elect again." *Brucker,* 290 Mich at 214.

Assuming this Court has jurisdiction to consider the instant Application, Culpert does not believe that the Court of Appeals' decision "involves legal principles of major significance to this state's jurisprudence." MCR 7.302(B)(3). Likewise, Culpert does not believe that the Court of Appeals' decision was "clearly erroneous" or in conflict with any precedent, MCR 7.302(B)(5). Moreover, the Court of Appeals' and Circuit Court's holdings were correct for reasons explained below.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. Did the Circuit Court properly dismiss Plaintiff's lawsuit, where Plaintiff put her medical condition into controversy by filing a personal injury claim, but refused to sign authorizations to release her medical records, and where this tactic – manipulating the physician-patient privilege so as to allow the Plaintiff to selectively disclose relevant evidence – is expressly prohibited by *Domako v Rowe* and other precedents of this Court?

The Trial Court said: "yes."

The Court of Appeals said: "yes."

Plaintiff-Appellant says: "no."

Defendant-Appellee Efficient Design, Inc. will likely say: "yes."

Defendant-Appellee Kevin Thomas Culpert says: "yes."

II. Were Plaintiff's due process rights violated by the Court of Appeals' decision to grant Culpert's Motion to Affirm, in part, prior to oral argument?

The Trial Court was not called upon to answer this question.

The Court of Appeals was not called upon to answer this question.

Plaintiff-Appellant says: "yes."

Defendant-Appellee Efficient Design, Inc. will likely say: "no."

Defendant-Appellee Kevin Thomas Culpert says: "no."

III. Did the Court of Appeals' motion panel properly apply collateral estoppel where this Court held in *Monat v State Farm* that mutuality is not required when the party being estopped – in this case, the Plaintiff – had a full and fair opportunity to litigate the issue?

The Trial Court was not called upon to answer this question.

The Court of Appeals said: "yes."

Plaintiff-Appellant says: "no."

Defendant-Appellee Efficient Design, Inc. will likely say: "yes."

Defendant-Appellee Kevin Thomas Culpert says: "yes."

IV. Did Plaintiff preserve any arguments regarding SCAO Form MC 315 for appellate review?

The Trial Court was not called upon to answer this question.

The Court of Appeals did not answer this question.

Plaintiff-Appellant says: "yes."

Defendant-Appellee Efficient Design, Inc. will likely say: "no."

Defendant-Appellee Kevin Thomas Culpert says: "no."

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff filed this third-party automobile negligence action on January 14, 2013, relative to a January 15, 2010 motor vehicle accident. See *Filas v Culpert,* unpublished opinion per curiam of the Court of Appeals, issued March 10, 2015 (Docket No. 317972), p 1 (Ex. 1). The suit on appeal here was actually a re-initiation of a 2011 combined first and third-party suit, Wayne County Circuit Court No. 11-014149-NF, which Plaintiff had filed relative to the same accident. (See Ex. 2, 3/10/15 Application, p 13 n 1.) The Circuit Court dismissed that suit without prejudice on August 22, 2012. (See Id.)

In the instant action, Plaintiff filed suit against Culpert, the driver of the other vehicle involved in the January 15, 2010 accident, as well as Efficient Design, Inc. ("Efficient Design"), which Plaintiff believed was Culpert's employer at the time of the accident. (See Id.)[1] On or about February 7, 2013, Efficient Design requested (among other discovery) copies of Plaintiff's medical records. (Id., p 7; Ex. D attached to 4/21/15 Application.) Culpert also requested various discovery from the Plaintiff, including requests for medical authorizations, on or about March 22, 2013. (Ex. 1, p 5.) Plaintiff did not timely respond to these requests. (Ex. 1, p 1.)

Around the time that these requests were due, Plaintiff had a falling out with her attorney. (See Id.) The attorney moved to withdraw, and the Circuit Court granted his motion at a May 2, 2013 hearing. (See Id.) At that hearing, the Circuit Court also stayed the case so as to allow Plaintiff to find a new attorney. (See 6/21/13 trans, p 11.) Plaintiff did not retain a new attorney,

[1] Around the same time, Plaintiff also re-filed her first-party suit, relative to the same accident, against MEEMIC Insurance Company ("MEEMIC"). See *Filas v MEEMIC Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2014 (Docket No. 316822) (Ex. 3). Plaintiff's first and third-party suits were originally filed as one action, but after that suit was dismissed without prejudice in the summer of 2013, she re-filed them as separate cases. (See Application, p 13 n 1.)

and elected to proceed in pro per. (See Id.; 8/9/13 trans.) Representing herself, Plaintiff had a number of issues with Defendants' discovery requests.

The Circuit Court first attempted to resolve these issues at a June 21, 2013 motion hearing. On that date, Efficient Design brought "a general basic motion to compel." (6/21/13 trans, p 5.) Efficient Design had actually attempted to argue this motion on May 2, 2013, but the court adjourned it at that time and "stayed [the case] to allow Ms. Filas to obtain successor counsel…." (Id., p 11.) As part of this motion to compel, Efficient sought "signed medical authorizations" from the Plaintiff. (Id., p 6.) As Efficient Design's counsel explained, this had been an ongoing problem dating back to the 2011 case. (Id.) At that time, the Circuit Court advised Plaintiff that "you have to do that" or Plaintiff would "leave the Court no alternative but to dismiss this case too." (Id.)

Plaintiff objected on the grounds that Efficient Design was contesting liability, and Plaintiff did not want to give medical authorizations to a party that might not have liability. (6/21/13 trans, pp 6-7.) The Circuit Court attempted to explain that this was not a coherent basis for refusing to sign the authorizations. (Id., p 7.) Plaintiff then said "I will fill out authorizations for them." (Id., p 8.) Plaintiff did not express any objection to the language of the authorizations at that time. (See Id.) The Circuit Court then held that the authorizations had to be signed by 2:00 p.m. the following Monday (June 24, 2013) or "I'm going to dismiss the case on Monday." (Id.) Plaintiff could not simply sign the authorizations at the hearing because Efficient Design's counsel learned the identies of the Plaintiff's treaters for the first time at that hearing (there were "about 27" of them and interrogatory requests had not been timely answered), so he was unable to prepare the authorizations in advance. (Id., p 17.) Counsel for Culpert requested "the same

relief" that Efficient Design had been given because Culpert had also been seeking "authorizations as well and I would like the answers to interrogatories." (Id., p 9.)

Plaintiff did not sign the authorizations by 2:00 p.m. the following Monday. (6/24/13 trans.) Efficient Design's counsel appeared before the Circuit Court at approximately 2:30 p.m. to seek enforcement of the ruling from the previous Friday. (Id., p 3.) Efficient Design's counsel explained that Plaintiff "did stop by my office and she provided some authorizations" but "they were altered." (Id.) Plaintiff had also failed to return some of the requested authorizations at all. (Id.) Plaintiff did not appear for this hearing. The Circuit Court attempted to telephone the Plaintiff but there was no answer. (Id., p 5.) Shortly thereafter, someone "called back and said they were her mother. The person identified herself as her mother. [The court] clerk, who talked to her said it sounded like Ms. Filas herself. However, this person claiming to be her mother gave us a telephone number. And we called that number as well and no answer." (Id.) In light of Plaintiff's non-compliance with the June 21, 2013 ruling, the Circuit Court dismissed Plaintiff's case "in its entirety without prejudice." (Id., p 6.) The court delayed entry of this order until July 1, 2013, so that Plaintiff would have an opportunity to object. (Id.)

Plaintiff did object, and the parties returned to the Circuit Court on August 9, 2013. At that time, the Circuit Court explained the situation to Plaintiff as follows:

> …if you want to proceed with your case, you'll have to sign these authorizations. They have them with them today. If you want to proceed and you want the Court to reinstate the case, sit down and sign the authorizations. I'm going to give you one last chance. (8/9/13 trans, p 3.)

At that point, Plaintiff indicated, for the first time in this lawsuit, that "I have a problem with some of the clauses." (Id.) The Circuit Court – presumably in reference to Plaintiff's related first-party suit, which had been before the same trial judge (Ex. 1, p 3) – responded that "I've

already ruled on that." (8/9/13 trans, p 3.) Plaintiff again indicated that she would not sign the authorizations as written, so the Circuit Court ruled that "the dismissal stands." (Id., p 4) Plaintiff then appealed by right to the Court of Appeals.

Around the same time, Plaintiff's suit against MEEMIC was also dismissed for virtually the same reasons. (Ex. 1, p 3; Ex. 3.) Plaintiff also appealed by right from that dismissal. (Ex. 3, p 1.) On October 14, 2014, the Court of Appeals unanimously affirmed the Circuit Court dismissal in *Filas v MEEMIC*. (Id., p 6.) By that point, briefing had been completed in the *Filas v Culpert* appeal. Because the two appeals were never consolidated, and because one panel of the Court of Appeals would not necessarily know about another panel's unpublished decision, Culpert filed a Motion to Affirm in *Filas v Culpert,* citing the then-recent *Filas v MEEMIC* decision and arguing that Ms. Filas was precluded from arguing the same issues in this appeal.

Plaintiff filed an answer to the Motion to Affirm which, with exhibits, was approximately 50 pages long. "There is no oral argument on motions" in the Court of Appeals, "unless ordered by the court." MCR 7.211(D). "There is no right to oral argument of a motion." Court of Appeals IOP 7.211(D).[2] "A party seeking to orally argue a motion must file a motion for leave to accomplish that result." *Id.* "However, individuals practicing before the Court of Appeals should understand that oral argument on motions is rarely granted." *Id.* In accordance with its standard operating procedure, the Court of Appeals decided the Motion to Affirm without a hearing, and determined that most, but not all, of Plaintiff's arguments had been rejected in *Filas v MEEMIC.* The motion panel determined that two of the six issues Plaintiff raised in this appeal had not been addressed in *Filas v MEEMIC* and therefore survived the Motion to Affirm. (See Ex. 1, p 3, referencing the November 25, 2014 Order.) More specifically, the motion panel

[2] <http://courts.mi.gov/courts/coa/clerksoffice/pages/iop.aspx> (accessed March 13, 2015).

ruled that this appeal could proceed with respect to Plaintiff's Issue IV, regarding whether the Circuit Court ordered disclosures that were beyond the scope of the Motion to Compel, and Issue V, regarding whether dismissal as to both Defendants was proper where purportedly, only Efficient Design had filed a written motion to compel.[3] Plaintiff filed a Motion for Reconsideration of this Order, and was also granted leave to file a reply relative to same, even though replies to motions in the Court of Appeals are not permitted. Court of Appeals IOP 7.211(B)-2. The Court of Appeals denied Plaintiff's Motion for Reconsideration on January 27, 2015. (Ex. 1, p 3.)

On March 3, 2015, the Court of Appeals held oral argument on the issues remaining in this appeal. (4/21/15 Application, p 1.) At this hearing, Plaintiff took the position that – although the November 25, 2014 Order specifically stated that Plaintiff's Issues IV and V were still on the table – the prior panel's decision to partially affirm effectively disposed of her appeal. (See Id., pp 3, 6.) Plaintiff was given an opportunity to argue the remaining issues, but declined. Rather, Plaintiff seemingly wanted either (1) to collaterally attack *Filas v MEEMIC* or (2) for this panel to revisit the motion panel's November 25, 2014 ruling. When the March 3, 2015 panel indicated that it was unable to review *Filas v MEEMIC,* and unwilling to review the motion panel's decision in this case, Plaintiff more or less gave up. With no other substantive arguments having been presented by the Plaintiff, and with the panel not having any questions, counsel for Culpert and Efficient Design being the appellees rested on their briefs.

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[3] Culpert had brought an oral motion to compel at the June 21, 2014 hearing (6/21/13 trans, p 9), which is permitted by the second sentence of MCR 2.119(A)(1). Culpert also filed a written concurrence in Efficient Design's response when Plaintiff tried to prevent the entry of the Order of Dismissal. (Ex. 1, p 5.) Plaintiff now protests that this is a "dishonest" description of her remaining arguments. (4/21/Application, pp 23-24.) Indeed, she calls the undersigned's description an "egregious lie." (Id., p 23.) However, it is unclear how her "clarification" of this issue establishes appealable error or advances her position in any way. (See Id.)

On March 10, 2015 – the same day Plaintiff brought her Application in Docket No. 151198 (Ex. 2) – the Court of Appeals issued its opinion in *Filas v Culpert,* affirming the Circuit Court's dismissal of this action. (Ex. 1.) The opinion noted the motion panel's decision of November 25, 2014 and proceeded to address, in some detail, the two arguments that had survived the Motion to Affirm (Id., p 3) even though Plaintiff had effectively waived those issues at the March 3, 2015 oral argument. The panel rejected Plaintiff's remaining arguments as follows:

> …[W]e first turn to Issue IV. Plaintiff argues that the trial court erred when it ordered her to sign record release authorizations provided to her by Efficient Design after the June 21, 2013 hearing on its motion to compel discovery without first requiring Efficient Design to file a second motion to compel discovery. We disagree.
>
> "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 616; 576 NW2d 709 (1998). Plaintiff alleged in her complaint that she "sustained injuries or aggravation of pre-existing conditions constituting serious impairment of a body function." Those alleged injuries were "to her head, neck, back and other parts and portions of her body all of which did cause her pain, suffering and limitations in use, function and enjoyment." Plaintiff also alleged that she suffered "[a] work loss and loss of earnings and earning capacity." And plaintiff alleged that "some or all of the injuries [she] sustained are permanent." Because of these claimed injuries, plaintiff sought a judgment against defendants "in excess of $25,000.00 plus costs, fees and interest."
>
> Plaintiff apparently believes, however, that defendants are required to "simply take her word for it" that she suffered these purported numerous and egregious injuries. But as the trial court repeatedly explained to plaintiff, she is wrong. Plaintiff's proffered reasons for refusing to sign record release authorizations included that: the requested records would be going to a third-party for copying; Efficient Design did not admit liability; she had "a problem with some of the clauses" on the authorizations; and she did not want some of her records provided to defendants. None of these reasons have merit. Again, defendants are entitled to "liberal discovery of

any matter, not privileged, that is relevant" to defending against and disproving plaintiff's numerous allegations made in support of her request for a substantial judgment in her favor. See *id.* Under the circumstances of this case, the trial court's decision to compel plaintiff to comply with the discovery requested, i.e., to sign record release authorizations, without requiring Efficient Design to file a second motion to compel discovery did not constitute an abuse of discretion….[4]

Next, in Issue V, plaintiff argues that the trial court erred when it dismissed her case against both defendants because only one of the attorneys for Efficient Design requested dismissal as a discovery sanction. We disagree.

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Plaintiff argues that her "case involves three separate insurance companies and three separate insurance policies---one for Kevin Culpert and two for Efficient Design." She states: "Plaintiff-Appellant does not believe her entire case against all three insurance companies representing both Kevin Culpert and Efficient Design should have been be dismissed." Plaintiff argues that only one attorney for Efficient Design requested that her case be dismissed, but not the other attorney representing Efficient Design and not Culpert's attorney so her case should not have been dismissed.

First, Efficient Design is a named defendant in this case, not an insurance company. That is, plaintiff sued Efficient Design. Efficient Design was entitled to conduct discovery. Because plaintiff repeatedly refused to provide the requested record release authorizations, Efficient Design sought dismissal of plaintiff's claim against it. Second, Culpert is a named defendant in this case, not an insurance company. Culpert's attorney repeatedly requested that the trial court dismiss plaintiff's case "for her continued refusal to engage in meaningful discovery" and, as plaintiff notes in her response to Culpert's motion to compel discovery, Culpert also requested signed record release authorizations be provided by plaintiff. Further, at oral argument conducted on May 2, 2013, Culpert's attorney requested signed authorizations from plaintiff. At oral argument conducted on June 21, 2013, Culpert's attorney again requested signed authorizations from plaintiff. Culpert also

[4] The panel further noted that "plaintiff does not even claim on appeal that she would, in fact, have signed record release authorizations if they were the subject of a second motion to compel." (Ex. 1, p 4 n 2.)

> filed a concurrence in Efficient Design's response to plaintiff's objection to the proposed order of dismissal, which requested that plaintiff's objection be stricken and that an order of dismissal be entered by the trial court. Accordingly, plaintiff's argument that her case should not have been dismissed as a discovery sanction because only one attorney for Efficient Design requested its dismissal is without merit. (Ex. 1, pp 4-5.)

Plaintiff currently has an Application for Leave to Appeal to this Court, pending as Docket No. 151198, from the Court of Appeals' November 25, 2014 Order. (4/21/15 Application, p 9.) Plaintiff now brings a second Application for Leave to Appeal, seeking review of the Court of Appeals' March 10, 2015 Order.

STANDARDS OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. MCR 7.302(B) sets out specific criteria for the granting of an application for leave to appeal to this Court. This rule states, in relevant part, that an application to this Court "must show" at least one of the following: "(3) the issue involves legal principles of major significance to the state's jurisprudence; [or] … (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice…." MCR 7.302(B). Plaintiff's Application does not satisfy either of these criteria. As explained in more detail below, the dismissal of Plaintiff's suit was completely in accord with, if not mandated by, the court rules and established precedent. Simply put, Plaintiff wanted to control what medical records the Defendants did, and did not, see, and this is not permitted in a personal injury action. Moreover, the Court of Appeals correctly applied collateral estoppel per *Monat v State Farm Ins Co,* 469 Mich 679, 691-692; 677 NW2d 843 (2004), which holds that "the lack of mutuality of estoppel should 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."

"A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process." *Id.* at 692. "There is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries." *Id.* (citation omitted). "In circumstances where mutuality is required and where collateral estoppel is asserted defensively, the mutuality requirement only encourages gamesmanship by a plaintiff." *Id.* "A party is entitled to his day in court on a particular issue, and is not entitled to his day in court against a particular adversary." *Id.* (citation omitted). Plaintiff has failed to even acknowledge the central holding of *Monat,* much less articulate any reason why this Court should revisit it. She has therefore failed to state any grounds for invoking this Court's review.

The second standard of review relates to the actual decision of the court below that is the subject of the Application. Plaintiff appeals from Judge Borman's Order dismissing Plaintiff's lawsuit for discovery violations. Appellate courts review "for an abuse of discretion a trial court's decision with regard to whether to impose discovery sanctions." *Linsell v Applied Handling, Inc,* 266 Mich App 1, 21; 697 NW2d 913 (2005). "[A]n abuse of discretion occurs *only* when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007) (emphasis added).

In the discovery context, such deference is warranted because the trial court "is in the best position to determine if a party has complied with" discovery rules. *Melendez v Illinois Bell Tel Co,* 79 F3d 661, 670-671 (7th Cir 1996). "Similarly, the [trial] court has primary responsibility for selecting an appropriate sanction," and appellate courts generally will not

disturb that selection "absent a clear abuse of discretion." *Id.* See also *State v Belken,* 633 NW2d 786, 796 (Iowa 2001): "Generally, we defer to the trial court on discovery matters … because the trial court is in the best position to determine whether prejudice resulted."

ARGUMENT

I. In this third-party automobile negligence suit, the Circuit Court properly dismissed Plaintiff's lawsuit, where Plaintiff put her medical condition into controversy by filing a personal injury claim, but refused to sign authorizations to release her medical records. This tactic – manipulating the physician-patient privilege so as to allow the Plaintiff to selectively disclose relevant evidence – is expressly prohibited by *Domako v Rowe* and other precedents of the Supreme Court and this Court.

Defendant's entitlement to the discovery sought is clear under the court rules. See MCR 2.305(A)(1); MCR 2.306(A)(1); MCR 2.314(B). "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy,* 227 Mich App at 616. There are no "good cause" or "admissibility" requirements for discovery requests. *Domako v Rowe,* 438 Mich 347, 359 n 10; 475 NW2d 30 (1991).

Under Michigan law, a plaintiff who brings a personal injury action waives the physician-patient privilege. MCL 600.2157; *Holman v Rasak,* 486 Mich 429, 436; 785 NW2d 98 (2010). A plaintiff who puts his or her medical condition at issue in a lawsuit waives any assertion of privilege when disclosure furthers the goals of discovery. *Howe v Detroit Free Press, Inc.,* 440 Mich 203, 214; 487 NW2d 374 (1992); *Domako,* 438 Mich at 354. MCR 2.314(B)(2) states that "if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable ... the party may not thereafter present or introduce any physical, documentary, or testimonial evidence

relating to the party's medical history or mental or physical condition." The waiver of the physician-patient privilege is codified at § 2157:

> If the patient brings an action against any defendant to recover for any personal injuries ... and the patient produces a physician as a witness on the patient's own behalf who has treated the patient for the injury... the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease or condition.

This waiver of privilege is based on the fundamental fairness of permitting defense counsel equal access to investigate the facts put at issue by plaintiff's claims alleging personal injuries. *Domako,* 438 Mich at 354-355. "The purpose of providing for waiver is to prevent the suppression of evidence ... an attempt to use the privilege to control the timing of the release of information exceeds the purpose of the privilege and begins to erode the purpose of the waiver by repressing evidence." *Id.* (citations omitted).

The rules in Michigan allow the assertion of the physician-patient privilege at various stages of the proceedings. The court rules do permit, however, an implied waiver when the patient fails to timely assert the privilege. MCR 2.314(B)(1) requires that the party assert the privilege "in the party's written response under MCR 2.310," and MCR 2.302(B)(1)(b) requires the assertion of the privilege "at the deposition." The penalty for not timely asserting the privilege, under either of these court rules, is to lose the privilege for purposes of that action. The rules recognize that "it is patently unfair for a party to assert a privilege during pretrial proceedings, frustrate rightful discovery by the other party, and then voluntarily waive that privilege at trial, thereby catching the opposing party unprepared, surprised, and at an extreme disadvantage." *Domako,* 438 Mich at 355-356. "Thus the rule requires that a party choose between the existing privilege and the desired testimony. The party may not have both." *Id.*

Here, Plaintiff placed her medical condition into controversy by filing this personal injury action, thereby waiving the privilege under § 2157. Moreover, the record is devoid of any indication that Plaintiff timely asserted the privilege in accordance with MCR 2.314(B)(1). Under these circumstances, the Circuit Court correctly noted that Plaintiff left "the Court no alternative but to dismiss…." (6/21/13 trans, p 6.)

Apart from being a proper sanction for Plaintiff's discovery violations, the dismissal of this suit fell squarely within the Circuit Court's authority under MCL 600.611, which states that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Dismissing the case, in light of Plaintiff's conduct, also fell squarely within the Circuit Court's broad inherent authority, as recognized by the Supreme Court in *Dep't of Envtl Quality v Rexair, Inc,* 482 Mich 1009; 761 NW2d 91 (2008) and *Oram v Oram,* 480 Mich 1163, 1164; 746 NW2d 865 (2008) ("Trial courts possess inherent authority to sanction litigants and their attorneys, including the power to dismiss a case."). See also *Anway v Grand Rapids R Co,* 211 Mich 592, 603, 622; 179 NW 350 (1920), where the Court observed that the power "to enter a final judgment and enforce such judgment by process, [is] an essential element of the judicial power…." Additionally, in *Underwood v McDuffee*, 15 Mich 361, 368 (1867), the Court held: "It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power…."

II. Plaintiff's due process rights were not violated by the Court of Appeals' decision to grant Culpert's Motion to Affirm, in part, prior to oral argument.

Plaintiff seems to be implying that she was denied oral argument in the Court of Appeals, although it is unclear what exactly her grievance is. To the extent that she is claiming that the

March 3, 2015 hearing was inadequate, this was of her own doing, as the panel was ready to hear her arguments on the remaining issues but Plaintiff declined.[5]

To the extent that Plaintiff believes she was entitled to a hearing on the Motion to Affirm, this argument is contrary to the Court Rules. As noted above, "[t]here is no oral argument on motions" in the Court of Appeals "unless ordered by the court." MCR 7.211(D). The Court of Appeals' Internal Operating Procedures further explain that "[t]here is no right to oral argument of a motion." Court of Appeals IOP 7.211(D). "A party seeking to orally argue a motion must file a motion for leave to accomplish that result." *Id.* "However, individuals practicing before the Court of Appeals should understand that oral argument on motions is rarely granted." *Id.* In accordance with its standard operating procedure, the Court of Appeals decided the Motion to Affirm without a hearing.

Plaintiff's due process rights were not implicated by this decision. In *Leonardi v Sta-Rite Reinforcing, Inc,* 120 Mich App 377, 381-382; 327 NW2d 486 (1982) the Court of Appeals, replying upon U.S. Supreme Court precedent, noted that the "availability of argument in written form satisfied the requirements of due process…." "Due process of law under the Fifth Amendment does not necessarily require that oral argument be granted." *Id.* "On the contrary, due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process." *Id.* (citations omitted).

Plaintiff had no constitutional, statutory, or court rule right to oral argument of the Motion to Affirm or for that matter, of their appeal in general. See MCR 7.214(E)(1).

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[5] Additionally, a Court of Appeals panel is authorized to decide an appeal without oral argument – even when it has been requested by both parties – pursuant to MCR 7.214(E)(1).

III. The Court of Appeals' motion panel property applied collateral estoppel and Plaintiff's argument regarding the lack of mutuality was expressly rejected by this Court in *Monat v State Farm.*

On October 14, 2014, the Court of Appeals issued its opinion in *Filas v MEEMIC.* (Ex. 3). As explained above, *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 Ex. 3.) For all intents and purposes, 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. (See Ex. 2, 3/10/15 Application, pp 18-24.)

The Court of Appeals' rejection of Ms. Filas' arguments in *Filas v MEEMIC* collaterally estopped 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,* 469 Mich at 682–684. 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* did 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.

"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,* 496 Mich at 99 (citation omitted). All of these purposes were advanced by applying the doctrine in the instant appeal.

In the Court of Appeals, Plaintiff argued that the *Filas v MEEMIC* decision could not have preclusive effect while her Application for Leave to Appeal to this Court was still pending. 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 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*[6] because in both *Leahy* and *Cantwell*, the time available for an appeal had passed before the Court of Appeals was called upon to apply collateral estoppel. *Leahy* cited *Cantwell* for this proposition, and *Cantwell* cited *Gursten v Kenney,* 375 Mich 330, 333-334;

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[6] *Dicta* has been defined by the Court of Appeals 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). This 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).

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 the 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. 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.

IV. Plaintiff did not preserve any arguments regarding SCAO Form MC 315 because she never raised the issue in the trial court in this case.

Moreover, what seems to be Plaintiff's principal argument in this Application – that the trial court ordered her to sign authorizations that were inconsistent with the "SCAO-mandated" forms (4/21/15 Application, pp 4, 13, 15, 34) – was not raised below, and therefore is not preserved for appellate review. See *Peterman v Department of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994). See also *Coates v Bastian Bros, Inc,* 276 Mich App 498, 510; 741 NW2d 539 (2007), where the panel noted that "[i]ssues raised for the first time on appeal are not ordinarily subject to review."

"The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice." *People v Taylor,* 195 Mich App 57, 60; 489 NW2d 99 (1992). Issue preservation requirements are designed to prevent a party from "sandbagging." *Polkton Charter Twp v Pellegrom,* 265 Mich App 88, 95; 693 NW2d 170 (2005). In order to

succeed on appeal, the appellant must address the basis of the trial court's decision. *Derderian v Genesys Health Care Sys,* 263 Mich App 364, 381; 689 NW2d 145 (2004). The reasons why such arguments *should not* be considered on appeal were explained in *Estate of Quirk v Commissioner,* 928 F2d 751, 758 (6th Cir 1991):

> Propounding new arguments on appeal … [that were] never considered by the trial court … is not only somewhat devious, it undermines important judicial values. The rule disciplines and preserves the respective functions of the trial and appellate courts. If the rule were otherwise, we would be usurping the role of the first-level trial court with respect to the newly raised issue rather than reviewing the trial court's actions. By thus obliterating any application of a standard of review, which may be more stringent than a *de novo* consideration of the issue, the parties could affect their chances of victory merely by calculating at which level to better pursue their theory. Moreover, the opposing party would be effectively denied appellate review of the newly addressed issue…. In order to preserve the integrity of the appellate structure, we should not be considered a "second shot" forum, a forum where secondary, back-up theories may be mounted for the first time.

In the Court of Appeals, Plaintiff claimed that this argument was preserved in a May 17, 2013 Motion for Reconsideration, but the Register of Actions contains no reference to any such motion having been filed in this case. (Ex. K attached to 4/21/15 Application.) Moreover, "[w]here 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).

CONCLUSION AND RELIEF REQUESTED

There is no dispute that Defendants were entitled to the authorizations requested. Plaintiff placed her medical condition into controversy by filing this personal injury action. As this Court noted in *Domako,* 438 Mich at 354-355, it would have been manifestly unfair to allow Plaintiff to use her medical privacy as a shield. Additionally, Plaintiff's Application does not cite a single precedent from this Court or the Court of Appeals that is supportive of her position.

"It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mudge v Macomb County,* 458 Mich 87, 105; 580 NW2d 845 (1998) (citations omitted). For these reasons, Culpert respectfully requests that this Supreme Court deny Plaintiff's Application forthwith.

SECREST WARDLE

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Dated: April 28, 2015

INDEX OF EXHIBITS

Exhibit 1 — *Filas v Culpert,* unpublished opinion per curiam of the Court of Appeals, issued March 10, 2015 (Docket No. 317972)

Exhibit 2 — Plaintiff's Application for Leave to Appeal in Docket No. 151198

Exhibit 3 — *Filas v MEEMIC Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2014 (Docket No. 316822)

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EXHIBIT
1

STATE OF MICHIGAN

COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

v

KEVIN THOMAS CULPERT and EFFICIENT DESIGN, INC.,

Defendants-Appellees.

UNPUBLISHED
March 10, 2015

No. 317972
Wayne Circuit Court
LC No. 13-000652-NI

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing her third-party no-fault insurance case against defendants, Kevin Thomas Culpert and Efficient Design, Inc., after she refused to provide signed authorizations for the release of her records during discovery. We affirm.

In January 2013, plaintiff filed this action alleging that, in January 2010, she sustained serious injuries when she was rear-ended by a vehicle being driven by Culpert in the course of his employment with Efficient Design. In March 2013, plaintiff terminated her attorney and filed a "motion for continuance," requesting the trial court to grant her extensions of time to complete discovery requested by defendants and to extend the scheduling order dates. At oral argument on plaintiff's motion, which was heard in May, the trial court advised plaintiff that her deposition and other discovery requests would be stayed for 30 days or until an attorney filed an appearance on her behalf, whichever was sooner. During the course of that hearing, the trial court referenced plaintiff's refusal to sign record release authorizations that had been requested by defendants, noting that the case had already been dismissed once because of her refusals and "[t]here's going to come a point where if I've dismissed the case twice, it's going to be with prejudice, and then you're not going to be able to bring a lawsuit again, so this is something you have to do." The court further advised plaintiff: "This is what the law requires. I understand you don't want to do it, but in order to bring such a lawsuit, you have to do it." Plaintiff responded: "But I'm being asked to give records to a third party, not just the attorneys. I'm being asked to give them to this deposition service, and I just wanted to clarify that it was just going to the one attorney." The court responded: "It goes through Record Copy Service. They don't care about your medical records, but that's the way it's done, okay. That's the way it's done. That way they know they get all your records and that you're not keeping any back."

Thereafter, on May 3, 2013, the trial court entered an order denying plaintiff's motion for continuance, but staying discovery for 30 days or until plaintiff retained new counsel.

In May 2013, Culpert and Efficient Design filed re-notices of hearing for their previously filed motions to compel certain discovery that had been requested from plaintiff in February 2013. In June 2013, plaintiff, *in propria persona*, responded to their motions to compel. In her answer to Efficient Design's motion, plaintiff contended "that until it is established through discovery that Efficient Design is liable for harm caused by Kevin Culpert while in the course and scope of his employment, Plaintiff should not be required to release her medical information to Defendant, Efficient Design Inc." Plaintiff requested 28 days "to prepare interrogatories and requests for admissions for [defendant] to attempt to determine the liability of Efficient Design Inc., in the third party tort case." Plaintiff further argued that she "does not believe it is reasonable for the Court to require her to provide medical records to Efficient Design Inc., a party that has not yet admitted any responsibility in the case."

During oral arguments on the motions held on Friday, June 21, 2013, counsel for Efficient Design advised the court that plaintiff continued to refuse to provide signed authorizations releasing her records, as she had since 2010. Plaintiff responded that she had requested more time "to investigate whether or not they're even liable because right now they're not even admitting that Mr. Culpert - - that they are the employer of Mr. Culpert." Plaintiff also argued that she should not have to give records to a party that has not admitted any liability. The trial court advised plaintiff that her argument had no merit and that if she did not provide the requested authorizations, the case would be dismissed. Plaintiff responded: "Okay, it's just that Efficient Design hasn't said they were liable, so." Again the trial court advised plaintiff that she had to provide the requested authorizations and asked her if she was going to do so. Plaintiff said that she would provide the authorizations and, although the trial court wanted her to do so while they were in court, plaintiff declined saying that "it takes a lot more time than that." Thereafter, the trial court advised plaintiff that if defense counsel did not get the requested authorizations—without amendment or alteration—by Monday, either outside of court or at a 2:00 p.m. court hearing, her case would be dismissed.

On Monday, June 24, 2013, oral argument on defendants' motions was continued with regard to plaintiff's refusal to provide the requested authorizations. Counsel for Efficient Design advised the trial court that plaintiff had stopped by his office and provided only about half of the requested authorizations. And they were altered. Plaintiff was not in court, but the court noted on the record that plaintiff knew about the hearing and an attempt to reach her by telephone was unsuccessful. Thereafter, the trial court dismissed the case without prejudice and requested that a seven-day order be submitted.

Subsequently, plaintiff filed an objection to Efficient Design's proposed order of dismissal without prejudice, arguing that she did not receive an email by 5:00 p.m. on the date of the first hearing, June 21, with the desired authorizations, so she filled out some SCAO medical authorizations and hand-delivered them to defense counsel on Monday, June 24, before the 2:00 p.m. court hearing. She subsequently checked her email and found that defendant had, in fact, emailed her the requested authorizations on June 21, but it was after 5:00 p.m. Plaintiff denied that she altered the authorizations or that she failed to provide the requested authorizations.

Efficient Design responded to plaintiff's objection, arguing that the authorizations it sought were sent by email to plaintiff as directed by the court, and plaintiff failed to check her email for those expected authorizations. Instead, plaintiff filled out some SCAO forms, which are not accepted by many medical providers, and she limited the authorizations to records for specific treatment dates. Further, plaintiff did not provide numerous other authorizations that had been requested and, to date, still had not provided the authorizations. Efficient Design noted that plaintiff's first-party no-fault insurance lawsuit had been dismissed because of her failure to provide signed authorizations, and requested that the trial court strike plaintiff's objection and enter an order of dismissal.[1] Culpert filed a concurrence in Efficient Design's response to plaintiff's objection to the proposed order of dismissal.

On August 9, 2013, oral arguments were held on plaintiff's objection to the proposed order of dismissal. At the beginning of the hearing, the trial court advised plaintiff that if she wanted to proceed with her case and have the court reinstate her case, she would have to sign the authorizations that were there in court at that time. Plaintiff responded: "I have a problem with some of the clauses." The trial court advised plaintiff that it had already ruled on the language of the authorizations and that this was her last chance; if she signed the authorizations, her case would be reinstated and, if she did not, the case would be dismissed. Plaintiff again responded: "I have some problems with some of the clauses they're asking for in the forms." The trial court, again, requested that plaintiff sign the authorizations and plaintiff refused, stating: "Not for some of the things that they're asking." Thereafter, the trial court dismissed the case.

Plaintiff then filed this appeal. Culpert filed a motion to affirm pursuant to MCR 7.211(C)(3), arguing that many of the issues raised by plaintiff in this appeal were raised and rejected by this Court in plaintiff's appeal related to the dismissal of her first-party insurance case. This Court granted the motion in part, holding that this appeal could proceed only with respect to Issue IV, regarding the motion to compel, and Issue V, regarding the dismissal of the case against both defendants. *Filas v Culpert*, unpublished order of the Court of Appeals, entered November 25, 2014 (Docket No. 317972). And plaintiff's motion for reconsideration was denied. *Filas v Culpert*, unpublished order of the Court of Appeals, entered January 27, 2015 (Docket No. 317972). Accordingly, we first turn to Issue IV.

Plaintiff argues that the trial court erred when it ordered her to sign record release authorizations provided to her by Efficient Design after the June 21, 2013 hearing on its motion to compel discovery without first requiring Efficient Design to file a second motion to compel discovery. We disagree.

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Plaintiff alleged in her complaint that she "sustained injuries or aggravation of pre-existing conditions constituting serious impairment of a body function." Those alleged

[1] See *Filas v MEEMIC Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2014 (Docket No. 316822).

injuries were "to her head, neck, back and other parts and portions of her body all of which did cause her pain, suffering and limitations in use, function and enjoyment." Plaintiff also alleged that she suffered "[a] work loss and loss of earnings and earning capacity." And plaintiff alleged that "some or all of the injuries [she] sustained are permanent." Because of these claimed injuries, plaintiff sought a judgment against defendants "in excess of $25,000.00 plus costs, fees and interest."

Plaintiff apparently believes, however, that defendants are required to "simply take her word for it" that she suffered these purported numerous and egregious injuries. But as the trial court repeatedly explained to plaintiff, she is wrong. Plaintiff's proffered reasons for refusing to sign record release authorizations included that: the requested records would be going to a third-party for copying; Efficient Design did not admit liability; she had "a problem with some of the clauses" on the authorizations; and she did not want some of her records provided to defendants. None of these reasons have merit. Again, defendants are entitled to "liberal discovery of any matter, not privileged, that is relevant" to defending against and disproving plaintiff's numerous allegations made in support of her request for a substantial judgment in her favor. See *id.* Under the circumstances of this case, the trial court's decision to compel plaintiff to comply with the discovery requested, i.e., to sign record release authorizations, without requiring Efficient Design to file a second motion to compel discovery did not constitute an abuse of discretion.[2] See *Ghanam v Does*, 303 Mich App 522, 530; 845 NW2d 128 (2014).

Next, in Issue V, plaintiff argues that the trial court erred when it dismissed her case against both defendants because only one of the attorneys for Efficient Design requested dismissal as a discovery sanction. We disagree.

"Discovery sanctions are reviewed for an abuse of discretion." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Plaintiff argues that her "case involves three separate insurance companies and three separate insurance policies---one for Kevin Culpert and two for Efficient Design." She states: "Plaintiff-Appellant does not believe her entire case against all three insurance companies representing both Kevin Culpert and Efficient Design should have been be dismissed." Plaintiff argues that only one attorney for Efficient Design requested that her case be dismissed, but not the other attorney representing Efficient Design and not Culpert's attorney so her case should not have been dismissed.

First, Efficient Design is a named defendant in this case, not an insurance company. That is, plaintiff sued Efficient Design. Efficient Design was entitled to conduct discovery. Because plaintiff repeatedly refused to provide the requested record release authorizations, Efficient Design sought dismissal of plaintiff's claim against it. Second, Culpert is a named defendant in

[2] We note that plaintiff does not even claim on appeal that she would, in fact, have signed record release authorizations if they were the subject of a second motion to compel.

this case, not an insurance company. Culpert's attorney repeatedly requested that the trial court dismiss plaintiff's case "for her continued refusal to engage in meaningful discovery" and, as plaintiff notes in her response to Culpert's motion to compel discovery, Culpert also requested signed record release authorizations be provided by plaintiff. Further, at oral argument conducted on May 2, 2013, Culpert's attorney requested signed authorizations from plaintiff. At oral argument conducted on June 21, 2013, Culpert's attorney again requested signed authorizations from plaintiff. Culpert also filed a concurrence in Efficient Design's response to plaintiff's objection to the proposed order of dismissal, which requested that plaintiff's objection be stricken and that an order of dismissal be entered by the trial court. Accordingly, plaintiff's argument that her case should not have been dismissed as a discovery sanction because only one attorney for Efficient Design requested its dismissal is without merit.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

EXHIBIT 2

STATE OF MICHIGAN

SUPREME COURT

TAMARA FILAS,

Plaintiff-Appellant,

-vs-

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

Defendants-Appellees.

/

Supreme Court No. _____

Court of Appeals No: 317972

Circuit Court No: 13-000652-NI

TAMARA FILAS Plaintiff-Appellant 6477 Edgewood Rd. Canton, MI 48187 (734) 751-0103 filastamd7@gmail.com	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
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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

Dated: March 10, 2015

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Jurisdictional Statement

Jurisdiction in the Michigan Supreme Court is appropriate because PL-AT is hereby filing a timely Application for Leave to Appeal to the Michigan Supreme Court on March 10, 2015, from the Court of Appeals' January 27, 2015 Order denying PL-AT's Motion for Reconsideration of the COA's 11-25-14 Order granting DF-AE Culpert's Motion to Affirm (11-25-14 Order, attached to PL-AT's Application as Exhibit A; 1-27-15 Order, attached to PL-AT's Application as Exhibit B). Culpert's 10-7-14 Motion to Affirm was based on the Doctrine of Collateral Estoppel, claiming that the *Filas v MEEMIC* ruling in COA Case No. 316822 prevented PL-AT from litigating the same issues against Culpert and Efficient Design Inc. The COA granted the Motion to Affirm in part, in regard to Items 1-3 and 6 of PL-AT's 12-20-13 Brief on Appeal to the COA. Issues 4 and 5 were to be heard on 3-3-15, but were rendered moot by the 11-25-14 Order granting DF-AE's Motion to Affirm for Item 3, which upheld the circuit court's dismissal of PL-AT's entire case.

Pursuant to MCR 7.302(B)(5), because PL-AT was denied a legitimate oral argument hearing denying her right of due process, and the COA's 11-25-14 granting of the DF-AE's Motion to Affirm based on the doctrine of collateral estoppel is clearly erroneous and will cause PL-AT material injustice if it is not reversed, PL-AT requests that the MSC grant her Application for Leave to Appeal. Due process is a right that is important to every citizen and important to maintaining the integrity of the legal system.

PL-AT also claims grounds to appeal pursuant to MCR 7.302(B)(3) because PL-AT's case also involves a substantial legal issue in regard to the circuit court's refusal to accept SCAO-mandated form MC 315 for Plaintiffs to provide their records to Defendants, which has

been upheld by the Court of Appeals in two of PL-AT's cases, in clearly erroneous Opinions and Orders, in an effort to conceal the issue from other Plaintiffs who may decide to stand up for their right under MCR 2.314(C)(1)(a) and (d) to provide copies of their records on their own, or to sign SCAO-mandated MC 315 forms, respectively, and not to allow their records to become part of a records copying services' database for sale to other lawyers and insurance companies.

The Supreme Court hereby has the opportunity to enforce the allowance of the forms approved and/or mandated by the Supreme Court Administrative Office, in this case, Form MC 315. If the MSC truly stands behind the law, it will take this opportunity to correct the injustice being done to this PL-AT and future Plaintiffs who simply want to follow the court rules and protect their rights to privacy of their medical records. This PL-AT should not have to lose both her first- and third-party auto cases for the same reason of wanting to use, and using, respectively, Form MC 315 to provide her medical records to the DF-AEs in her cases.

Statement of Questions

I. Did the COA err in failing to provide a legally valid hearing on oral arguments when it made its 11-25-14 Order to grant DF-AE's Motion to Affirm in part for items 1-3 and 6 of PL-AT's Brief on Appeal, which then rendered the 3-3-15 oral arguments hearing moot in regard to PL-AT's remaining items 4 and 5, when these two items that had the potential to reverse the dismissal of one or both parties to the case?

PL-AT answers: YES

COA answers: No Opinion formally issued by the COA, but COA panel of judges at the 3-3-15 hearing agreed with PL-AT that her oral arguments would be moot due to the 11-25-15 ruling, which upheld the circuit court's dismissal of PL-AT's entire case against both defendants, Culpert and EDI, due to its inclusion of Item 3 from PL-AT's 12-20-13 Brief on Appeal.

II. Did the COA wrongly apply the Doctrine of Collateral Estoppel when it granted Culpert's Motion to Affirm for items 1-3 and 6 of PL-AT's Brief on Appeal, when the doctrine was inapplicable for five reasons: (1) the defendants were different; (2) the issues were not identical; (3) the issue was not actually litigated; (4) the judgment the motion was based upon was not a final judgment and was not decided on the merits; and (5) there existed no mutuality of estoppel? Add to argument II.

PL-AT answers: YES

COA answers: NO

III. Did the COA err by upholding the circuit court's decision to order Plaintiff-Appellant to provide medical record authorization forms of Efficient Design's choice to Efficient Design without establishing that they were a liable party to the case, by applying the Doctrine of Collateral Estoppel, when it clearly was inapplicable to this third-party case, as there was no question of liability in the first-party *Filas v MEEMIC* case upon which the Doctrine was applied?

PL-AT answers: YES

COA answers: NO

Material Proceedings and Facts

This is a third-party auto case against two defendants, Kevin Culpert, and his employer, Efficient Design, Inc., EDI, whose name does not appear on the Court of Appeals' case caption. EDI is represented by two different attorneys, representing two different insurance companies. EDI has a $1,000,000 policy with each company. Kevin Culpert has a $20,000 policy with Progressive Insurance Co.

PL-AT fulfilled her obligation to provide medical records to both Defendants by executing and mailing SCAO-mandated Form MC 315 to over 20 health care providers. However, the circuit court dismissed PL-AT's case against both Culpert and EDI, for her refusal to re-do the extensive process using attorney, Mr. Wright's personal forms that contained language above and beyond the requirements of MC 315.

PL-AT also has a first-party case against MEEMIC Insurance Company pending in the MSC, Case No. 150510, in which PL-AT *requested* to use MC 315, but hadn't actually *provided* records to the defendant yet, as she had in this case. In an October 14, 2014 Opinion, the COA upheld the circuit court's dismissal of the MEEMIC case, using the novel argument that was never presented in any court filings, that due to a stipulated Protective Order entered in the MEEMIC case, PL-AT could not use MC 315 to provide her records to MEEMIC and had to instead use third-party record copying service forms provided by MEEMIC.

On November 25, 2014, the COA heard and issued an order on Culpert's 10-7-14 Motion to Affirm, with neither the Plaintiff-Appellant or the Defendant-Appellees present, thereby showing no regard for PL-AT's request for oral argument under MCR 7.214(A) in her 11-7-14 Answer. Culpert's 10-7-14 Motion to Affirm argued that the Doctrine of Collateral Estoppel barred the PL-AT from having the same claims against Culpert and EDI, since the COA had

ruled in the MEEMIC case that she could not use MC 315 to provide her medical records. Not only is there no Protective Order in the Culpert and EDI case, which is the basis of the COA's Opinion in the MEEMIC case, but Culpert and EDI are completely different defendants involving different insurance companies than MEEMIC. PL-AT had it clarified at the 6-21-13 hearing that the PO was no longer in effect, although the court stated that the protective order did not exist in that case (Exhibit W, 6-21-13 transcript pg. 17-18; Exhibit X, 6-21-13 Order Vacating PO).

The Doctrine of Collateral Estoppel cannot bar a plaintiff from making the same or similar claims against <u>different</u> defendants. Nonetheless, the COA granted the Motion to Affirm on 11-25-14 for items 1-3, and 6 that were presented in PL-AT's 12-20-13 Brief on Appeal.

The COA scheduled a hearing for oral arguments on March 3, 2015, in regard only to items 4 and 5 from PL-AT's 12-20-13 Brief on Appeal. However, by the COA already having granted Culpert's Motion to Affirm on 11-25-14 with respect to items 1-3, and 6, the COA affirmed that the circuit court did not err when it dismissed PL-AT's entire case because this was the pertinent question presented in item 3 of PL-AT's Brief on Appeal. Therefore, anything PL-AT would have argued at the 3-3-15 hearing in regard to items 4 and 5 would be moot, since there only needs to be <u>one</u> reason to dismiss a case. By its granting of the Motion to Affirm in regard to Item 3 of PL-AT's Brief on Appeal, the COA has already chosen to affirm the circuit court's dismissal of the entire case for PL-AT's refusal to complete personal forms provided by the Defendant. The case can't be dismissed twice. Even if the COA ruled in PL-AT's favor on Items 4 and 5, their new Opinion could not cancel out their 11-25-14 Order that already dismissed the case in its entirety due to its inclusion of Item 3. The COA panel of judges at the 3-3-15 hearing affirmed PL-AT's assertions that the case was already dismissed and oral

arguments would be moot. Now, the only way PL-AT can ever be heard on issues 4 and 5, which had the potential to change the outcome of dismissal for both Culpert (items 4 and 5) and EDI (item 4), would be for the MSC to reverse the 11-25-14 Order (since the Doctrine of Collateral Estoppel cannot possibly be applied to cases with different defendants), and to require that the COA hears oral arguments on all Items #1-6 from PL-AT's 12-20-13 Brief on Appeal, and issue an Opinion that encompasses all of the issues.

Arguments

I. In violation of MCR 7.214, the COA erred in failing to provide a legally valid hearing on oral arguments on 3-3-15 since PL-AT's entire case had already been dismissed by the COA's 11-25-14 Order. It was not possible for the COA to hear any arguments against the dismissal of PL-AT's cases against either Culpert or EDI on 3-3-15 since the COA had already affirmed the Circuit Court's dismissal of the entire case against both defendants, Culpert and EDI.

It can be assumed the Appellate Judges know the law. Therefore, it can be argued the Appellate Judges were aware that any oral arguments PL-AT made at the hearing on 3-3-15 would have no bearing on the 11-25-14 Order to grant DF-AE's Motion to Affirm with regard to items 1-3 and 6 presented in PL-AT's 12-20-13 Brief on Appeal, which, due to the inclusion of item 3, resulted in the dismissal of PL-AT's entire case.

From PL-AT's observations, it appeared the three Defense attorneys, Mr. Wright and Mr. O'Malley representing EDI, and Mr. Broaddus representing Kevin Culpert, were prepared to give oral arguments at the 3-3-15 hearing. It is reasonable to argue that these seasoned attorneys also knew that the 11-25-14 Order rendered any arguments presented in regard to items 4 and 5 of PL-AT's Brief on Appeal, moot, because the case had already been dismissed. Only one reason is needed to dismiss a case, and the COA already accepted the DF-AE's argument of the application of the Doctrine of Collateral Estoppel when it granted the DF-AE's Motion to Affirm

on 11-25-14, and included Item 3 from PL-AT's 12-20-13 Brief on Appeal, which stated the following:

> *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)?*

Therefore, regardless of how the COA rules on issue 4 (which had the potential to reverse the dismissal of both the Culpert and EDI case) and issue 5 (which had the potential to reverse the Culpert case), those rulings would have no impact, because the case was already dismissed on 11-25-14 by issue 3. PL-AT did not receive a legitimate hearing on oral arguments since the COA could no longer consider them on 3-3-15. The COA would not be able to issue an opinion that would have any validity after the case had already been dismissed by the 11-25-14 Order.

A. A ruling in PL-AT's favor on Items 4 and 5 would have reversed the dismissal of PL-AT's cases against EDI and/or Culpert, if the COA could have made a legitimate Opinion following the 3-3-15 oral arguments hearing.

As explained above, the COA's granting of the DF-AE's Motion to Affirm, which included Item 3 of PL-AT's Brief on Appeal, resulted in the upholding of the circuit court's dismissal of PL-AT's case against <u>both</u> Culpert and EDI. A ruling by the COA in PL-AT's favor in regard to Item 4 and/or Item 5 cannot change the fact that the case was already dismissed at the time of the 3-3-15 oral arguments hearing. PL-AT's case could not be dismissed twice by a ruling against her, nor could the COA reverse the 11-25-15 Order that dismissed both cases and rule in favor of the PL-AT on items 4 and 5, based on any arguments heard at the 3-3-15 hearing. Therefore, PL-AT did not receive due process since all six of the items presented in PL-AT's Brief on Appeal should have been heard at the same time to prevent such a situation from

happening in which oral arguments would be rendered moot due to a prior Order of the COA.

1. **A ruling in PL-AT's favor in regard to item 4 of PL-AT's Brief on Appeal would have reversed the dismissal of PL-AT's case against both EDI and Culpert.**

Item 4 of PL-AT's Brief on Appeal posed the following question:

> *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?*

As explained in Argument I above, it should be clear that PL-AT's case was not dismissed by the granting of a Motion to Dismiss filed by DF-AE, as PL-AT inadvertently stated in regard to Item 5 of her 12-20-13 Brief on Appeal. PL-AT's entire case was dismissed by the circuit court based on Mr. Wright's assertions at a 6-24-13 "special conference" that PL-AT did not comply with his Motion to Compel. PL-AT was not informed about being required to appear at the court on 6-24-13 for the "special conference" and was unaware that Mr. Wright was not satisfied with the copies of the filled out SCAO MC 315 forms Plaintiff had mailed to her health care providers along with copies of her postal receipts proving the medical release forms were mailed on June 21, 2013, that were hand-delivered to Mr. Wright's legal office at 11:24 a.m. on 6-24-13, until she was informed by telephone by the court later that afternoon that her case had been dismissed (Exhibit F, signed cover letter from Wright's office). The special conference did not appear on the 6-24-13 Register of Actions (Exhibit G, Register of Actions dated 6-24-13, Current Register of Actions dated 3-10-15).

With regard to the production of documents for Mr. Wright, Defendant Efficient Design asked only for **"copies of any and all medical records relating to injuries received as a result of the subject accident", "copies of any and all photographs with regard to this accident,"** and for Plaintiff-Appellant to sign an enclosed authorization form regarding Medicare/Medicaid

benefits. **He did not provide or request that any specific authorization form be used to provide him with copies of Plaintiff-Appellant's medical records** (Exhibit D, relevant page from Efficient Design's Request for Production of Documents to Plaintiff and relevant page from Request for Production of Documents Regarding the Existence of a Medicare/Medicaid Lien dated 2-7-13, but not mailed to PL-AT until 4-30-13). Mr. Wright did not have any filled-out forms for Plaintiff to sign when she appeared in court on June 21, 2013 for a hearing on EDI's Motion to Compel. Judge Borman ordered Mr. Wright to e-mail forms to Plaintiff June 21, 2013. PL-AT interpreted Judge Borman's order to mean the forms would be e-mailed by the end of the business day, which under court rule for e-mail was 4:30 pm. Plaintiff–Appellant checked her e-mail at 5:00 pm and no authorization forms had been sent by Mr. Wright. The reason Mr. Wright gave for not having filled out authorization forms available for PL-AT to sign with him during the motion to compel hearing on 6-21-13 which was that he did know the providers at the time of the hearing. It is reasonable to argue the reason Mr. Wright did not have any authorization forms with him is because he did not ask for authorization forms in his motion to compel, he asked for medical records. It was Judge Borman that ordered PL-AT to provide medical authorization forms that Mr. Wright did not ask for in his motion to compel.

Worried about not being able to meet the June 24, 2013, 2:00 pm deadline to sign medial release authorizations as ordered by Judge Borman, after Mr. Wright's failure to timely comply with Judge Borman's order to e-mail the authorization forms, Plaintiff-Appellant mailed out numerous, individual, completely filled-out SCAO MC 315 medical release forms requesting any and all medical records relating to injuries received as a result of the subject accident.

At the June 24, 2013 "special conference," the transcript indicates that Mr. Wright misrepresented the facts regarding the authorization forms he received from Ms. Filas, stating

that he only received about half of what he asked for. Plaintiff Appellant did provide all of the authorization forms to release her medical records to Mr. Wright, which were the only authorization forms she was ordered by Judge Borman to provide by 2:00 pm on June 24, 2013.

Copies of Mr. Wright's forms were delivered to PL-AT's home around 3:00 pm on June 24, 2013, after the 2:00 deadline June 24, 2013 ordered by Judge Borman for her to sign and provide Mr. Wright's authorization forms "as-is" to Mr. Wright (Exhibit H, 6-24-14 FedEx time/date stamped envelope, stamped 3:00 PM).

Plaintiff-Appellant provided only medical release authorizations for Efficient Design to obtain her medical records, because that is what Judge Borman ordered her to provide. Judge Borman did not order Plaintiff-appellant to provide copies of medical records as requested by Mr. Wright in his order to compel. Thereby, Judge Borman ordered Plaintiff –Appellant to provide medical authorization forms that were not requested by Mr. Wright in his Motion to Compel filed 4-30-13 and heard June 21, 2013. PL-AT already had some medical records and easily could have obtained the other medical records from her doctors to give to Mr. Wright without using any specific authorization forms since the medical records would first have been sent directly to PL-AT and then given to Mr. Wright.

In addition to authorization forms for her medical providers, the FedEx packet mailed on June 21, 2013 to Plaintiff, also included additional authorizations for Plaintiff-Appellant to fill out for her academic records, employment records, tax returns, Blue Cross Blue Shield and MEEMIC insurance records, psychotherapy notes, and records from Don Massey Cadillac. None of these additional records were requested by Efficient Design in the original Interrogatories or Requests for Production of Documents, and were not part of Mr. Wright's 4-30-13 Motion to Compel. Plaintiff-Appellant contends new documents cannot be added to Mr.

Wright's original 4-30-13 motion to compel, that were not listed in the 4-30-13 requests for production of documents that was dated 2-7-13. The Plaintiff-Appellant must be provided with the new requests, permitted time to respond (28 days), and then a new motion to compel would be filed if she did not provide the documents. Plaintiff-Appellant could then object to the production of said documents, if necessary.

The aforementioned, new Defendant's Request for Production of Documents to Plaintiff, dated June 21, 2013, which included additional records requests, states that it "hereby requests production of documents from Plaintiff pursuant to MCR 2.310, to be delivered to our office within twenty-eight (28) days after service of this request." The document then lists the requested documents, including the additional authorizations over and above the original request for medical records in the original 4-30-13 Interrogatories and Request for Production of Documents. Therefore, this would be considered a new request for production of documents (Exhibit I, First page of Efficient Design's Request for Production dated 6-21-13). These new requests would not have been covered under the 4-30-13 Motion to Compel, that was heard on June 21, 2013. Thereby, Mr. Wright lied when he told Judge Borman during the special conference on June 24, 2013, that PL-AT had provided authorizations for only half of the records she was ordered provide. The records she was ordered to provide were only medical authorizations, in accordance with the 4-30-13 Motion to Compel. The fact Mr. Wright stated he had authorizations, clearly proves he had received the copies of the medical authorizations and receipts of mailing delivered to his office earlier on 6-24-13 PL-AT for what PL-AT believed were sent to all of her medical care providers. PL-AT was not in attendance to argue against Mr. Wright's statement at the special conference 6-24-13 because PL-AT believed she had no reason to attend, because she already met her obligation to provide medical release authorizations forms

by hand-delivering copies of the mailed MC-315 forms to Mr. Wright's office after 11:00 on June 24, 2013. This lie on the part of Mr. Wright is reprehensible and should not have been told to Judge Borman before Judge Borman dismissed the PL-AT's entire case against both EDI and Culpert. Culpert's attorney was not even in attendance at the special conference and had no complaints with PL-AT providing him with records using MC 315. It can reasonably be argued that upon hearing EDI's attorneys' statements on 6-24-13, it could have interpreted by Judge Borman that PL-AT had not followed Judge Borman's orders to provide medical authorizations to Mr. Wright and that PL-AT was not present at the special conference because she not did not provide medical authorizations, which was not true. Mr. Wright also made claims that PL-AT "altered" the authorizations, which was impossible, because she hadn't even received them in order to make any alterations. The only difference was that they were MC 315 forms instead of Mr. Wright's personal forms that were not sent to her by Mr. Wright by the end of the business day on 6-21-13, as he was ordered by the Court to do.

Plaintiff-Appellant should not have had her case dismissed at the "special conference," based on her failure to provide additional records beyond the records requested in the 4-30-13 Motion to Compel heard on 6-21-13, unless a new Motion to Compel regarding the new 6-21-13 requests had been filed and granted. Even in that situation, a Motion to Dismiss would need to be filed if PL-AT did not comply with the new Motion to Compel. No Motion to Dismiss was ever filed to dismiss PL-AT's entire case. It was simply just ordered at the 6-24-14 special conference by the Court.

If the COA had been able to rule on item 4 of PL-AT's Brief on Appeal by providing a valid oral arguments hearing on 3-3-15, they could have overturned the Circuit Court's erroneous decision to dismiss PL-AT's case based on the 4-30-13 Motion to Compel that PL-AT clearly had

complied with by disclosing her medical records using MC 315, ruling that a new motion to compel would be required in order to sanction the PL-AT for not providing records that were not requested in the 4-30-13 Motion to Compel and were instead requested in a 6-21-13 Request for Production of Documents. Because the court also dismissed PL-AT's against Culpert at the same time, even though Culpert's attorney, Mr. Hassouna, had no objections to PL-AT's use of MC 315 to provide records to him, a ruling by the COA in favor of PL-AT on this issue would have resulted in the reversal of the dismissal of both cases. However, it was not possible for the COA to hear this issue after they upheld the dismissal of the entire case based on Item 3 of PL-AT's Brief on Appeal, in the Order issued 11-25-14.

2. A ruling in PL-AT's favor in regard to item 5 of PL-AT's Brief on Appeal would have reversed the dismissal of PL-AT's case against Culpert.

Item 5 of PL-AT's Brief on Appeal posed the following question:

> *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?*

PL-AT inadvertently misstated the facts when she said that EDI "motioned for the case to be dismissed" in Item 5 above. No Motion to Dismiss was ever filed by Mr. Wright. The case was dismissed by the court at a special conference based on EDI's attorneys' word that PL-AT only provided half of the authorizations, which was a lie. See argument I(A)(1) above for details.

This case involves three separate insurance companies and three separate insurance policies---one for Kevin Culpert, and two for Efficient Design. Michael C. O'Malley represents a different insurance company for Efficient Design, than Mr. Wright represents. PL-AT argued

in her 12-20-13 Brief on Appeal that her case against the insurance company that Mr. O'Malley represents should not have been dismissed, based upon issues Mr. Wright (representing a different insurance company than Mr. O'Malley) had with the SCAO-approved form MC 315 authorization forms PL-AT provided and/or his unsubstantiated and unproven claims PL-AT did not provide the records ordered by Judge Borman on June 21, 2013, due to the fact Judge Borman did not order PL-AT to produce records, but only ordered Plaintiff-Appellant to provide authorization forms to release medical records, and/or his unsubstantiated and unproven claims PL-AT altered records.

PL-AT's case against Defendant, Kevin Culpert should not have been able to be dismissed since Plaintiff-Appellant complied with all requests from Kevin Culpert's attorney, Mr. Hassouna, and he did not object to PL-AT's method of using SCAO-approved Form MC 315, by which she provided medical records release authorization forms to him. Although in his 7-22-13 Concurrence in Defendant Efficient Design, Inc.'s Response to Plaintiff's Objection to Defendant Efficient Design, Inc.'s Proposed Order of Dismissal Without Prejudice (filed after the case was already dismissed on 6-24-13 at the "special conference"), Mr. Hassouna stated that he was in concurrence with Mr. Wright's Proposed Order of Dismissal, he states only that he concurs, and provides no additional reasons on his own behalf as justification for why Culpert's case should be dismissed (Exhibit O, 7-22-13 Culpert's Concurrence with Efficient Design's Response to Plaintiff's Objection to Proposed Order of Dismissal). In hindsight, and now with further knowledge of court procedure, PL-AT now understands that the only objections that could have been made to Mr. Wright's proposed order would have to be in regard to the accuracy and completeness of the events that occurred at the court on 6-24-14 at the special conference, which was the dismissal of the entire case. Mr. Hassouna, representing Culpert, should not have

filed a concurrence with the proposed order at all since he was not even present at the 6-24-14 special conference and therefore was not a party to what occurred that day. It appears these filings and proceedings were meant to further confuse PL-AT into believing she had a chance at reversing the dismissal by objecting to the proposed order, when she should have filed a Motion for Reconsideration instead of Objections to the 7-Day Order.

Further, on July 19, **2012**, just before the original no-fault and third-party case, which did not include Efficient Design as a Defendant[1], was dismissed on July 20, 2012, Mr. Hassouna was ready to settle the tort case against Kevin Culpert for Progressive's policy limit of $20,000. On July 19, 2012, Mr. Hassouna had not required PL-AT to sign any authorizations to disclose medical records to him as a condition for the settlement. Therefore, it would be unjust to ask for Plaintiff-Appellant's case/claims against Kevin Culpert represented by Progressive's attorney Mr. Hassouna, to be dismissed for lack of providing specific authorization forms to Mr. Wright, since Mr. Hassouna didn't need any additional medical information on July 19, 2012 to settle the case, and he accepted the copies of MC 315 provided to him on June 21, 2013 by the PL-AT at the Court, and her medical records were on their way to him (Exhibit P, 7-19-12 e-mail from Terry Cochran and attached settlement offer from Mr. Hassouna). It should also be clear that in Plaintiff-Appellant's original combined first- and third-party case, none of the attorneys had requested medical information of the Plaintiff before the close of discovery on June 17, 2012 (Exhibit Q, Scheduling order for initial consolidated first- and third-party cases; Exhibit J, Accountings of Disclosure from PL-AT's three main health care providers.

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[1] This case was originally filed 11-15-2011 as a combined first- and third-party case and was assigned Docket #11-014149-NF. The case included only MEEMIC and Kevin Culpert. It was dismissed without prejudice on 7-20-12 and re-filed as a separate first-party case against MEEMIC on 12-18-12, Docket #12-016693-NF, and a separate third-party case against Kevin Culpert and his employer, Efficient Design, Inc. on 1-14-13, Docket #13-000652-NI. Efficient Design was not a Defendant in the original combined case filed in 2011.

PL-AT provided in good faith, all of the medical authorization forms she believed were necessary to comply with Judge Borman's Order to provide authorizations instead of the medical records that Mr. Wright motioned PL-AT to provide. PL-AT's entire case against all three insurance companies representing both Kevin Culpert and Efficient Design should not have been be dismissed when Mr. Wright was the only attorney presenting any issues to the court in regard to PL-AT's production of records using MC 315.

If the COA had been able to rule on item 5 of PL-AT's Brief on Appeal, they could have overturned the Circuit Court's erroneous decision to dismiss PL-AT's case against Culpert, and/or PL-AT's claims against EDI's other insurance policy, represented by Mr. O'Malley. However, it was not possible for the COA to hear this issue after they upheld the circuit court's dismissal of the entire case based on Item 3 of PL-AT's Brief on Appeal, in the Order issued 11-25-14.

B. Even if the COA took the position that PL-AT did not have a right to oral arguments on Culpert's 10-7-14 Motion to Affirm, the COA clearly believed PL-AT had the right to oral arguments on issues 4 and 5, or they would not have scheduled the 3-3-15 hearing for the parties to present their oral arguments on those issues.

1. PL-AT requested oral argument in accordance with MCR 7.214(A).

PL-AT's 11-7-13 Answer to Culpert's 10-7-14 Motion to Affirm stated on the title page in capital letters and boldface type "ORAL ARGUMENT REQESTED," in accordance with MCR 7.214(A) (Exhibit T, cover page of PL-AT's 11-7-14 Answer to Culpert's Motion to Affirm). Therefore, PL-AT should have been provided with a legitimate oral arguments hearing for all of the issues presented to the COA in her 12-20-13 Brief on Appeal. PL-AT was not provided with any oral arguments for the Motion to Affirm, which was granted for items 1-3 and 6 of PL-AT's Brief on Appeal, which violated her due process rights. PL-AT also properly requested oral arguments on the first page of her 12-20-14 Brief on Appeal, so there is no valid

reason she should not have been granted a legitimate oral argument hearing (Exhibit U, cover page of PL-AT's 12-20-13 Brief on Appeal).

2. The COA violated MCR 7.214(E)(1) by making a decision without providing oral argument.

According to MCR 7.214(E)(1), there are only three reasons that the COA is permitted to make a decision without providing oral arguments. There must be a unanimous decision by the panel concluding that:

(a) The dispositive issue or issues have been recently authoritatively decided;

(b) the briefs and record adequately present the facts and legal arguments, and the court's deliberations would not be significantly aided by oral argument; or

(c) the appeal is without merit.

There is no document in the court file that indicates that the panel that made the 11-25-14 order to grant Culpert's Motion to Affirm, unanimously concluded any of the three items listed above.

MCR 7.214(E)(1)(a) clearly would not apply because the issue of whether or not a plaintiff can use SCAO-mandated Form MC 315 has never been authoritatively decided by the COA. In the MEEMIC case, currently before the MSC, Case #150510, the COA avoided ruling on this issue by presenting the novel argument that it was a protective order entered in this case that prevented PL-AT from being able to use MC 315 to provide her medical records to the defendant.

MCR 7.214(E)(1)(b) clearly would not apply because if the COA wanted to claim that the briefs and record adequately presented the facts and legal arguments, and that the court's deliberations would not be significantly aided by oral argument, then the 11-25-14 order would not have separated out items 4 and 5 for oral argument to be heard on 3-3-15.

MCR 7.214(E)(1)(c) clearly would not apply because if the COA wanted to claim that PL-AT's was without merit, it could have done so in its 11-25-14 order, rather than leaving items 4 and 5 for oral argument to be heard on 3-3-15.

Therefore, since no oral arguments were held on the Motion to Affirm, against PL-AT's request under MCR 7.214(A), and the oral arguments session held 3-3-15 in regard to items 4 and 5 was meaningless due to the prior 11-25-14 Order, the COA violated MCR 7.214(E) by making a decision without providing a legitimate oral argument hearing. PL-AT requests that the MSC grant this Application for Leave to Appeal so that her case can be remanded to the COA for oral arguments on all 6 items presented in PL-AT's 12-20-13 Brief on Appeal so she can receive due process.

II. The COA's granting of the DF-AE's Motion to Affirm for items 1-3 and 6 of PL-AT's Brief on Appeal, which was based on the Doctrine of Collateral Estoppel, is clearly erroneous and will cause material injustice. The Doctrine was inapplicable for five reasons: (1) the defendants were different; (2) the issues were not identical; (3) the issue was not actually litigated; (4) the judgment the motion was based upon was not a final judgment and was not decided on the merits; and (5) there existed no mutuality of estoppel.

According to Section 2.16(C) of the Civil Proceedings Benchbook published by the Michigan Judicial Institute, in order for collateral estoppel to apply, there are three general requirements:

> "(1) '[A] question of fact essential to the judgment must have been actually litigated and determined by 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 (2004), quoting *Storey v Meijer, Inc,* 431 Mich 368 n 3 (1988).

As explained in detail below, none of the above requirements are fulfilled, and therefore,

the doctrine of collateral estoppel cannot legally be applied to this case. PL-AT argued these issues in her 11-7-14 Answer to Culpert's Motion to Affirm, 12-16-14 Motion for Reconsideration of the 11-25-14 Order, 12-31-14 Reply to Culpert's Answer to PL-AT's Motion for Reconsideration and 1-23-15 Reply to O'Malley's Answer to PL-AT's Motion for Reconsideration.

A. A Plaintiff can make the <u>same</u> claims against <u>different</u> Defendants. Therefore, the doctrine of collateral estoppel does not apply.

It is clearly evident from the case captions on the filings by the parties, that *Tamara Filas v MEEMIC Insurance Company,* COA case no. 316822, the case upon which the COA granted Culpert's 10-7-14 Motion in part, accepting Culpert's argument that the Doctrine of Collateral Estoppel applied, clearly did not include any of the same Defendants in the instant case, *Tamara Filas v. Kevin Culpert and Efficient Design.* These captions speak for themselves regarding the "same" defendant issue, and preserve that issue, clearly showing there are no defendants in common, the main criteria that must be met before the Doctrine of Collateral Estoppel can even be considered applicable or enforceable. In her 11-7-14 Answer to Culpert's Motion to Affirm, PL-AT included arguments as to why the rest of the less important criteria to meet the requirements to apply the Doctrine of Collateral Estoppel were also not met, but most importantly, <u>the defendants were not the same</u>.

Suppose for example, a person makes a contract with a specialty custom auto shop to do body work on their car. The technician inadvertently does damage to the person's car in the process of working on the car. The person files a court claim against the auto shop to attempt to recoup the cost to repair the damages to their car. The court rules that the person is entitled to partial damages, but still has to pay the shop for the work they did. Then a year later, the person contracts to have work done by a <u>different</u> shop, and that shop also damages their car in the same

way as the first shop. For a court to decide that due to the doctrine of collateral estoppel, the person cannot file a claim against the second shop because they already filed a similar case against a different defendant would be absolutely absurd! It is the same here---there are two different Defendants, so the Doctrine of Collateral Estoppel cannot be applied.

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. However, the facts that led to the rulings were not even the same, as explained below.

B. The issues in the instant appeal are not identical to those raised in *Filas v MEEMIC*, as can be observed through an analysis of the "questions presented" in both cases.

Culpert's 10-7-14 Motion to Affirm stated that "*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*" and asked the reader to compare the Questions Presented in the two appeals. After analysis of these questions, as discussed below by PL-AT, the court should find that the Defendant-Appellee's claim is completely erroneous when the reader compares the Questions, and thereby the granting of the Motion to Affirm by the COA is clearly erroneous.

Questions #2, 3, and 6 the instant case are similar, but not identical, to questions #2, 3 and 5 in the MEEMIC case, respectively. However, questions #1, 4 and 5 are completely different and relate only to the instant case, and are not questions that were reviewed by the Court of Appeals in the MEEMIC case. In the 11-25-14 Order to Grant Culpert's Motion to Affirm in part, items 1-3 and 6 were included in the decision, with 4 and 5 left for oral arguments

on 3-3-15, which as already explained would have been meaningless to argue once the COA already affirmed dismissal of the entire case by inclusion of item 3.

Analysis of question 2

Below is question #2 from the instant case:
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?

Below is question #2 from the MEEMIC case:
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)?

These two questions are similar, but still not identical. The difference is the additional wording at the end of the question in the instant case of, "*she also had the choice under MCR 2.314(C)(1)(a) to simply provide the medical records.*"

Analysis of question 3

Below is question #3 from the instant case:
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)?

Below is question #3 from the MEEMIC case:
Did the circuit court err 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)?

These two questions are similar, but not identical. The MEEMIC case refers to the Plaintiff-Appellant's refusal to complete authorization forms for a nonparty to the case [RDS], whereas the instant case refers to the Plaintiff-Appellant's refusal to complete specific authorization forms provided by the Defendant-Appellee's attorney, Mr. Wright, which has similar characteristics to the RDS form, such as, giving Mr. Wright permission to re-disclose the information to anyone he wants to re-disclose it to, to allow copies to be made of the form, and not having a specific expiration date on the form, which is over and beyond language and conditions that the mandated SCAO MC 315 requires a Plaintiff to agree to and/or sign off on in a request for medical records under MCR 2.310 and MCR 2.314(C)(1)(a) or (d) (Exhibit R, Mr. Wright's HIPAA Privacy Authorization form).

Analysis of question 6

Below is question #6 from the instant case:
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")?

Below is question #5 from the MEEMIC case:
Is the Plaintiff-Appellant in a no-fault auto case for PIP benefits, or in any case where medical records are requested as part of discovery, justified in refusing to agree to additional language that is not included in the SCAO-mandated Form MC 315 and/or missing information on a medical or employment authorization form (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.)?

These two questions are similar, but not identical. Both refer to whether or not a plaintiff is justified and refusing to agree to additional language that is not included in the SCAO-mandated form MC 315, and/or missing information on medical or employment authorization forms. In the 10-14-14 ruling by the Court of Appeals in the *Filas v MEEMIC* case, this question

was not even addressed because the Court of Appeals relied on the argument that the protective order entered in the MEEMIC case was the sole reason the Plaintiff was required to have signed the RDS forms. It should also be noted that the Court of Appeals came up with this argument on its own, because it never appeared in any of MEEMIC's pleadings, which is unjust and contrary to proper court procedure in which judges may only rule on the arguments presented and cannot help out either party by presenting novel arguments to justify their ruling, as the Court of Appeals has done in the MEEMIC case Opinion.

The remaining questions in the instant case are presented below. It can be observed that these questions relate only to the instant case, and could not have been answered by an analysis of the Court of Appeals opinion in the MEEMIC case.

Question 1 from the instant case:

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?

There was no question that MEEMIC was the liable party in the PIP case as they were the Plaintiff's insurer, so this question in no way relates to the MEEMIC case. In the instant case, Plaintiff-Appellant was ordered to provide her medical records to Mr. Wright, the attorney representing an insurance policy held by the company, Efficient Design Inc., who had denied they were even Kevin Culpert's employer in prior pleadings. The question of whether the court could order the Plaintiff to provide medical records to a party that claimed they were not liable, and no liability was ever determined through a deposition of Kevin Culpert that Mr. Wright was ordered by the Judge to conduct but never conducted, still remains to be answered by the Court of Appeals, and cannot be disregarded.

Question 4 from the instant case:
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?

This question is also clearly specific to the instant case, and has nothing to do with the MEEMIC case, because it is in regard to the actions of Mr. Wright in representing this particular Defendant. Plaintiff-Appellant provided all of the records requested in the Defendant's Motion to Compel, yet the authorizations sent by Mr. Wright after his Motion to Compel was granted, requested more information than was requested in his original motion to compel. The question still needs to be answered by the Court of Appeals whether or not a new motion to compel needed to have been filed in order to request additional records.

Question 5 from the instant case:
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?

This question is also clearly specific to the instant case and had nothing to do with the MEEMIC case. There are three different defendants involved in the instant case: Kevin Thomas Culpert, and two different insurance companies representing Efficient Design Inc. Let it be clear that because Culpert's attorney, Mr. Hassouna did not object to the executed copies of MC 315 she provided to him in person, and the fact he looked at them and verbally accepted them, Plaintiff has argued that her case against Culpert should not be dismissed, no matter what the Court of Appeals rules in regard to dismissal of the case against Efficient Design Inc. This question in and of itself is very important and should not be disregarded by the Court of Appeals.

The remaining questions presented in the MEEMIC case are as follows:

Question 1 from the MEEMIC case:
Did the circuit court err when it ordered Plaintiff-Appellant to provide her medical records to a records copying service that was not a party to the case?

This question is inapplicable to the instant case because it is in regard to providing records to a third-party records copying service, RDS, which is not what Plaintiff-Appellant was ordered to do in the instant case. Plaintiff was ordered to re-do the process of disclosing medical records using Mr. Wright's personal forms which contained terms and conditions that were beyond what PL-AT was obligated to agree to on the SCAO-mandated MC315 forms that she had already executed and mailed to her health care providers.

Question 4 from the MEEMIC case:
Did the circuit court err 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)?

This question is also only applicable to the MEEMIC case because Plaintiff-Appellant argued that a PIP insurer is only entitled to wage and salary as permitted under MCL 500.3158, The Insurance Code of 1956 (no-fault law). A third-party tort case is not governed by MCL 500.3158, thereby this question is not relevant to the instant case.

C. The issue of a plaintiff's use of MC 315 was never actually litigated since the Protective Order entered in the MEEMIC case was used as justification by the COA in upholding the circuit court's decision to deny Plaintiff the right to use MC 315 to disclose her medical records to MEEMIC.

It is extremely important to note that the MEEMIC Court of Appeals opinion dated 10-14-14 did not actually answer any of the questions presented, so even if they had been relevant to the instant case, they would be of no assistance to the Defendants to use as justification for

dismissal of the instant case. The COA, in their unpublished opinion, avoided a response to the Plaintiff-Appellant's questions in the MEEMIC case by using the novel argument that Plaintiff-Appellant was required to sign the RDS forms solely because of wording in a Protective Order that was entered in the MEEMIC case by Plaintiff-Appellants attorney, in breach of the hiring agreement between Plaintiff-Appellant and the attorney.

As no Protective Order was entered in the instant case, the Defendant-Appellee is left with no argument as to why Plaintiff-Appellant's executed copies of SCAO-mandated Form MC 315 were not acceptable. Because the issue of a Plaintiff's use of MC 315 when no PO exists was never actually litigated, the doctrine of collateral estoppel cannot be applied.

D. The 10-14-14 Opinion of the COA in *Filas v* MEEMIC is not a final judgment because it has been appealed to the MSC and it was not decided on the merits.

To qualify as a "final order," the issue must have necessarily been decided on the merits. The 4 questions from PL-AT's Brief on Appeal that the COA applied to the upholding of the circuit court's dismissal (Items 1-3 and 6) were never addressed by the COA since the COA avoided similar issues in the MEEMIC case by using the PO as justification. Therefore, there has been no decision on the merits of whether or not a Plaintiff can disclose their medical records to Defendants using MC 315.

The COA's 10-14-14 Opinion in *Filas v MEEMIC* is also not a "final order" since PL-AT has applied for Leave to Appeal to the MSC and is awaiting a determination. Therefore, the Doctrine of Collateral Estoppel has been erroneously applied.

E. There existed no mutuality of estoppel, therefore the Doctrine of Collateral Estoppel could not be applied.

According to Section 2.16(C) of the Civil Proceedings Benchbook published by the Michigan Judicial Institute, in order for collateral estoppel to apply, "*there must be mutuality of*

estoppel." The Benchbook continues, "*to satisfy mutuality of estoppel, the party attempting to estop the other party from relitigating an issue must have been a party or privy to a party in the previous action.*" According to the Benchbook, a party is defined as "*one who was directly interested in the subject matter, and had a right to defend or to control the proceedings and to appeal from the judgment.*" According to the Benchbook, a privy is defined as "*one who, after the judgment, has an interest in the matter affected by the judgment through one of the parties, as by inheritance, succession, purchase.*"

The Defendants in the instant case, Kevin Culpert and Efficient Design Inc., are defendants in a separately-filed third-party tort case deriving from circuit court case number 13-000652-NI. PL-AT's case against MEEMIC Insurance Co., the case upon which a claim of estoppel has been granted by the COA in the 11-25-14 Order, is derived from circuit court case number 12-016693-NF, a no-fault auto case. Neither Kevin Culpert nor Efficient Design have ever been parties to the re-filed MEEMIC case no. 12-016693-NF.

Prior to PL-AT's refiling the two separate cases, she had a combined first- and third-party case against MEEMIC Ins. Co. and Kevin Culpert which was dismissed without prejudice. This case was given circuit court no. 11-014149-NF. Efficient Design was never a party to case no. 11-014149.

Since neither Culpert or Efficient Design Inc. are parties or privy to MEEMIC Ins. Co., the Doctrine of Collateral Estoppel has been erroneously applied.

III. The COA erred by upholding the circuit court's decision to order Plaintiff-Appellant to provide medical record authorization forms of Efficient Design's choice to Efficient Design without establishing that they were a liable party to the case. The Doctrine of Collateral Estoppel clearly should not have been applied to this issue since it had nothing to do with the *Filas v MEEMIC* case. If the COA would have ruled in PL-AT's favor on this issue, her entire case would have to be re-instated because EDI would not have been able file a Motion to Compel if they were not even entitled to the records, and therefore the case could not have been dismissed based on the Motion to Compel that was filed 4-30-13.

The COA's 11-25-14 Order to grant Culpert's Motion to Affirm based on collateral estoppel in part included item 1 of PL-AT's Brief on Appeal with the items that were granted in part. Item 1 clearly cannot be considered the same or even similar to the MEEMIC case because there was no question of liability in the MEEMIC case. Therefore, the Doctrine of Collateral Estoppel is inapplicable to Item #1. I added this paragraph.

PL-AT is only required to provide her medical records to liable parties in the case. PL-AT's third-party case was re-filed just before the 3-year statute of limitations expired. PL-AT's previous lawyer failed to depose or send interrogatories to Kevin Culpert during discovery to determine if Kevin Culpert was in the scope of his employment. In order to preserve her right to hold Efficient Design liable if Kevin Culpert was in the scope of his employment when the auto accident occurred, she had to list Efficient Design as a defendant in the case, until it was determined if Kevin Culpert was in the scope of his employment when the accident occurred.

On pg. 4 of the 6-24-13 transcript, the Court states, "...I really don't understand [Plaintiff's] reluctance to allow any---and this happened in the PIP case, too---to allow counsel to see the medical records. So I have given her lots of adjournments." Let it be clear that in the PIP case, Plaintiff-Appellant did not refuse to provide the medical and employment discovery information to the Defendant. She provided signed forms to her attorney, Terry Cochran, provided to her by MEEMIC for the release of medical information and employment information

dated November 4, 2011, that her attorney agreed to forward to MEEMIC. In her PIP case, Plaintiff-Appellant objected only to providing records to a third-party, non-party records-copying service, and contended that she should only have to provide records directly to the attorney representing her PIP insurance company (See current MSC case against MEEMIC Insurance Co., COA Case # 316822, MSC Case #150510).

In this third-party tort, Plaintiff-Appellant objected to providing her records to the party, Efficient Design, Inc., whose liability had not yet been established, and who therefore may not end up being a party to the case.

Defendant Efficient Design, Inc.'s Response to Plaintiff's Objection to Defendant Efficient Design, Inc.'s Proposed Order of Dismissal Without Prejudice, filed 7-16-13, cites the case of *Christopher v Liberty Mutual Ins Co.* (unpublished opinion, no 30856), and states that Plaintiff-Appellant case is analogous in that it involves a dismissal for failure to permit discovery. Mr. Wright states on page 4, "*That case's facts are identical to the facts in this case. It was a no-fault case where Plaintiff failed to answer interrogatories or sign medical authorizations.*" First, this is a third-party tort case that differs from a first-party PIP case in which there is no doubt the PIP insurer is entitled to the Plaintiff-Appellant's medical records under the Insurance Code of 1956 (no-fault law). Liability should first have been established before PL-AT was ordered to provide her medical records (even though she did comply with the order of Judge Borman to supply copies of medical release forms to Mr. Wright, under the threat of case dismissal). Pg. 7 of the 6-21-13 transcript, the court states, "We don't wait for liability. No, no. That's not the way---" and PL-AT replied, "I shouldn't have to give my records to a party that may not even be party to this case though. They haven't---" and the Court continued

to stand by the opinion that she had to provide records to EDI or her case would be dismissed (Exhibit X, 6-24-13 transcript).

Second, as already explained, Plaintiff-Appellant submitted fully completed interrogatories to Culpert and EDI at the court on June 21, 2013, before the hearing began, and she did sign multiple copies of medical authorization form MC 315, which were provided to Mr. Wright's office on June 24, 2013, at 11:24a.m. Therefore, his arguments for case dismissal at the special conference on 6-24-13 should not have been accepted by the court.

In this third-party auto case, there are two named defendants---Kevin Culpert, and his employer, Efficient Design. On 6-21-13, prior to the 6-21-13 hearing at the court, Plaintiff-Appellant **provided copies of fully executed MC-315 authorization forms to release her medical records to Kevin Culpert's attorney, Mr. Hassouna**. Plaintiff-Appellant was only reluctant to provide records to Efficient Design due to the fact that Efficient Design had not admitted any liability and they denied that Kevin Culpert was in the scope of his employment or that he was even an agent of Efficient Design. According to Defendant, Efficient Design Inc.'s 2-5-13 Answer to Plaintiff's Complaint, Item #16, "**Defendant Culpert was not an agent of Efficient Design Inc. and was not in the course and scope of his employment when the alleged accident occurred**" (Exhibit E, Relevant page of Mr. Wright's 2-5-13 Answer to Complaint against Efficient Design).

However, at the hearing on June 21, 2013, Defense, for the first time, confirmed that Kevin Culpert was employed with Efficient Design. At the same hearing, it was discussed that it had not been determined if Mr. Culpert was in the scope of his employment at the time of the accident. Judge Borman indicated that she wanted Kevin Culpert deposed by Mr. Wright to determine this. In PLAINTIFF'S 6-18-13 ANSWER TO DEFENDANT EFFICIENT

DESIGN'S MOTION TO COMPEL DISCOVERY FROM PLAINTIFF, pg. 3-4, Plaintiff-Appellant also asked the Court to "*grant Plaintiff's request for 28 days to prepare interrogatories for Efficient Design so that it can be determined whether or not Efficient Design Inc. is even liable for any damages to Plaintiff, before Plaintiff provides medical records to Defendant, Efficient Design,*" but Plaintiff-Appellant's request was denied.

On August 2, 2013, Plaintiff-Appellant inquired of the three Defense attorneys whether or not Kevin Culpert had been deposed and if so, if the deposition revealed whether or not he was in the scope of his employment. Plaintiff-Appellant received a response from Mr. Hassouna, Kevin Culpert's attorney, stating, "The Court dismissed your case. My client will not be deposed" (Exhibit K, 8-2-13 e-mail from Ms. Filas to Mr. Hassouna, Mr. Wright and Mr. O'Malley; and Mr. Hassouna's response). However, the Order to Dismiss had not yet been entered and the Defense attorneys still could have deposed Mr. Culpert. Mr. O'Malley and Mr. Wright did not respond to Plaintiff-Appellant's e-mail.

On pg. 4 of the 6-24-13 transcript, Mr. O'Malley, co-attorney for Efficient Design, and representing a different insurance company than Mr. Wright, for which Efficient Design was also insured, states, "These are actually only Efficient Design's authorizations. I know that Mr. Culpert's attorney was going to rely on them also but these are our [Mr. O'Malley's and Mr. Wright's] authorizations; we both represent Efficient Design." The 6-24-13 transcript makes it appear as if Kevin Culpert's attorney was also relying on the medical information requested by Efficient Design, but this is not true. It should be clear that medical records were <u>separately</u> requested by <u>both</u> Mr. Hassouna, Mr. Culpert's attorney, <u>and</u> Mr. Wright, Efficient Design's attorney. The facts were misrepresented when Mr. O'Malley stated that Mr. Culpert's attorney, Mr. Hassouna, was going to rely on those authorizations. Mr. Hassouna provided the Plaintiff-

Appellant with his own interrogatories and request for production of documents. Mr. Hassouna's 4-19-13 Motion to Compel asks for an "Order compelling the Plaintiff to provide signed, notarized, and full and complete answers to interrogatories and fully executed medical authorizations for all providers listed in plaintiff's answers to interrogatories" (Exhibit L, 4-19-13 Defendant's Motion to Compel Answers to Interrogatories & Production of Documents). On June 21, 2013, to meet Mr. Hassouna's request for production of fully executed medical Authorizations, Plaintiff-Appellant provided Mr. Hassouna, with signed SCAO MC 315 authorization forms for her healthcare providers, and copies of certificates of mailing verifying they had been mailed to her health care providers on June 19, 2013. Mr. Hassouna indicated these authorizations were acceptable.

PL-AT asserts it was reasonable for her not to disclose her records to Efficient Design until it was verified they were a liable party in the case. Plaintiff-Appellant still contends she should not have had to release personal or medical information to Efficient Design until they have admitted liability, but to avoid having her case dismissed, she followed the Judge's order to provide medical record authorization release forms to Mr. Wright, as previously explained.

The COA avoided ruling on the issue of PL-AT being ordered to supply medical information to a party claiming no liability, when it granted Culpert's 10-7-14 Motion to Affirm based on the doctrine of collateral estoppel for items #1-3 and 6 of PL-AT's 12-20-13 Brief on Appeal. This item was #1 of PL-AT's 12-20-13 Brief on Appeal, and should not have been lumped together with the other issues the COA considered "resolved" by the 10-14-14 *Filas v MEEMIC* Opinion, because it clearly had absolutely nothing in similarity with any of the issues in the MEEMIC case, as MEEMIC's liability was never questioned.

A ruling must be made on Item #1 of PL-AT's 12-20-13 Brief on Appeal because this item alone could reverse the dismissal of the entire case. If EDI was not entitled to PL-AT's records, there is no way they could file a Motion to Compel the production of the records, and therefore no way PL-AT's case could have been dismissed for not providing the specific authorization forms ordered by Judge Borman during the 6-21-13 hearing on the 4-30-13 Motion to Compel. Again, the 4-30-13 Motion to Compel requested copies of medical records, not authorizations. Further, the authorizations PL-AT did not complete were the authorizations requested after the 4-30-13 Motion to Compel was granted on 6-21-13 in regard to executed medical authorizations only, and PL-AT had complied with the 6-21-13 Order. Since the Doctrine of Collateral Estoppel clearly could not be applied to Item 1 of PL-AT's 12-20-13 Brief on Appeal, the COA's 11-25-14 Order needs to be reversed so that oral arguments can be heard and an Opinion issued on whether or not a party must be determined to be a liable party in order to compel production of medical records from the PL-AT.

Conclusion and Relief Requested

The question becomes why did the COA separate the case into parts and leave out items 4 and 5 when they granted the Motion to Affirm in part, and why did the DF-AE's attorneys prepare to argue those issues, if they knew they would have no bearing on the dismissal of PL-AT's case? It is reasonable to argue that the COA did not want to have the SCAO MC 315 forms to be an issue in the case and did not want it known that Mr. Hassouna, an auto attorney, representing Kevin Culpert in the Circuit Court, accepted those forms to satisfy PL-AT's obligation to provide medical information in a third party tort case. By issuing an Order granting Culpert's Motion to Affirm, instead of issuing an Opinion, which would likely be published on the internet, the issue of the MC 315 forms remains hidden unless a person goes through the

trouble of ordering the case file so they could determine that the main focus of the case was about the circuit court's non-acceptance of MC 315 forms. The COA already avoided a discussion of MC 315 forms in the MEEMIC case, when they created the novel argument that was not argued in any pleadings, that a Protective Order entered in that case was the sole reason PL-AT could not use MC 315 forms to provide her medical records to the Defendant. Because the MEEMIC ruling does not address the use of MC 315 when there is no protective order in place, it is not helpful to any Plaintiff trying to use MC 315 to disclose their medical records in a personal injury case. Clearly, the COA is doing everything in its power to prevent Plaintiffs from using or even being aware of their right to use MC 315 forms instead of records copying service forms, or similar forms that allow attorneys to act as a copying service (such as Mr. Wright's forms).

By separating out the issues about forms contained in items 1-3 and 6 by the granting of Culpert's 10-7-14 Motion to Affirm and accepting Culpert's argument that these items could not be litigated by PL-AT due to collateral estoppel, and then providing a hearing date for meaningless oral arguments on 3-3-15 in regard to the other two items, 4 and 5, the COA was enabled to write an Opinion only in regard to issues 4 and 5, avoiding any discussion of the use of authorization forms such as MC 315.

By including item 1, the COA was able to avoid making an Opinion as to whether or not a Defendant could compel production of medical records from a Plaintiff if the Defendant has claimed not to be liable. Clearly, this issue should not have been included in the granting of the Motion to Affirm, as there was no question of liability in *Filas v MEEMIC* so there is no possible way the Doctrine of Collateral Estoppel was applicable to this item.

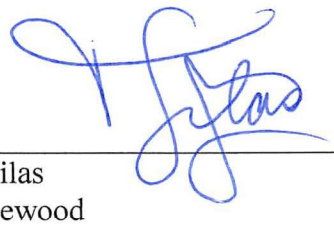
The State Court Administrative Office, the administrative agency of the Michigan Supreme Court, is clearly aware of the problem existing in which courts are refusing to accept SCAO-approved court forms, exemplified by the 6-23-11 memorandum from Chad C. Schmucker, State Court Administrator (Exhibit S). PL-AT's case, is a case in which the circuit court has refused to accept executed and mailed SCAO-mandated form MC 315 even though MCR 2.314(C)(1)(d) mandates the use of "the form approved by the state court administrator," which is MC 315 (Exhibit M, List of SCAO-mandated forms; Exhibit N, SCAO-mandated form MC 315).

It would cause PL-AT great harm to lose her entire third-party auto case and not receive damages related to physical injuries that significantly changed her life, simply for standing up for her right to use MC 315 as provided under MCR 2.314(C)(1)(d) and not allowing herself to be bullied by the attorneys and the courts into signing forms that will have a detrimental effect on her future. PL-AT has never refused to provide her records, as the DF-AE continues to erroneously claim and the Court has stated in the transcripts. PL-AT has rebutted this multiple times in her filings.

In his 6-23-11 memo, Mr. Schmucker, State Court Administrator "intended to clarify what is already the practice of the all courts across the state." Unfortunately, it is not just the circuit courts failing to follow proper procedure by refusing to accept PL-AT's use of MC 315. The COA did all it could to uphold the circuit court's decision to refuse to allow PL-AT to use MC 315 in either her first-party or third-party cases.

PL-AT has hope that Mr. Schmucker's memo was sincere, and that the Supreme Court will use its power ensure that the lower courts are following proper procedures in regard to using SCAO-mandated form MC 315 when a request under MCR 2.314(C)(1)(d) is made for a party's

medical records, by granting PL-AT's request for leave to appeal the 11-25-14 COA Order and any Opinion it may issue in regard to Items 4 and 5 of PL-AT's 12-20-13 Brief on Appeal resulting from the 3-3-15 hearing, so that PL-AT will be given due process by allowing her to have oral arguments on all 6 issues appealed to the COA.



3-10-15
Date

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EXHIBIT 3

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