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 CORRECTED MOTION FOR RECONSIDERATION

Defendant-Appellee Kevin Thomas Culpert ("Culpert"), for his Answer to the Motion for Reconsideration brought by Plaintiff-Appellant Tamara Filas ("Plaintiff"), states as follows:

Plaintiff asks this Court to reconsider its September 9, 2015 Order Denying Plaintiff's Application for Leave to Appeal. However, Plaintiff has failed to identify the applicable standard of review. MCR 7.311(F)(1) and (G) state that both motions for rehearing and motions for reconsideration brought in this Court "are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) expressly states that motions for reconsideration *may not* merely present "the same issues ruled on by the court, either expressly or by reasonable implication…." Moreover, a motion for reconsideration "resting on a legal theory and facts which could have been pled or argued prior to the … original order" is insufficient to satisfy the "palpable error" standard. *Charbeneau v Wayne Co Gen Hosp,* 158 Mich App 730, 733; 405 NW2d 151 (1987). A motion for reconsideration is used to correct palpable error, not to present new evidence or arguments. *Maiden v Rozwood,* 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). Evidence or arguments "offered … for the first time in support of [a] motion for rehearing" are "not properly before the court." *Id.* MCR 2.119(F)(3) "taken as a whole, can be interpreted as an expression of great reluctance to entertain or grant motions for reconsideration." *Mich Bank v Reynaert, Inc,* 165 Mich App 630, 645; 419 NW2d 439 (1988). Here, Plaintiff has made no effort to articulate how the leave denial was palpably erroneous. Rather, she simply repeats her prior arguments, contrary to MCR 2.119(F)(3).

Moreover, reconsideration is not warranted because this Supreme Court properly denied leave to appeal; the Court of Appeals' and Circuit Court's holdings were correct for reasons explained in Culpert's Answer to the leave application. (See Ex. A.)

Additionally, Plaintiff claims that this Court "prematurely denied" leave to appeal because Plaintiff's motion for reconsideration, from the denial of her application for leave to appeal in *Filas v MEEMIC,* 497 Mich 1028; 863 NW2d 74 (2015), was still under consideration

by this Court. (Corrected Motion for Reconsideration, p 3.)[1] However, this Court denied reconsideration in *Filas v MEEMIC* on September 29, 2015 (Ex. B), rendering this argument moot.

In conclusion, 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 v Rowe*, 438 Mich 347, 354-355; 475 NW2d 30 (1991), it would have been manifestly unfair to allow Plaintiff to use her medical privacy as a shield. Additionally, Plaintiff's Application did 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 Motion for Reconsideration forthwith, as this Court properly denied leave on September 9, 2015.

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Dated: October 7, 2015
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[1] The Court of Appeals affirmed in this case, in part, on the grounds that the holding in *Filas v MEEMIC* was *res judicata*, at least as to some of Plaintiff's arguments. (See Ex. A, pp 14-17.)

EXHIBIT
A

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

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

MISCELLANEOUS

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.

***

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

EXHIBIT B

Order

Michigan Supreme Court
Lansing, Michigan

September 29, 2015

Robert P. Young, Jr.,
Chief Justice

150510(61)

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

TAMARA FILAS,
Plaintiff-Appellant,

v

SC: 150510
COA: 316822
Wayne CC: 12-016693-NF

MEEMIC INSURANCE COMPANY,
Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's May 28, 2015 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

p0921

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2015

Clerk