STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(MURRAY, C.J. (DISSENTING), METER, AND K. F. KELLY, JJ.)

MECOSTA COUNTY MEDICAL CENTER d/b/a **SPECTRUM HEALTH BIG RAPIDS**, **SPECTRUM HEALTH HOSPITALS**, **SPECTRUM HEALTH PRIMARY CARE PARTNERS** d/b/a **SPECTRUM HEALTH MEDICAL GROUP**, **MARY FREE BED REHABILITATION HOSPITAL**, and **MARY FREE BED MEDICAL GROUP** (JACOB CARL MYERS),

Plaintiffs-Appellees,

-v-

METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant-Appellant,

-and-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Supreme Court
Case No. 161628

Court of Appeals
Docket No. 345868

Kent County Circuit Court
Case No. 17-007407-NF
Hon. Dennis B. Leiber

STATE FARM'S SUPPLEMENTAL APPENDIX

MECOSTA COUNTY MEDICAL CENTER d/b/a **SPECTRUM HEALTH BIG RAPIDS**, **SPECTRUM HEALTH HOSPITALS**, **SPECTRUM HEALTH PRIMARY CARE PARTNERS** d/b/a **SPECTRUM HEALTH MEDICAL GROUP**, **MARY FREE BED REHABILITATION HOSPITAL**, and **MARY FREE BED MEDICAL GROUP** (JACOB CARL MYERS),

Plaintiffs-Appellees,

-v-

METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant-Appellee,

-and-

Supreme Court
Case No. 161650

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Docket No. 345868

Kent County Circuit Court
Case No. 17-007407-NF
Hon. Dennis B. Leiber

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

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STATE FARM'S SUPPLEMENTAL APPENDIX

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IN THE KENT COUNTY CIRCUIT COURT

MECOSTA COUNTY MEDICAL CENTER, d/b/a SPECTRUM HEALTH BIG RAPIDS; SPECTRUM HEALTH PRIMARY CARE PARTNERS, d/b/a SPECTRUM HEALTH MEDICAL GROUP; MARY FREE BED REHABILITATION HOSPITAL; and MARY FREE BED MEDICAL GROUP,

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METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY; and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;

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Hon. Dennis B. Leiber

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Introduction

Through procedural confusion created by two no-fault cases running in parallel, Defendants, Metropolitan Group Property and Casualty Insurance Company ("MetLife") and State Farm Mutual Automobile Insurance Company ("State Farm," collectively, the "Insurers"), were able to secure a judgment against one party—and injured person, Jacob Myers—in Wayne County. The Insurers were then able to enforce the judgment against different parties—Myers's healthcare providers, Plaintiffs (the "Hospitals")—in Kent County, arguing res judicata and foreclosing the Hospitals' ability to have their day in court. The trial court's grant of summary disposition on the basis of the Wayne County judgment was in error and should be reversed.

Because Myers had assigned his rights to all claims against the Insurers *before* he sued in Wayne County, he had no legal right to bring claims for the Hospitals' charges, and those claims should have been dismissed. For that reason alone, the Wayne County judgment is unenforceable against the Hospitals. Even were that not the case, because the assignment extinguished Myers's rights against the Insurers and substituted the Hospitals as new parties to those rights, the Wayne County judgment has neither res judicata or collateral estoppel effect. The Hospitals were neither the same parties as Myers nor his privies.

Because of its decision, the trial court did not reach the substance, thereby compounding the errors in this case. Namely, MetLife argued—as it did successfully in Wayne County—that Myers was excluded from no-fault coverage as an uninsured owner under MCL 500.3113(b). MetLife relied on *Barnes v Farmers*

Ins Exch, 308 Mich App 1; 862 NW2d 681 (2014), but *Barnes* is currently pending before the Supreme Court, and, more importantly, this Court recently distinguished *Barnes* in *Maurer v Fremont Ins Co*, ___ Mich App ___; ___ NW2d ___ (2018) (cited at Slip op., At. App'x A195-A204). In *Maurer*, this Court rejected precisely the same argument MetLife advanced below and in Wayne County. Because no-fault coverage was maintained on the vehicle Myers was driving at the time of the accident, the uninsured owner exclusion does not apply.

The substantive failure of MetLife's arguments amplifies the trial court's error in applying res judicata below. If uncorrected, the Insurers will have litigated the substance of the claims with the wrong party, won based on an error of law, and precluded the correct parties from arguing for a correct application of the law. And all this will have occurred because the Wayne County Circuit Court happened to reach disposition before the Kent County Circuit Court.

This Court should either: (1) reverse the Kent County Circuit Court's ruling below and remand this case with instructions for that court to address the substance of the parties' arguments or (2) remand this case for entry of summary disposition in favor of the Hospitals in light of the straightforward legal issues presented in this appeal. For the sake of judicial economy, the Hospitals respectfully request the latter.

Statement of Basis of Jurisdiction

The Hospitals claim an appeal by right from the September 21, 2018 order of the Kalamazoo County Circuit Court granting summary disposition to State Auto. At. App'x at A1-A2. That order is a final order under MCR 7.202(6)(a). On October 18, 2018, the Hospitals timely filed a claim of appeal. Accordingly, this Court has jurisdiction under MCR 7.204.

Statement of Questions Presented

I. Whether res judicata or collateral estoppel bars a healthcare provider's claims, where the injured person assigned those claims to the provider before filing the lawsuit that resulted in the judgment sought to be enforced against the healthcare provider.

The Hospitals answer, no.

The Insurers answer, yes.

The trial court answered, yes.

II. Whether the uninsured motorist exclusion of MCL 500.3113(b) requires all vehicle owners to purchase a no-fault insurance policy in his or her own name.

The Hospitals answer, no.

The Insurers answer, yes.

The trial court did not answer this question.

III. Whether an insurer can void its policy on the basis of a misrepresentation when the insurer has failed to refund policy premiums and the insurer's actions would harm innocent third parties.

The Hospitals answer, no.

The Insurers answer, yes.

The trial court did not answer this question.

Statement of Facts

I. Jacob Myers was injured in a motor vehicle accident and treated by the Hospitals.

On August 15, 2016, Myers sustained serious injuries in a motor vehicle accident, while driving a 2003 Mercury Mountaineer. From August 17, 2016, through March 29, 2017, the Hospitals provided care and treatment to Myers for his injuries. The Hospitals' charges for their care and treatment of Myers total more than $600,000.

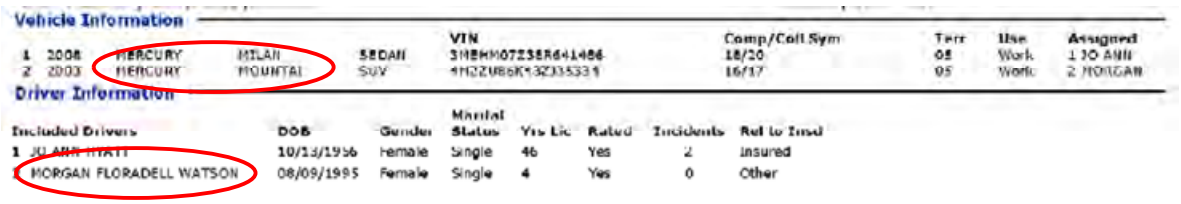
II. The MetLife Policy covered the Mountaineer and its co-owner, Morgan Watson.

Myers co-owned the Mountaineer with his girlfriend, Morgan Watson. At the time of the accident, Myers, Watson, and their daughter, Sage, were living in an apartment with Watson's grandmother, JoAnn Hyatt. See At. App'x at A28, 21:18-22:13; *Id.* at A44, 27:13-22. Both Myers and Watson had keys to the apartment; both had belongings there; both received mail there; both shared a room there; and Sage's crib was there. *Id.*; *Id.* at A27, 18:1-8. Moreover, Myers was a party to the lease and paid rent. *Id.* at A27, 18:16-17.

Consistent with those living arrangements, the Mountaineer—which was primarily Watson's vehicle—was insured under a MetLife policy owned by Hyatt (the "MetLife Policy," At. App'x at A53-A107). *Id.* at A45, 31:2-3. Hyatt had contacted MetLife and had MetLife put Watson and the Mountaineer on the MetLife Policy. *Id.* at A113, 20:4-22:4. Hyatt informed MetLife that Watson was her granddaughter, that Watson was living with her, and that Watson owned the Mountaineer. *Id.* MetLife changed Hyatt's policy and charged her a higher premium. *Id.* at A113,

22:12-14. Watson and Myers paid Hyatt for the additional premiums. *Id.* at A42, 19:4-10; *Id.* at A126 17:14-18 and A128, 21:2-13.

The declarations page of the MetLife Policy lists the Mountaineer as a covered vehicle and Watson as an included driver. At. App'x at A54:



Vehicle Information

1	2008	MERCURY	MILAN	SEDAN	3MEHM07Z38R641486	18/20	05	Work	1 JO ANN
2	2003	MERCURY	MOUNTAI	SUV	4M2ZU86K13ZJ35331	16/17	05	Work	2 MORGAN

Driver Information

Included Drivers	DOB	Gender	Marital Status	Yrs Lic	Rated	Incidents	Rel to Insd
1 JO ANN HYATT	10/13/1956	Female	Single	46	Yes	2	Insured
2 MORGAN FLORADELL WATSON	08/09/1995	Female	Single	4	Yes	0	Other

And the address listed on the declarations page is the apartment Hyatt, Watson, and Myers shared. *Id.*

III. Myers assigned his rights to the Hospitals, and they sued the Insurers.

Through a series of assignments, the last of which is dated May 19, 2017, Myers assigned to the Hospitals all of his rights, benefits, and causes of action in connection with the Hospitals' charges. At. App'x at A146-A179. The assignments provide:

ASSIGNMENT OF BENEFITS

I agree:

- To pay all expenses including, but not limited to, court costs and actual attorney fees incurred by Mary Free Bed Rehabilitation Hospital (MFB) in collecting this account.
- To assign MFB in collecting this account.
- To assign MFB any right or cause of action that I may have against any third person to collect and recover for the expense of this account.
- To release any billing information for payment of account by any insurance company or employer. I authorize any insurance companies to pay directly to MFB liability and/or medical insurance proceeds for all services and supplies rendered by MFB for this admission.
- That I am financially responsible to MFB for all services and supplies not covered by the liability and/or medical coverage insurance.

ASSIGNMENT

– I assign Spectrum Health:

– All benefits, claims, and any and all other rights, including the right to bill and talk to any third party for the purpose of seeking payment.

– The right to file suit or intervene in any lawsuit or proceeding which involves my charges at Spectrum Health.

– The right to take any other action seeking payment of my Spectrum Health charges.

– This assignment includes, but is not limited to, the right to appeal the denial of payment of my Spectrum Health charges from any payer, including any employer–sponsored benefit plan, insurance policy or insurance coverage provided by law or contract. I authorize Spectrum Health to act on my behalf to pursue an ERISA benefit claim or to appeal an adverse benefit determination. I agree to assist Spectrum Health in the pursuit of all insurance benefits and agree to pay all co–insurance, co–payments and deductibles required by any insurance plan:

– I also assign to Spectrum Health, and agree that I waive, any and all rights to settle, release or retain payment of my Spectrum Health charges, or take any other action which would in any way compromise payment or reimbursement of my Spectrum Health charges.

As the owners of Myers' claims against the Insurers, the Hospitals sued the Insurers on August 15, 2017, in Kent County Circuit Court. In violation of his assignments, on the same day, August 15, 2017, Myers also sued the Insurers in Wayne County Circuit Court to recover the Hospitals' charges. See *Myers v Metropolitan Group Property & Cas Ins Co, et al* (Case No. 17-012213-NF) (the "Wayne County Lawsuit."). Because both cases involved the Insurers' denial of coverage for the Hospitals' charges, the Insurers are defendants in both actions.

V. The Kent County Circuit Court held that a Wayne County Judgment against Myers barred the Hospitals' claims against the Insurers.

On October 26, 2017, MetLife moved this Court to transfer venue to Wayne County. The Kent County Circuit Court denied that motion on December 14, 2017. Accordingly, this case and the Wayne County Lawsuit ran in parallel.

On July 20, 2018, the Wayne County Circuit Court granted the Insurers' summary disposition motion against Myers, holding that he was not covered under

the MetLife Policy, and dismissed his claims against the Insurers (the "Wayne County Judgment"). At. App'x at A219-A220.

The Insurers then took the Wayne County Judgment and moved for summary disposition in this case under MCR 2.116(C)(7), arguing that it was res judicata to, or collaterally estopped, the Hospitals' claims in this case.

On September 21, 2008, the Kent County Circuit Court granted the Insurers' summary disposition motion, holding that the Hospitals' claims were barred by res judicata and collateral estoppel. At. App'x at A2. The Court explained its holding as follows:

> [R]ecognizing that Judge Hughes found that Jacob Myers is ineligible for first party personal injury protection benefits, recognizing that Judge Hughes dismissed Myers' claims against Defendant Metropolitan with prejudice, this Court is of the opinion that the claims in the instant case filed in Kent County are barred by the doctrines of collateral estoppel and res judicata.
>
> The law is clear and the answer is plain, the health care provider is barred from litigating a claim for payment of medical expense against an insurer when the patient's claims have been dismissed with prejudice against the insurer. *See TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39 (2010). [At. App'x at A193.]

The trial court did not address the substantive coverage issues that were also before it, finding that analysis irrelevant in light of its holding.

The Hospitals now appeal to this Court.

Standard of Review

This Court reviews de novo a grant of summary disposition, the application of a legal doctrine, and questions of statutory interpretation de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016).

Argument

I. The trial court incorrectly held that res judicata or collateral estoppel bars the Hospitals' claims.

"[O]nly parties to the former judgment or their privies may take advantage of or be bound by it." *Duncan v State Hwy Comm,* 147 Mich App 267, 271; 382 NW2d 762 (1985) (citation omitted).

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (citations omitted).]

Similarly,

> for collateral estoppel to apply three elements must be satisfied: (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." *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). [*Monat v State Farm Ins Co*, 469 Mich 679, 682–683; 677 NW2d 843 (2004).]

The Wayne County Judgment does not preclude the Hospitals' claims in this case because Myers assigned those claims to the Hospitals *before he filed suit in Wayne County*. Accordingly, Myers had no right or ability to bring those claims, and the Wayne County Lawsuit should have been dismissed. Moreover, at the time of the Wayne County Judgment, Myers and the Hospitals were not the same parties or privies. Thus, neither res judicata nor collateral estoppel applies. The trial court erred in holding otherwise.

A. Because Myers had previously assigned the Hospitals the claims he raised in the Wayne County Lawsuit, the Wayne County Judgment is unenforceable against the Hospitals.

1. An assignment extinguishes the assignee's rights and substitutes the assignor as a new party to those rights.

"An assignment is defined as '[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.' *Black's Law Dictionary* (4th ed), p. 153." *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987); see also *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 113 n 26; 825 NW2d 329 (2012).

"The assignee has a legal right if the assignors had one. Prior to notice to the obligor, the assignor still has the power to discharge; *and none after such notice*." 47 Corbin, Contracts (one volume ed), § 856, p 787 (emphasis added). Professor Corbin further explains by analogy:

> An alienation or transfer or conveyance of "title" is the substitution of a new party to some or all of the legal relations of which "title" consists. *The grantor extinguishes his relations with others respecting the subject matter and creates similar relations between the grantee and others.* If the grantor had rights . . . that other persons shall not trespass, the grantee now has such rights. If the grantor was legally privileged as against others to use or abuse, the grantee now has such power. . . .
>
> Alienation, conveyance, and transfer, therefore, consist of some operative action that extinguishes and creates, that *substitutes a new party as the focus of legal relations with respect to the subject matter*. Such also is an "assignment" in the law of contracts. [*Id.* at § 861, p 793 (emphasis added).]

See also 1 Mich Civ Jur, Assignments § 1 ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to

performance by the obligor is extinguished in whole or in part, and the assignee acquires a right to such performance."); 6A CJS, Assignments § 88 ("[T]he assignee takes all of the rights of the assignor, no greater and no less; i.e., assignee stands in the same position as its assignor stood. Further, *such an assignment divests the assignor of any interest in the subject matter of the assignment*.") (emphasis added); accord *First of Am Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516, 520 (1996) ("An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed.")

In this case, the assigned property was Myers's legal right to pursue the Insurers for payment of the Hospitals' charges. See, e.g., At. App'x at A146 ("I agree . . . to assign [Hospitals] any right or cause of action that I may have against any third party to collect and recover for the expense of this account."). Myers assigned that right on or before May 19, 2017. See At. App'x at A163. Three months later, on August 15, 2017, Myers filed the Wayne County Lawsuit.

Because Myers assigned the claims *before* he filed the Wayne County Lawsuit, Myers had no right to bring the claims he asserted. That case should have been dismissed because his assignment "extinguishe[d] his relations with [the Insurers] respecting the subject matter." Corbin, *supra*; see also *Moore v Smith*, 103 Mich 387, 389; 61 NW 538, 539 (1894) ("The foreclosure sale under the assigned decree was void. After the assignment, further proceedings could not be prosecuted in the name of the assignor."); see also *Lambert v Harbor Springs Real Estate Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 1999; 1999

WL 33441311, at *1 (Docket No. 204605) ("Had plaintiff made the assignment before he filed the instant action, the assignment would have constituted a ground for dismissal."), At. App'x A216-A218.[1] The Supreme Court incorporated this concept into our Court Rules at MCR 2.116(C)(7), which allows a party to move for "[e]ntry of judgment, dismissal of the action, or other relief . . . because of . . . assignment or other disposition of the claim before commencement of the action."

On that basis, the Insurers could and should have moved for summary disposition in the Wayne County Lawsuit. Inexplicably, they did not. But that failure does not change the legal impact of Myers' pre-suit assignment: Myers could not assert the Hospitals' claims in the Wayne County Case because he had already extinguished his right to do so. Accordingly, the Wayne County Judgment is ineffective and unenforceable against the Hospitals.

2. Assignees are not bound the by post-assignment acts of their assignors.

Actions taken "by the assignor, after the assignment, can not [*sic*] avail against the assignee, and courts will protect the latter against all the acts of the former[.]" *Hogan v Sherman*, 5 Mich 60, 61-62 (1858) (citations omitted); *Kudner v Bath*, 135 Mich 241, 243; 97 NW 685 (1903) ("Mr. Young, after his assignment, could not affect complainant's rights by any statement he might make in his petition to be declared a bankrupt, unless such statement were ratified by the complainant."); *Blumenthal v Simons*, 110 Mich 42, 44; 67 NW 1102 (1896) ("[A]s to Simons and his

[1] Pursuant to MCR 7.215(C)(1), the Hospitals cite *Lambert* because it provides the simplest articulation of this dispositive issue.

creditors, the legal title to the property passed to Bement, and with it the right to collect the judgment against Burnham, which Simons was not thereafter in a situation to enforce."); accord 6A CJS, Assignments § 88 ("[A]n assignment divests the assignor of any interest in the subject matter of the assignment.").

As this Court explained in *Middleditch v Irish American Club*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2000 (Docket No. 212406), At. App'x at A213-A215:

> As the assignee of the settlement agreement from the club's insurer, defendant acquired the same rights that the insurer possessed. [*Profl Rehab Assocs v State Farm Mut Auto Ins Co,* 228 Mich App 157, 177; 577 NW2d 909 (1998).] Defendant merely sought to enforce the terms of the agreement in which plaintiff assigned away any claims that she had against defendant. *Because plaintiff assigned away all her claims against defendant, her judgment against him was unenforceable because the claim was no longer hers to pursue.* [*Id.* at A215 (emphasis added).[2]]

The same is true here. Myers's post-assignment actions in bringing and losing the Wayne County Lawsuit cannot bind the Hospitals. The Wayne County Judgment is ineffective and unenforceable against the Hospitals.

B. The Hospitals and Myers are not the same parties or privies.

Even if the Wayne County judgment were effective, neither res judicata nor collateral estoppel would apply because the Hospitals are not the same parties as Myers or his privies. It is self-evident that the Hospitals are not Myers; they have separate legal identities. Accordingly, the Insurers cannot demonstrate that the

[2] Pursuant to MCR 7.215(C)(1), the Hospitals cite *Middleditch* because it addresses the central issue of Insurers' argument by citing a case upon which they rely.

Wayne County case involved the "same parties." Accord, Corbin, *supra* (explaining that assignment *"substitutes a new party* as the focus of legal relations with respect to the subject matter.") (emphasis added).

Neither are the Hospitals Myers's privies. "A privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties . . ." *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971) (emphasis added). As previously noted, Myers assigned his claims to the Hospitals before the Wayne County Lawsuit. Because "the Supreme Court's definition of a 'privy' . . . requires that the interest be obtained after rendition of the judgment," the Hospitals are not privies of Myers. *Rohe Sci Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984).

The Wayne County Judgment has neither res judicata nor collateral estoppel effect on this case.

C. The Insurers and trial court mistakenly relied on pre-*Covenant* caselaw that did not involve assignments.

The Insurers and trial court relied exclusively on caselaw decided when the legal landscape in Michigan allowed healthcare providers to bring direct—but derivative—causes of action against insurers. Under the theory, actions by the injured person in a separate lawsuit bound the healthcare provider because the healthcare provider was asserting *the injured person's legal rights* under the no-fault act. See, e.g., *Michigan Head & Spine Inst, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 443, 448; 830 NW2d 781 (2013) (holding that "an insured's release

bars a healthcare provider's claim for payment for medical services rendered to the insured after the release was executed"); *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 44; 795 NW2d 229 (2010) ("Plaintiff, by seeking coverage under the policy, is now essentially standing in the shoes of Afful. Being in such a position, there is also no question that plaintiff, although not a party to the first case, was a 'privy' of Afful.").

On May 5, 2017, that all changed. The Supreme Court decided *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), which reversed decades of this Court's caselaw and declared that healthcare providers could no longer bring direct actions against insurers under the no-fault act. See 500 Mich at 199-204. *Covenant* held "that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act." *Id*. at 195-196. Accordingly, *Covenant* "overrule[d] all Court of Appeals caselaw inconsistent with this conclusion." *Id.* That included, for example, *Michigan Head & Spine*. See *Covenant*, 500 Mich at 203 n 23.

The Supreme Court noted, however, "our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." In fundamentally changing no-fault litigation, *Covenant* made clear that if a healthcare provider wanted to pursue no-fault charges, it had to do so through an assignment. In so doing, the Supreme Court destroyed the Insurers' current theory that healthcare providers and injured persons are the same parties or privies. Because, after *Covenant*, healthcare providers must pursue

insurance claims through assignment, they—not the injured persons—own those assigned claims. The claims are no longer derivative, and the post-assignment actions of an assignor-injured person cannot effect the legal rights of an assignee-healthcare provider.

For these reasons, the Hospitals are neither the same parties as Myers, nor his privies. To the contrary, the Hospitals own the rights that Myers purported to litigate. And the insurers knew that all along. The subsequent disposition of Myers' separate lawsuit has no res judicata or collateral estoppel effect on claims that he transferred to the Hospitals long before. The trial court erred in holding otherwise.

II. MetLife's argument that Myers was an uninsured owner under MCL 500.3113(b) was recently rejected by this Court.

In substance, MetLife's exclusion of no-fault benefits is premised on its argument—accepted in the Wayne County Lawsuit—that Myers is excluded from no-fault coverage under MCL 500.3113(b) as an uninsured owner of the Mountaineer.

MCL 500.3113(b), the uninsured owner exclusion, provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by section 3101 . . . was not in effect.

A. As this Court explained in *Iqbal*, MCL 500.3113(b) requires that the vehicle—not the owner—have no-fault coverage at the time of the accident.

In *Iqbal v Bristol W Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008), this Court addressed the uninsured owner exclusion in a situation where the plaintiff was injured while driving a car that was titled and registered in his brother's name. The insurer argued that the uninsured driver exclusion applied because, as the primary driver of the car, the plaintiff was an owner under the no-fault act and, therefore, had to insure the car under a policy in his own name. This Court rejected that argument:

> [MCL 500.]3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the *motor vehicle involved in the accident* . . . and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the [vehicle], and not [the owner operating the vehicle], had the coverage or security required by MCL 500.3101. As indicated above, the coverage mandated by MCL 500.3101(1) consists of "personal protection insurance, property protection insurance, and residual liability insurance." While [the owner operating the vehicle] did not obtain this coverage, there is no dispute that the [vehicle] had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant [which owner] . . . procured the vehicle's coverage . . . Stated differently, the security required by MCL 500.3101(1) was in effect for purposes of MCL 500.3113(b) as it related to the [vehicle.] [*Iqbal*, 278 Mich App at 39-40.]

Under the same logic, the uninsured owner exclusion does not apply to Myers because Watson, a co-owner, maintained coverage on the Mountaineer through the MetLife Policy. Thus, the Mountaineer had the coverage required by MCL 500.3101. MCL 500.3113(b) does not apply.

B. In *Maurer*, this Court rejected MetLife's argument that *every owner* of a vehicle must maintain an insurance policy in his or her own name.

Below, MetLife attempted to avoid *Iqbal* by relying on this Court's decision in *Barnes*. *Barnes* involved a situation where neither owner of a vehicle owned an insurance policy covering the vehicle *or was a resident relative of someone who did*. Under those circumstances, *Barnes* wrote:

> [P]laintiff cites *Iqbal* and argues that the fact that neither she nor Burton insured the Cavalier does not matter because Huling did. Plaintiff contends that this is so regardless of whether Huling was an owner of the Cavalier. *Iqbal* should not be read so broadly as to apply to even nonowners. . . .
>
> * * *
>
> Therefore, while *Iqbal* held that each and every owner need not obtain insurance, it did not allow for owners to avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance. Thus, under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits. [*Barnes*, 308 Mich App at 7-9.]

However, in the more recent decision *Maurer*, this Court explained—as the Hospitals did below—that *Barnes* does not apply to this case because *an owner* of the Mountaineer, Watson, maintained coverage on the vehicle as a resident relative of the MetLife policyholder, Hyatt.

In *Maurer*, a woman was killed in an accident while driving a car she owned, but which was insured through a policy owned by her husband. Like MetLife here, the insurer took the position, relying on *Barnes*, that coverage was excluded under MCL 500.3113(b): "because plaintiff was the titleholder and registrant of the

vehicle, but her husband was the policyholder, plaintiff is not entitled to coverage . . . ." *Maurer*, Slip op. at *8. This Court explained, as it already had once before in *Iqbal*, that MCL 500.3113(b) is concerned with whether the vehicle, not the driver, had no-fault coverage:

> The seminal case interpreting MCL 500.3113(b) is *Iqbal*. In that case, we considered the plain text of MCL 500.3113(b) and concluded that the critical question was whether the *vehicle* was insured, not whether the owner or registrant had been the purchaser of the policy. [*Maurer*, Slip op. at *8.]

Maurer then rejected *Barnes*'s application of MCL 500.3113(b) in the case of an owner being a resident relative of a policyholder, along with *Barnes*'s crabbed reading of *Iqbal*:

> Six years after *Iqbal* was decided, a panel of this Court read that decision as holding that at least one of the vehicle's owners had to obtain the policy in order "to avoid the consequences" of MCL 500.3113(b). *Barnes*, 308 Mich App at 8-9. We do not read *Iqbal* so narrowly and note that *Barnes* never addressed the plain text of the statute, which by the rules of grammar and the canons of legal interpretation attaches the need for a policy to the vehicle and not the owner. Were the ruling in *Barnes* controlling under the facts of this case, we would declare a conflict with it. However, that is not necessary here because *Barnes* is plainly distinguishable. In that case, *the purchaser of the insurance was neither a relative nor a resident of the same household as the plaintiff. In this case, the policy was purchased by plaintiff's husband, a wholly different scenario*. . . . [*Maurer*, Slip op. at 9 (footnotes omitted).]

And *Maurer* also noted, as the Hospitals did below, that the "Supreme Court has granted leave in a separate case to determine if *Barnes* was rightly decided. See *Dye by Siporin & Assoc, Inc v Esurance Prop & Cas Ins Co*, 501 Mich 944; 904 NW2d 620 (2017)." *Maurer*, Slip op. at 9 n 9.

C. *Maurer* controls the outcome in this case.

Maurer is on all fours with this case because an owner of the Mountaineer (Watson) was a resident relative of the policyholder (Hyatt), thereby insuring the Mountaineer.

The MetLife Policy does not define "reside," but a representative definition is "To live in a place permanently or for a long period." *The American Heritage College Dictionary* (4th ed.). In the no-fault context, the Supreme Court has explained that "resident" has "no absolute meaning," but "must be viewed flexibly, 'only within the context of the numerous factual settings possible.'" *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 495-496; 274 NW2d 373 (1979) (citation omitted). This Court has considered the following indicia in evaluating where someone resides:

> whether the claimant continues to use [the] home as his mailing address, whether he maintains some possessions [there], whether he uses [the] address on his driver's license or other documents, [and] whether a room is maintained for the claimant at the . . . home . . . [*Tienda v Integon Natl Ins Co*, 300 Mich App 605, 616; 834 NW2d 908 (2013), citing *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 382; 333 NW2d 322 (1983).]

The Supreme Court has also explained that a person can have more than one residence. *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 494; 835 NW2d 363 (2013).

Here, Watson used the apartment address for her mail; she maintained possessions there; she used the apartment address on her driver's license; and she, Myers, and Sage had a dedicated room at the apartment. At. App'x at A43-A44.

Watson considered the apartment her "home base." *Id.*; see also *id.* at A112-A113. Thus, Watson resided with Hyatt at the apartment. Accordingly, she was a resident relative of Hyatt under the MetLife Policy. Therefore, Watson maintained coverage for the Mountaineer at the time of the accident.

Iqbal's analysis applies: "While [Myers] did not obtain th[e] coverage, there is no dispute that the [Mountaineer] had the coverage, and that is the only requirement under MCL 500.3113(b)." See *Iqbal*, 278 Mich App at 40. Therefore, the uninsured owner exclusion does not apply to Myers. MetLife is liable for the Hospitals' charges pursuant to Myers's assignments to the Hospitals.

III. MetLife's concealment argument is irrelevant to the Hospitals' claims and otherwise meritless.

Finally, MetLife has argued that Myers is not entitled to no-fault benefits because the MetLife policy is void *ab initio* as a result of Hyatt's failure to list Myers as a driver. Here, it cited *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d 759 (2016), which provides:

> The plain terms of the contract did not require a finding of fraud or intentional misstatement, but rather allowed plaintiff to rescind the contract based on a false statement, misstatement of a material fact, or a failure to disclose. Indeed, it is well settled that an insurer is entitled to rescind a policy *ab initio* on the basis of a material misrepresentation made in an application for no-fault insurance.

In arguing that Hyatt made "a false statement, misstatement of a material fact, or a failure to disclose," MetLife has contended:

> In the present case, it is undisputed that Myers was not identified by Ms. Hyatt as a title owner of the Mountaineer at the time Ms. Hyatt added the vehicle to the subject

> insurance policy. Likewise, Myers was not identified by Ms. Hyatt as a primary driver of the Mountaineer at the time Mr. Hyatt added the vehicle to the subject insurance policy. Consequently Myers is not identified on Metropolitan's policy. [MetLife 2d Br at 12 (citations omitted).]

In addition to being factually incorrect because Watson—not Myers—was the primary driver of the Mountaineer, At. App'x at A45, the only basis in contract that MetLife cited is the declarations page of its policy. *Id.* at A54. But that page nowhere demonstrates any contractual obligation of Hyatt to list Myers. Moreover, it correctly lists that the Mountaineer was Watson's vehicle. Accordingly, MetLife has forwarded no support for its argument. For this reason, it should be rejected as a matter of law.

Moreover, the Supreme Court recently ruled that where an innocent third party hangs in the balance—as Myers and the Hospitals do here—a court must balance the equities in considering rescission.

> When a plaintiff is seeking rescission, "the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks." *Johnson v QFD, Inc*, 292 Mich App 359, 370 n 3; 807 NW2d 719 (2011). Accordingly, courts are not required to grant rescission in all cases. For example, "rescission should not be granted in cases where the result thus obtained would be unjust or inequitable," [*Amster v Stratton*, 259 Mich 683, 686; 244 NW 201 (1932)], or "where the circumstances of the challenged transaction make rescission infeasible," CJS, § 11, p. 507. Moreover, when two equally innocent parties are affected, the court is "required, in the exercise of [its] equitable powers, to determine which blameless party should assume the loss . . . ." [*Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982).] "[W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the

> wrong." *Zucker v Karpeles*, 88 Mich 413, 430; 50 NW 373 (1891). "The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked." *Id.* [*Bazzi v Sentinel Ins Co*, 502 Mich 390, 410-422; 919 NW2d 20 (2018).]

Thus, even if MetLife had demonstrated concealment by Hyatt, its policy is not void *ab initio*; a court must weigh the equities. Here, where the Mountaineer was listed on the MetLife Policy, where Watson was listed on the MetLife Policy, where Myers paid premiums via Hyatt, because Myers and the Hospitals reasonably expected coverage, and, perhaps most importantly, *because MetLife has never returned the premiums it collected under the MetLife Policy*, the equities favor the Hospitals and Myers, not MetLife. See At. App'x at A114 ("At any point after the accident did MetLife refund any of those premiums you paid on that Mountaineer? No.").

MetLife's rescission argument is without merit.

Conclusion

For these reasons, this Court should either (1) reverse the Kent County Circuit Court's ruling below and remand this case with instructions for the Kent County Circuit Court to address the substance of the parties' arguments or (2) remand this case for entry of summary disposition on behalf of the Hospitals in light of the straightforward legal issues and controlling authority that favors the Hospitals. The Hospitals respectfully request the latter.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

MECOSTA COUNTY MEDICAL CENTER, d/b/a SPECTRUM HEALTH BIG RAPIDS; SPECTRUM HEALTH PRIMARY CARE PARTNERS, d/b/a SPECTRUM HEALTH MEDICAL GROUP; MARY FREE BED REHABILITATION HOSPITAL; and MARY FREE BED MEDICAL GROUP,

Plaintiffs-Appellants,

v

METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY; and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;

Defendants-Appellees.

Court of Appeals
Case No. 345868

Kent County Circuit Court
Case No. 17-07407-NF

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PLAINTIFFS-APPELLANTS' BRIEF IN REPLY TO STATE FARM'S BRIEF ON APPEAL

Oral Argument Requested

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Introduction

State Farm's brief repeats the analytical flaws of MetLife's. Because Myers assigned his claims to the Hospitals before he filed the Wayne County Lawsuit, the Hospitals are not the same parties as Myers or his privies as to the judgment in that case. Neither res judicata nor collateral estoppel applies. Myers's post-assignment actions cannot affect the Hospitals' claims.

I. Myers's post-assignment actions in the Wayne County Lawsuit cannot preclude the Hospitals' claims.

A. The Hospitals are not the same parties as Myers or his privies.

It is a "basic premise of preclusion law" that a "court's judgment binds only the parties to a suit subject to a handful of discrete and limited exceptions." *Smith v Bayer Corp*, 564 US 299, 312; 131 S Ct 2368; 180 L Ed 2d 341 (2011).

> The importance of this rule and the narrowness of its exceptions go hand in hand. We have repeatedly "emphasize[d] the fundamental nature of the general rule" that only parties can be bound by prior judgments; accordingly, we have taken a "constrained approach to nonparty preclusion."

Id. at 312-313, citing *Taylor v Sturgell*, 553 US 880, 898; 128 S Ct 2161; 171 L Ed 2d 155 (2008). The issues of privity and identity are crucial to the application of res judicata and collateral estoppel because the Insurers seek to apply preclusion to the Hospitals, who were not parties to the Wayne County Lawsuit.

State Farm seeks to avoid the rule articulated in *Smith* by confusing the relevant concepts. For instance, State Farm's position is that the Hospitals "are the same party as Myers, *or, at the very least they are substantially identical to Myers* (*i.e., in privity with Myers*)." SF Br. at 8 (emphasis added). But this is not a situation

in which courts may squint to determine that a relationship is close enough. Either the parties are the same or in privity or they are not. And if they are not, they cannot be bound by rulings against one another.

As the Hospitals have repeatedly noted, they are not Myers's privies because a "privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties . . . ." *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971) (emphasis added). Here, the Hospitals acquired their interest in Myers's claims against the Insurers before "rendition of the judgment" in Wayne County; the Hospitals acquired their interest months before Myers even filed the Wayne County Lawsuit. Accordingly, the Hospitals were not the same parties as Myers or his privies at the time the judgment that the Insurers now seek to apply against the Hospitals was rendered.

To support its "substantial identity" argument, State Farm cites a string of unpublished cases. *Cauff v Fieger, Fieger, Kenney & Johnson, PC*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2009 (Docket No. 281442); *Kelley v Heppler*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 1997 (Docket No. 187925); *Liberty Bidco v Production Stamping, Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2002 (Docket No. 226609). None is persuasive because each involved *post-suit* assignments. In each, the action for which the court found privity occurred *before* the rights were assigned. That fact is fatal to State Farm's position. See, e.g., *Kelley*, SF App'x at SF178 ("Subsequently,

NBD assigned its rights to plaintiff, who filed an action" against which res judicata was asserted.); *Liberty Bidco*, SF App'x at SF180 ("[A]lmost two months after the first amended complaint was filed . . . Enamelcote assigned to Liberty Bidco its accounts receivable . . . ."); contra, *Howell*, *supra*. Moreover, in *Cauff* the plaintiff was actually a party to the case on which res judicata was based. SF App'x at SF176 ("That element is . . . met in this case given that plaintiff was individually a party to the 2005 lawsuit and that plaintiff's assignors or privies to the promissory note . . . were also parties to the 2005 lawsuit."). Because Myers assigned the Hospitals his claims pre-suit, the Hospitals were not Myers's privies in that action. State Farm's reliance on the unpublished cases is misplaced.

Despite having just cited three unpublished cases, State Farm asks this Court to disregard the Supreme Court's holding in *Howell* as dicta and ignore it. SF Br. at 13. But *Howell*'s statement is not dicta. "[A] decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case." *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003).

In *Howell*, the Court explicitly stated that one issue was whether "plaintiff's estate or Anna Sue were parties or privies in the former federal suit . . . ." *Id.* at 43. *Howell*'s holding regarding privity was necessary to that issue and "demonstrates application of the judicial mind." See *Howell*, 386 Mich at 43, citing

Bernhard v Bank of Am Nat Trust & Savins Ass'n, 19 Cal 2d 807; 122 P2d 892, 894 (1942). *Howell*'s holding is not dicta.

B. The Hospitals have not made the arguments State Farm attacks.

State Farm spends the remainder of its response brief attacking strawmen of its own creation. For instance, it contends:

> . . . Michigan courts apply a definition of privity that is broader than the after-rendition of judgment standard Plaintiffs assert from *Howell*. Indeed, one who acquires a post-judgment interest in the subject affected by the judgment is one ***type*** of privity, and privity can (and does) exist pre-judgment.

SF Br. at 13.

The Hospitals do not argue against the concept of pre-judgment privity. It can exist, but that is not relevant to this case because the Hospitals took assignment of Myers's right to sue the Insurers before he filed the Wayne County Lawsuit. Actions taken "by the assignor, after the assignment, can not [*sic*] avail against the assignee, and courts will protect the latter against all the acts of the former[.]" *Hogan v Sherman*, 5 Mich 60, 61-62 (1858) (citations omitted). State Farm's statement is inapposite.

State Farm also suggests that the Hospitals argue that an assignee can *never* be in privity with an assignor, stating "an assignee has met the requirements for privity since before the Civil War." SF Br. at 14, citing *Prentiss v Holbrook*, 2 Mich 372, 376-377 (1852). But the Hospitals have never argued that an assignee can *never* be in privity with an assignor. Of course, he, she, or it can. If, for instance, the Wayne County Lawsuit had been dismissed *before* Myers assigned his claims to the

Hospitals, the Hospitals would be in privity with Myers as to that dismissal. Under those circumstances, the Hospitals would "*after rendition of the judgment*, ha[ve] acquired an interest in the subject matter affected by the judgment through or under one of the parties." *Howell*, *supra*.

State Farm's antebellum caselaw confirms that distinction:

> The remaining question in this case is, whether the Court erred in charging the jury that the judgment rendered in the case of *Prentiss v. Cicotte*, was a bar to the plaintiff's action. Cicotte was the sheriff of Wayne County, and levied on the property in question by virtue of an execution issued on a judgement in the County Court, rendered in the case of *Spellman and Fraser v. Chase*, as the property of Chase. After the levy, and while the property was in the hands of the sheriff, Prentiss claiming the property as his, brings his action against the sheriff, which, on a final hearing, was determined against him, *and he now seeks to recover the property in specie, against the present defendant, who was the purchaser thereof at the sheriff sale.*

Prentiss, 2 Mich at 375 (emphasis added). As with every other case upon which State Farm relies, *Prentiss* involved a situation where the judgment was rendered *before* the assignment. Here, it was rendered after.

Finally, State Farm claims that the Hospitals "argue that their assignee status immunizes them from any defenses that State Farm or MetLife may have against Jacob Myers." SF Br. at 18. That is also untrue. If Myers is not entitled to no-fault coverage, the Hospitals cannot receive coverage. But the *coverage determinations* made in the Wayne County Lawsuit do not impact whether coverage exists for purposes of the Kent County Lawsuit. The Hospitals—not Myers—have the right to argue those claims in this lawsuit and respond to the Insurers' defenses.

And as set forth in the Hospitals opening brief, the Wayne County holding that Myers was excluded from no-fault coverage is legally incorrect.

On this point, State Farm cites caselaw that directly supports the Hospitals. "The rule that an assignee of a nonnegotiable chose takes subject to defenses means, of course, *defenses existing at the time of the assignment*. After assignment, the assignor loses all control over the chose, and cannot bind the assignee, by estoppel or otherwise." *Saginaw Fin Corp v Detroit Lubricator Co*, 256 Mich 441, 443; 240 NW 44, 45 (1932) (emphasis added); see also *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). At the time of the assignment, Myers could bring claims against the Insurers and counter their claim that he was excluded from coverage. Myers's post-assignment actions cannot affect those claims because, as *Saginaw* explains, "[a]fter assignment, the assignor loses all control over the" claims. Just because the Insurers persuaded the Wayne County court that the no-fault exclusion applied, does not mean they do not have to do so in the Kent Circuit court. That is an especially important point in this case because the Wayne County court's holding is legally incorrect.

Because Myers assigned his claims to the Hospitals before he filed the Wayne County Lawsuit, that Court lacked jurisdiction over those claims. "The foreclosure sale under the assigned decree was void. *After the assignment, further proceedings could not be prosecuted in the name of the assignor*." *Moore v Smith*, 103 Mich 387, 389; 61 NW 538, 539 (1894) (emphasis added). State Farm's extended argument on this point is misplaced.

C. Myers's ability to affect the claims he assigned to the Hospitals concluded the moment he assigned those claims.

Like MetLife, State Farm contends that the "stands-in-the-shoes" standard applies to the Hospitals as Myers's assignees. SF Br. at 22, citing *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 44; 795 NW2d 229 (2010); *Profl Rehab Assocs v State Farm Mut Auto Ins Co,* 228 Mich App 157, 177; 577 NW2d 909 (1998). But this Court has explained, consistent with the Michigan caselaw above, that once an assignee assigns his or her claims any "judgment . . . [is] unenforceable because the claim was no longer hers to pursue." *Middleditch v Irish American Club*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2000 (Docket No. 212406), At. App'x at A215.

Before *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), healthcare providers' claims were considered derivative of the patients. After *Covenant*, they are not because the patients have assigned them and, therefore, have no right to pursue them. To use State Farm's language, in the pre-*Covenant* world, the healthcare providers stood in the patient's shoes, and the patient continued to wear those shoes. In the post-*Covenant* world, the healthcare providers stand in the patient's shoes *at the time of the assignment*. Through assignment the patient takes off the shoes, and the healthcare providers stand in them alone.

Because Myers assigned his claims to the Hospitals before the Wayne County Lawsuit was decided, that decision does not affect the Hospitals. Myers's post-assignment actions cannot be imputed to the Hospitals under res judicata or collateral estoppel.

II. There is an apparent priority dispute between MetLife and State Farm that requires State Farm's continued involvement in this case.

Finally, State Farm argues that, regardless of preclusion, "there are no facts supporting the conclusion that State Farm is the responsible insurer." SF Br. at 26. The Hospitals agree that MetLife is the highest priority insurer, but, because MetLife has claimed that State Farm is the higher priority insurer, the Hospitals must preserve their potential claims against State Farm in the unlikely event that a court agrees with MetLife.

Conclusion

This Court should both (1) reverse the Kent County Circuit Court's ruling below and remand this case with instructions for the Kent County Circuit Court to address the substance of the parties' arguments or (2) remand this case for entry of summary disposition on behalf of the Hospitals and requiring MetLife to provide coverage, given the straightforward legal issues and controlling authority that favors the Hospitals. The Hospitals respectfully request the latter.

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STATE OF MICHIGAN

IN THE SUPREME COURT

MECOSTA COUNTY MEDICAL CENTER, d/b/a SPECTRUM HEALTH BIG RAPIDS; SPECTRUM HEALTH HOSPITALS; SPECTRUM HEALTH PRIMARY CARE PARTNERS, d/b/a SPECTRUM HEALTH MEDICAL GROUP; MARY FREE BED REHABILITATION HOSPITAL; and MARY FREE BED MEDICAL GROUP,
(Jacob Carl Myers)

Plaintiffs-Appellees,

v

METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY; and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;

Defendants-Appellants.

Case No. 161628

Court of Appeals
Case No. 345868

Kent County Circuit Court
Case No. 17-07407-NF
Hon. Dennis B. Leiber

MECOSTA COUNTY MEDICAL CENTER, d/b/a SPECTRUM HEALTH BIG RAPIDS; SPECTRUM HEALTH HOSPITALS; SPECTRUM HEALTH PRIMARY CARE PARTNERS, d/b/a SPECTRUM HEALTH MEDICAL GROUP; MARY FREE BED REHABILITATION HOSPITAL; and MARY FREE BED MEDICAL GROUP,
(Jacob Carl Myers)

Plaintiffs-Appellees,

v

METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY; and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;

Defendants-Appellants.

Case No. 161650

Court of Appeals
Case No. 345868

Kent County Circuit Court
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PLAINTIFFS/APPELLEES' ANSWER IN OPPOSITION TO DEFENDANTS/APPELLANTS' APPLICATIONS FOR LEAVE TO APPEAL IN CASE NOS. 161628 AND 161650

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STATEMENT OF QUESTION INVOLVED

Did the Court of Appeals err in ruling that the plaintiff-hospitals, as assignees (and, therefore, owners, real parties in interest, and the *only* parties free to pursue the claims assigned), were not bound by a judgment entered against their assignor in a lawsuit he filed *after the assignments* and to which they were not made parties, when Michigan law authorizes assignment-based claims, when the Court of Appeals' decision was consistent with more than a century of this Court's jurisprudence, when the parties seeking to invoke preclusion could have protected themselves from the possibility of inconsistent rulings by seeking joinder under MCR 2.205 but failed to do so, and when the very basis of the judgment against the assignor has since been shown to be wrongful?

The trial court did not answer this question.

The Court of Appeals answers: No.

Appellants answer: Yes.

Appellees answer: No.

INTRODUCTION

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v Sturgell*, 553 US 880, 884; 128 S Ct 2161; 171 LE2d 155 (2008). The application of res judicata or collateral estoppel to a nonparty runs up against the "deep-rooted historic tradition that everyone should have his own day in court," *id*. at 892-93, the opportunity to be heard being an "essential requisite" of the due process of law. *Postal Telegraph Cable Co v Newport*, 38 S Ct 566, 476; 38 S Ct 566; 62 L Ed 1215 (1918).

In seeking leave to appeal to this Court, Metropolitan Group Property and Casualty Insurance Company ("MetLife") and State Farm Mutual Automobile Insurance Company ("State Farm") (collectively, "the Insurers"), ask this Court to ignore this deep-rooted and essential principle. The Court should decline the invitation.

After receiving more than $600,000 in treatment for injuries he sustained in his accident, Jacob Myers assigned to Spectrum Health and Mary Free Bed all of his rights, benefits, and causes of action relating to the hospitals' charges. As proper assignees, Spectrum Health and Mary Free Bed were owners, real parties in interest, and the *only* parties free to pursue the claims assigned. The Court of Appeals properly concluded that a judgment entered against Myers in a lawsuit he filed *after the assignments*, and to which Spectrum Health and Mary Free Bed were not made parties, did not bar Spectrum Health and Mary Free Bed from pursuing their claims here. The Court of Appeals' decision was consistent with more than a century of this Court's assignment jurisprudence. Indeed, all parties knew here that Myers' action against the Insurers and Spectrum Health's and Mary Free Bed's action were proceeding independently. If the Insurers had wished Spectrum Health and Mary Free Bed to be bound by Myers' action, they were free to seek joinder under MCR 2.205 and, in fact, it was their burden to do so. Having failed to take advantage of the court rules, the law is clear: they cannot now

invoke res judicata and collateral estoppel against those they failed to join. For the Court of Appeals to have held otherwise would have deprived the hospitals not only of their day in court, but from pursuing their rights consistent with this Court's ruling in *Covenant Med Ctr Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

Beyond that, these are judicially-created, equitable doctrines, not inflexible mandates. Even if their elements were satisfied (which they are not), their application here would be plainly unjust. It would render the assignments Spectrum Health and Mary Free Bed received effectively null and void without the hospitals ever having received their day in court, a deep-rooted and essential requisite of the due process of law. Even more, the sole basis for the judgment against Myers—that he was excluded from receiving benefits under MCL 500.3113(b), as an uninsured owner, because neither he nor his co-owner had *personally* obtained the insurance on the vehicle—has since been overturned by this Court. That is, the Wayne County Court's judgment was quite simply wrong. Where, as here, the very underpinnings of the prior ruling have been shown to be erroneous, the doctrines of res judicata and collateral estoppel have even less application.

For these reasons and those discussed below, Spectrum Health and Mary Free Bed respectfully request that this Court deny the Insurers' applications for leave to appeal.

COUNTER-STATEMENT OF FACTS

I. THE VEHICLE IS INSURED WITH METLIFE.

In early 2016, Jacob Myers and his girlfriend, Morgan Watson, purchased a 2003 Mercury Mountaineer with money from Watson's tax return. The vehicle was titled in both of their names, though Watson would be the primary driver as Myers had another vehicle of his own already. (Watson 8/27/18 Dep, pp 12-13, 30-31; AT App'x SF290-291, SF295) (Myers 8/27/18 Dep, pp 11-15; AT App'x SF274-275.) At the time, the couple and their two-year old daughter, Sage, were living with Watson's grandmother in a two-bedroom apartment, the small family sharing one bedroom and the

grandmother, Jo Ann Hyatt, in the other. (Watson 8/27/18 Dep, pp 13-14; AT App'x SF291) (Hyatt 8/14/18 Dep, p 8; AT App'x SF306.)

Myers initially insured the Mountaineer through Progressive, but then switched to Esurance because it offered a lower premium. (Myers 8/27/18 Dep, p 14; AT App'x SF275.) Eventually even Esurance proved more than the couple could afford. Myers cancelled the Esurance policy and Watson asked her grandmother to add the Mountaineer onto her existing policy with MetLife. (Myers 8/27/18 Dep, pp 12-14; AT App'x SF274-275) (Watson 8/27/18 Dep, pp 14-16; AT App'x SF291.) Hyatt called MetLife seeking to insure the Mountaineer. She informed them that Watson was her granddaughter, that Watson was living with her, and that Watson owned the Mountaineer and was its primary driver – all of which was true and correct. (Watson 8/27/18 Dep, pp 16-18; AT App'x SF291-292) (Hyatt 8/14/18 Dep, pp 20-22; AT App'x SF309-310.) MetLife informed Hyatt that her rate would go up by around $200 per month; Hyatt agreed and Watson promised to pay her grandmother as often as she could for the additional premiums. (Watson 8/27 Dep, pp 18-20; AT App'x SF292) (Hyatt 8/14/18 Dep, pp 22-23; AT App'x SF310.) Consistent with this transaction, MetLife's amended policy declaration page listed the Mountaineer as a covered vehicle, Mrs. Watson as both an included driver and the "assigned" driver of the Mountaineer, and identified the address of the apartment they shared. (AT App'x MET55.)

II. JACOB MYERS IS INJURED IN A MOTOR VEHICLE ACCIDENT AND IS TREATED BY SPECTRUM HEALTH AND MARY FREE BED.

Early in the morning on August 15, 2016, Myers was injured in a motor vehicle accident. He was driving the Mountaineer at the time, his other vehicle having broken down and been sold a few weeks prior. His injuries were severe. (Myers 8/27/18 Dep, pp 15-16, 23-26; AT App'x SF275, SF277-78.) From August 15, 2016 through and exceeding March of 2017, Spectrum Health and Mary

Free Bed provided him with care and treatment, with the charges for those many months of care exceeding $600,000.[1]

III. MYERS ASSIGNS HIS RIGHTS TO SPECTRUM HEALTH AND MARY FREE BED AND SPECTRUM HEALTH AND MARY FREE BED, AS PROPER ASSIGNEES, SUE THE INSURERS.

Through a series of assignments, the last of which is dated May 19, 2017, Myers assigned to Spectrum Health and Mary Free Bed all of his rights, benefits, and causes of action in connection with Spectrum Health's and Mary Free Bed's charges. (AT App'x SF54-87.) The assignments provide:

ASSIGNMENT OF BENEFITS
I agree:

- To pay all expenses including, but not limited to, court costs and actual attorney fees incurred by Mary Free Bed Rehabilitation Hospital (MFB) in collecting this account.
- To assign MFB in collecting this account.
- To assign MFB any right or cause of action that I may have against any third person to collect and recover for the expense of this account.
- To release any billing information for payment of account by any insurance company or employer. I authorize any insurance companies to pay directly to MFB liability and/or medical insurance proceeds for all services and supplies rendered by MFB for this admission.
- That I am financially responsible to MFB for all services and supplies not covered by the liability and/or medical coverage insurance.

ASSIGNMENT

– I assign Spectrum Health:
  – All benefits, claims, and any and all other rights, including the right to bill and talk to any third party for the purpose of seeking payment.
  – The right to file suit or intervene in any lawsuit or proceeding which involves my charges at Spectrum Health.
  – The right to take any other action seeking payment of my Spectrum Health charges.
– This assignment includes, but is not limited to, the right to appeal the denial of payment of my Spectrum Health charges from any payer, including any employer–sponsored benefit plan, insurance policy or insurance coverage provided by law or contract. I authorize Spectrum Health to act on my behalf to pursue an ERISA benefit claim or to appeal an adverse benefit determination. I agree to assist Spectrum Health in the pursuit of all insurance benefits and agree to pay all co–insurance, co–payments and deductibles required by any insurance plan.
– I also assign to Spectrum Health, and agree that I waive, any and all rights to settle, release or retain payment of my Spectrum Health charges, or take any other action which would in any way compromise payment or reimbursement of my Spectrum Health charges.

[1] Though it admits that the issue of residency is not pertinent to its application, MetLife nonetheless asserts that Watson and Myers had both moved out of Hyatt's apartment and into his parents' home by the time the motor vehicle accident occurred. (MetLife's Application, pp 3-4.) Spectrum Health and Mary Free Bed agree that Watson's and Myers' domicile are not material to ruling on MetLife's Application, but also deny that either was domiciled with Myers' parents. At the time of the accident, both Myers and Watson had keys to Hyatt's apartment; both had belongings there, including Sage's crib; both received mail there; Myers' name was on the lease and he paid rent. Watson testified that she still considered her grandmother's place to be "home-base" and it was the address on her driver's license. Moreover, the couple did not have a room at Myers' parents' home and, instead, slept on the couch when they did stay there, and had no intention to stay there permanently. (Myers 8/27/18 Dep, pp 18, 20-22; AT App'x SF276-77) (Watson 8/27/18 Dep, pp 27, 33; AT App'x SF294, SF296.)

As the owners of Myers' claims as related to their charges, Spectrum Health and Mary Free Bed filed suit on August 15, 2017 against the Insurers in Kent County Circuit Court. At that point in time, litigation was already ongoing between the Insurers in Wayne County, State Farm having sued MetLife seeking a declaratory judgment as to their priority. (See *State Farm Mut Auto Ins Co v Metropolitan Group Prop & Cas Ins Co*, Wayne County Circuit Court Case No 17-005137-NI, filed on March 31, 2017) (See also State Farm's Application, p 8.) Consistent with MCR 1.109(D)(2), Spectrum Health and Mary Free Bed included in their complaint a statement identifying that action as pending. (AT App'x SF34.)

On the same day that Spectrum Health and Mary Free Bed filed their suit, and in violation of the assignments he had given them, Myers himself sued the Insurers in Wayne County Circuit Court purporting to recover the Hospitals' charges. (See *Myers v Metropolitan Group Prop & Cas Ins Co*, Wayne County Circuit Court Case No. 17-012213-NF, filed August 15, 2017; AT App'x SF90.) Myers' complaint sought not only wage loss, attendant care, and replacement services, but also "reasonable and necessary expenses for care, recovery, and rehabilitation." (Myers Complaint, ¶12, AT App'x SF92.) It appears that the two Wayne County cases were eventually consolidated (hereinafter, the "Wayne County Litigation"). (State Farm's Application, p 8.)

IV. THE WAYNE COUNTY AND KENT COUNTY LITIGATION RUN IN PARALLEL, WITH THE KNOWLEDGE OF ALL PARTIES.

On October 26, 2017, MetLife moved the Kent County Circuit Court to transfer venue to Wayne County. Spectrum Health and Mary Free Bed objected. They were proper plaintiffs and Kent County a proper venue for the claims that Myers had assigned to them. Kent County is where nearly all of Myers' treatment occurred and where a substantial majority of the witnesses and evidence were located. The accident had actually occurred in Mecosta County, Myers had initially treated at Spectrum's Big Rapids facility, and was promptly transferred to Spectrum's Grand Rapids facility,

where he remained inpatient for a month. Following that, Myers was inpatient at Mary Free Bed for an additional two weeks. And following that, Myers continued to treat intermittently at Spectrum's and Mary Free Bed's facilities in the weeks and months that followed. As Spectrum Health and Mary Free Bed argued, MetLife simply had not met *its* burden, as the party seeking transfer, to make a persuasive showing that Wayne was the more convenient county. (AE App'x 1.) The trial court agreed and, by order dated December 14, 2017, denied MetLife's motion to change venue. (AE App'x 2.) Accordingly, this case and the Wayne County Litigation ran in parallel.

Notably, after the trial court denied MetLife's request to change venue, neither MetLife nor State Farm sought, in the Wayne County Litigation, to join Spectrum Health and Mary Free Bed as necessary parties under MCR 2.205 nor did they move for summary disposition against Myers as to the claims they knew he had assigned away, and thus no longer owned. See MCR 2.116(C)(7) (permitting dismissal "because of . . . assignment or other disposition of the claim before commencement of the action"). Instead, both matters moved forward independently with the knowledge of all parties and with Spectrum Health and Mary Free Bed having no involvement in the Wayne County Litigation.

V. THE INSURERS FILE SEVERAL MOTIONS FOR SUMMARY DISPOSITION. THE TRIAL COURT RULES THAT SPECTRUM HEALTH'S AND MARY FREE BED'S CLAIMS ARE BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Initially, in this case, both Insurers filed motions for summary disposition arguing that Spectrum Health's and Mary Free Bed's claims were barred by this Court's holding in *Covenant* that medical providers do not possess their own statutory cause of action. By order dated April 20, 2018, the trial court denied those motions, explaining that *Covenant* expressly preserved a provider's ability to directly sue insurers by way of assignment, as Spectrum Health and Mary Free Bed had done. (AE App'x 3.)

On May 21, 2018, MetLife filed a second motion for summary disposition, this time arguing that Myers was excluded from receiving benefits under MCL 500.3113(b), as an uninsured owner, because neither he nor Watson had *personally* insured the vehicle, citing *Barnes v Farmers Ins Exch*, 308 Mich App 1; 862 NW2d 681 (2014). In the alternative, MetLife argued that the policy it had issued to Hyatt was void *ab initio* because, it claimed, she had concealed the fact that Myers was a co-owner of the Mountaineer. That motion was adjourned to the close of discovery. (See AT App'x SF149-151.)

On June 14, 2018, MetLife filed a new motion for summary disposition on those very same grounds, with the hearing set for August 17, 2018. (AT App'x SF149-151.)

Apparently, at some point, MetLife had also filed a similar motion in the Wayne County Litigation, which the Wayne County Circuit Court granted by order dated July 19, 2018, finding Myers "ineligible for first party personal injury protection benefits pursuant to MCL 500.3113(b)." (AT App'x MET30-31.) Whether and to what extent Myers had actually opposed MetLife's motion in the Wayne County Litigation is unclear. Neither any brief in opposition he may have filed nor transcript of a hearing on the motion was ever submitted in this case.

The Wayne Court order now in hand, on July 26, 2018, MetLife filed another motion for summary disposition, this time arguing that the Wayne County judgment against Myers precluded Spectrum Health and Mary Free Bed from proceeding with this action under the doctrines of res judicata and collateral estoppel. (See AT App'x SF235-237.) Spectrum Health and Mary Free Bed opposed both of MetLife's pending motions. (See AT App'x SF244-348.)

As to res judicata and collateral estoppel, Spectrum Health and Mary Free Bed argued they are neither the "same party" as Myers nor his privy. Indeed, when Myers assigned his rights to them, he had not even filed—let alone lost—the Wayne County Litigation, so that litigation could not affect

what it was he had assigned to them. The case upon which MetLife had primarily relied, *TBCI PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010), was inapposite both in that it was decided in a pre-*Covenant* landscape and because it simply did not involve an assignment. Moreover, res judicata and collateral estoppel are equitable doctrines, not intended to be used as a means of gamesmanship. MetLife knew that Myers had assigned away his claims regarding Spectrum Health's and Mary Free Bed's charges, but never moved for summary disposition against him in the Wayne County Litigation. Instead, it proceeded against Myers, knowing he had assigned his rights away, hoping that it could use a judgment in that case to collaterally attack Spectrum Health's and Mary Free Bed's claims here. (AT App'x SF256-260.)

On MetLife's substantive motion, Spectrum Health and Mary Free Bed argued that Myers wasn't excluded as an uninsured owner because his co-owner, Watson, had "maintained" coverage on the Mountaineer through MetLife as a relative residing with Hyatt. Hyatt's apartment was the address on Watson's driver's license; she had keys; she received mail there; she had belongings there, including Sage's crib; and she had testified that she considered it her "home base." It was, therefore, *Iqbal v Bristol W Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008), not *Barnes*, that was controlling on the issue. Moreover, Spectrum Health and Mary Free Bed noted, this Court had already granted leave in *Dye v Esurance Prop & Cas Ins Co*, 501 Mich 944; 904 NW2d 620 (2017), to consider whether *Barnes* was correctly decided. Spectrum Health and Mary Free Bed also opposed MetLife's alternative "concealment" argument against Hyatt both as factually untrue and improper under the law. (AT App'x SF260-269.)

The hearing on MetLife's motions for summary disposition was set for September 7, 2018. One day before, on September 6, 2018, State Farm filed its own motion for summary disposition based upon res judicata and collateral estoppel. As with MetLife, State Farm had been granted summary

disposition against Myers in the Wayne County Litigation. (AT App'x SF231.) Again, it is unclear whether and to what extent Myers had actually opposed State Farm's motion. Nonetheless, State Farm sought to use the Wayne County judgment to bar Spectrum Health and Mary Free Bed from pursuing their claims in this case. In the alternative, State Farm also argued that there was no genuine issue of material fact that it was not in the order of priority because Myers did not reside with its insured, Michael Gray. (See AT App'x SF349-352.)

The next day, September 7, 2018, the trial court heard argument on MetLife's two pending motions. (AT App'x MET34.) From the start, the court assumed that State Farm would join MetLife's position regarding res judicata and collateral estoppel and State Farm did, in fact, do so. (AT App'x MET41-42.) The court's ruling addressed only the Insurers' res judicata and collateral estoppel arguments. It did not make any ruling regarding Myers' or Watson's domicile or the effect thereof. It stated:

> [R]ecognizing that Judge Hughes [in the Wayne County Litigation] found that Jacob Myers is ineligible for first party personal injury protection benefits, recognizing that Judge Hughes dismissed Myers' claims against Defendant Metropolitan with prejudice, this Court is of the opinion that the claims in the instant case filed in Kent County are barred by the doctrines of collateral estoppel and res judicata.
>
> The law is clear and the answer is plain, the health care provider is barred from litigating a claim for payment of medical expenses against an insurer when the patient's claims have been dismissed with prejudice against the insurer. *See TBCI, PC v State Farm Mutual Automobile Insurance Company*, 289 Mich App 39 (2010).
>
> Accordingly, the defendants' Motion for Summary Disposition is granted, and the Court thereby finds that further discussion under (C)(10) analysis is irrelevant. [AT App'x MET48.]

An order dismissing Spectrum Health's and Mary Free Bed's claims against both of the Insurers on grounds of res judicata and collateral estoppel was entered September 21, 2018. (AT App'x MET32-33.)

VI. THE COURT OF APPEALS ISSUES AN UNPUBLISHED DECISION REVERSING THE TRIAL COURT: RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR SPECTRUM HEALTH AND MARY FREE BED, AS PROPER ASSIGNEES, FROM PURSUING THEIR CLAIMS IN THIS CASE.

Spectrum Health and Mary Free Bed timely appealed the dismissal of their claims. The parties briefed the issues, oral argument took place March 4, 2020, and the Court of Appeals issued an unpublished opinion on March 24, 2020. (AT App'x SF1-7.)

The opinion is thorough and well-reasoned. The court began by addressing assignment law, noting first that an assignee stands in the shoes of his assignor and, therefore, obtains no greater rights than the assignor possessed at the time of the assignment. It then noted, however, that once he has assigned away his rights, an assignor cannot deprive his assignee of his day in court. It explained:

> An assignee is not bound by a judgment that his predecessor in interest obtained after the assignment at issue, even though the defendants raised the assignment as a defense, because the assignee was not in privity with the assignor. *Aultman, Miller & Co v Sloan*, 115 Mich 151, 154; 73 NW2d 123 (1897). A contrary rule would allow an assignor to cut off the rights of the assignee without affording him an opportunity to be heard. *Id.* Indeed, it may constitute a deprivation of property without due process of law to extend privity to bind an assignee by a judgment entered against his or her assignor that occurred after the assignor assigned his or her rights in the property. *Postal Tel Cable Co*, 247 US 464, 476; 38 S Ct 566; 62 L Ed 1215 (1928). In this state rather, for purposes of property law, an assignee is in privity with the assignor only up to the time of the assignment. See *Howell v Vito's Trucking & Escavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971). Accordingly, if the party asserting preclusion has no other basis for establishing privity beyond the fact that the assignee succeeded to the assignor's interest, the party asserting preclusion will not prevail unless the judgment was entered before the transfer at issue. *Id.* [AT App'x SF4-5.]

The Court then laid out and analyzed the elements of res judicata and concluded that the last two were not satisfied: (1) the two actions did not involve the same parties or their privies and (2) the

issues presented in the second action could not have been decided in the first.[2] As to the latter, Myers had assigned away his rights regarding Spectrum Health's and Mary Free Bed's charges and, thus, divested himself of the ability to pursue those claims in the Wayne County Litigation. As to the former, the Court explained as follows:

> [The Insurers] make much of the fact that an assignee stands in the shoes of the assignor, and they suggest that legal maxim requires courts to extend privity beyond the date of the assignor's assignments. That maxim, however, is nothing more than a shorthand reference for the well-settled principle that the assignee of property obtains no greater rights than the assignor had, and remains subject to the same defenses that would be applicable to the assignor. It does not mean that the assignee remains in privity with the assignor in perpetuity, such that the assignor can intentionally or unintentionally alter the assignee's rights after the assignment. [AT App'x SF6 (internal citations omitted).]

Instead, the Court explained:

> [W]ith certain exceptions, the assignor relinquishes all power to alter the assignee's rights in the property. See *Saginaw Fin Corp v Detroit Lubricator Co*, 256 Mich 441, 443-444; 240 NW 44 (1932) ("The rule that an assignee of a nonnegotiable chose takes subject to defenses means, of course, defenses existing at the time of the assignment. After the assignment, the assignor loses all control over the chose, and cannot bind the assignee, by estoppel or otherwise."). To be sure [the Insurers] can still assert any defenses they may have—including a claim of fraud to invalidate the policy and the violation of MCL 500.3113(b)—to defeat the claims by [Spectrum Health and Mary Free Bed]. What is clear, however, is that the trial court had no authority to deprive [Spectrum Health and Mary Free Bed] of their day in court on the ground that [they] were Myers' privies because Myers assigned his rights under the insurance policy to them. Once Myers assigned his right, nothing he did or suffered after he parted with his rights could—on the facts before this Court—affect the rights previously vested in [Spectrum Health and Mary Free Bed] because they were no longer his privies. [*Id.*]

[2] The Court did not separately analyze the elements of collateral estoppel, but, like res judicata, it requires that the two suits involve the same parties, a requirement not satisfied here.

Beyond that, the Court noted, res judicata is a judicially created, equitable doctrine, and its application here "would obviate the assignment and effectively render it null and void and deprive [Spectrum Health and Mary Free Bed] of the right to pursue their claims." (*Id.*)

The Court of Appeals also rejected the trial court's reliance on *TBCI* because it did not involve an assignment and because its application would run contrary to this Court's rulings in cases like *Aultman*, *supra*, by extinguishing Spectrum Health's and Mary Free Bed's rights without affording them the opportunity to be heard. (AT App'x SF7.)

Finally, the Court did not rule on the Insurers' domicile and fraud arguments, as the trial court had not ruled on them. The Court reversed and remanded to the trial court for proceedings consistent with its opinion. (*Id.*) MetLife and State Farm's applications to this Court followed.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews de novo a grant or denial of summary disposition. *Covenant*, 500 Mich at 199. Also reviewed de novo are questions of statutory interpretation and the application of legal doctrines, like res judicata and collateral estoppel. *Washington v Sinai Hosp of Greater Detroit,* 478 Mich 412, 417; 733 NW2d 755 (2007).

II. JACOB MYERS' ACTIONS, SPECTRUM HEALTH'S AND MARY FREE BED'S ACTIONS, AND THE COURT OF APPEALS' ANALYSIS WERE ENTIRELY CONSISTENT WITH THE NO-FAULT ACT AND MORE THAN CENTURY OF THIS COURT'S ASSIGNMENT JURISPRUDENCE.

A. The vehicle was properly insured through MetLife.

Conspicuously absent from MetLife's application is any assertion that it *properly* denied benefits to Mr. Myers. That is because it did not. MetLife's position, and the Wayne County Circuit Court's judgment, was that Myers was excluded from receiving benefits under §3113(b), as an uninsured owner, because neither he nor Watson had *personally* insured the vehicle. (See AT App'x

SF149-151 and MET30-31) This Court has unequivocally rejected that argument: "an owner or registrant of a motor vehicle is not required to personally purchase no-fault insurance for his or her vehicle in order to avoid the statutory bar to PIP benefits" in §3113(b). *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167, 172-73; 934 NW2d 574 (2019). The act requires only that owners "maintain" insurance. It does not prescribe any particular manner by which they do so. As this Court held in *Dye*, it is entirely proper for someone other than an owner to procure insurance for the vehicle. *Id*. And that is precisely what Ms. Hyatt did here, for her granddaughter. While it is true that *Dye* came down after the Wayne County Circuit Court issued its rulings, as this Court is well-aware, this Court's decisions are generally "given full retroactive effect." *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 462; 795 NW2d 797 (2010); accord *W A Foote Mem Hosp, d/b/a Allegiance Health v Mich Assigned Claims Plan et al.*, 504 Mich 985 (Oct 25, 2019) (when a decision does not "clearly establish a new principle of law", it is retroactive). MetLife in fact has not argued otherwise. Its denial of Spectrum Health and Mary Free Bed's claims was wrongful.

B. Myers properly assigned his claims to Spectrum Health and Mary Free Bed. As a result, Spectrum Health and Mary Free Bed became the owner, real party in interest, and the *only* party free to pursue those claims.

The no-fault act expressly condones assignment-based claims. MCL 500.3143 (precluding only the assignment of *future* benefits). In *Covenant*, this Court held that medical providers did not (at that time) possess their own statutory cause of action to directly sue no-fault insurers, yet it was careful to preserve a provider's ability to proceed by way of assignment, stating: "our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." 500 Mich 217 n40 (citing MCL 500.3143). Consistent with both the act and *Covenant*, therefore, Myers assigned to Spectrum Health and Mary Free Bed all of his rights, benefits, and causes of action in relation to Spectrum Health's and Mary Free Bed's charges. In reliance on

these assignments, Spectrum Health and Mary Free Bed had every right to directly pursue the Insurers for those claims. Myers, on the other hand, upon issuing the assignments, *lost* the ability to do so.

An assignment is, by definition, a "transfer of rights or property." *Kim v JPMorgan Chase Bank*, 493 Mich 98, 113 n26; 825 NW2d 329 (2012). The assignor *transfers* to the assignee his interest in the thing assigned such that he no longer owns it. 1 Mich Civ Jur Assignments, §1 ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which *the assignor's right* to performance by the obligor *is extinguished* in whole or in part, and the *assignee acquires* a right to such performance.") (emphasis added). The assignee of a chose in action becomes the "real party in interest" with regard to the claim. *Kearns v Mich Iron & Coke Co*, 340 Mich 577, 582-83; 66 NW2d 230 (1954); *Cannon Twp v Rockford Pub Schs*, 311 Mich App 403, 412; 875 NW2d 242 (2015). The claim is no longer the assignor's to pursue; it belongs *solely and exclusively* to the assignee. See, e.g., *Moore v Smith*, 103 Mich 387, 389; 61 NW 538 (1894) ("After the assignment, further proceedings could not be prosecuted in the name of the assignor."); *Blumenthal v Simons*, 110 Mich 42, 44; 67 NW1102 (1896) ("[A]s to Simons and his creditors, the legal title to the property passed to Bement, and with it the right to collect the judgment against Burnham, which Simons was not thereafter in a situation to enforce."); accord 6A CJS, Assignments §88 ("[A]n assignment divests the assignor of any interest in the subject matter of the assignment."). This concept has even been incorporated into our court rules. See MCR 2.116(C)(7) (permitting dismissal of an action on the grounds of "*assignment* or other disposition of the claim before commencement of the action") (emphasis added). Myers, in other words, had no authority to pursue Spectrum Health's and Mary Free Bed's claims in the Wayne County Litigation. The Insurers do not actually argue otherwise.

C. The Court of Appeals properly ruled that Spectrum Health and Mary Free Bed were not bound by a judgment obtained against Myers in a suit he filed *after the assignment.*

Consistent with an assignor having parted with title to the thing assigned, this Court has repeatedly rejected the notion that assignees are bound by the *post*-assignment actions of their assignors. An assignor cannot, for example, admit away his assignee's title. See *Jacobs v Queen Ins Co of America*, 195 Mich 18, 23; 161 NW 936 (1917) ("The rule may be stately broadly to the effect that declarations of assignors, grantors, devisors, and others through whom title is claimed are incompetent if made after the title or interest in the property in question has passed from them."); *Kudner v Bath*, 135 Mich 241, 243; 97 NW 685 (1903) ("Mr. Young, after his assignment, could not affect complainant's rights by any statement he might make in his petition to be declared a bankrupt, unless such statement were ratified by the complainant."); *Hogan v Sherman*, 5 Mich 60, 61-62 (1858) ("Admissions made by the assignor, after the assignment, can not avail against the assignee, and courts will protect the latter against all the acts of the former.").

Likewise, an assignee is not bound by a judgment obtained against the assignor after the assignment. In *Saginaw Financing Corp*, *supra*, this Court stated:

> The rule that an assignee of a nonnegotiable chose takes it subject to defenses means, of course, defenses existing at the time of the assignment. After assignment, the assignor loses control over the chose, and cannot bind the assignee, by estoppel or otherwise. [256 Mich at 443.]

The same rule applied in *Aultman*, *supra*. There, on November 13, 1894, Charles Mains assigned to James Sloan his interest in four chattel mortgages. *Id*. at 152. "*Subsequent* to the execution of the paper by Mr. Mains to Mr. Sloan," Mains sued the mortgagors and recovered a judgment against them; Mr. Sloan was "*not party of record*" to that suit. *Id*. at 153 (emphasis added). When new plaintiffs, claiming an interest through the same mortgagors, attempted to bind Mr. Sloan to the prior judgment, this Court refused: "Mr. Sloan was not a party to the litigation, and is not bound by its

result." *Id*. at 154. To have bound him, this Court explained, would permit his assignor and the mortgagors to improperly cut of his rights "without giving him an opportunity to be heard." *Id*.

State Farm tries to distinguish *Aultman* on the ground that there was a "dispute about the assignment" in that case and, so it claims, that is why this Court found no privity. (State Farm's Application, pp 25-26.) Not so. This Court accepted, for the sake of argument, plaintiff's position that there *was* privity, stating "it is difficult to see how there is any such privity between Mr. Mains and Mr. Sloan as to make a litigation of the question in the case of Mains v Cool & Cool res judicata, when Mr. Sloan was not a party", *but even* "[i]f this contention is true" the assignor could not, after the assignment, cut off his assignees rights "without giving him an the opportunity to be heard." See *id*. State Farm's attempt to distinguish *Aultman* is wrong.

This is aptly demonstrated by reasoning through the question. The reason an assignee is not bound by the post-assignment actions of his assignor, though he may be bound by the prior, is plain: *before the assignment*, an assignee is in a position to protect himself simply by inquiry of his assignor about any pre-existing judgments, claims, or defenses relating to the claim assigned. If it is encumbered, he can choose not to acquire the thing assigned. Once it is his, however, the assignor cannot retroactively destroy the acquired value:

> No rule is better settled than that the assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should exist at the inception of the debt or contract. It is sufficient that they exist *prior to the assignment*; for the reason of the rule is as applicable to one case as to the other; which is, that the assignee has it in his power to protect himself against them by inquiry of the debtor before the assignment. [*Warner v Whittaker*, 6 Mich 133, 136 (1858) (emphasis added).]

This Court's jurisprudence in this regard is consistent with the general rule articulated in the Restatement:

> The determination of issues in an action by or against either assignee or assignor is not preclusive against the other of them in a subsequent action, except that:
>
> (a) If an action has been brought by the assignor *before the assignment* and a subsequent action is brought by the assignee on the same obligation, the assignee is precluded in such an action from relitigating the issues determined therein in the action by the assignor. [Restatement Judgments, 2d, Assignor Assignee, §55 (1982)]

Contrary to the Insurers' position, timing *is* everything. Only if the assignor's action was brought *before* the assignment could it bind the assignee. Here, it is undisputed that Myers assigned his rights to Spectrum Health and Mary Free Bed well before he filed the Wayne County Litigation and well before any judgment in that case was entered. The Court of Appeals properly ruled that Spectrum Health and Mary Free Bed are not bound by judgments obtained against Myers in a suit he filed after the assignment. Myers could no more impair Spectrum Health's and Mary Free Bed's claims once assigned than he could resell a vehicle after he already assigned the title away. He no longer owned the claims he purported to pursue.

III. RES JUDICATA AND COLLATERAL ESTOPPEL ARE EQUITABLE, JUDICIALLY-CREATED DOCTRINES. THEY DO NOT APPLY HERE BECAUSE (1) THEIR ELEMENTS ARE NOT SATISFIED AND (2) THEIR APPLICATION UNDER THE CIRCUMSTANCES PRESENTED WOULD BE PLAINLY UNJUST.

Res judicata and collateral estoppel are "judicially created" doctrines that reflect "appropriate concern for the use of judicial resources and the finality of litigation." *Riley v Northland Geriatric Ctr*, 431 Mich 632, 640; 433 NW2d 787 (1988); *Detroit v Qualls*, 434 Mich 340, 356 n30; 454 NW2d 374 (1990). They are not constitutional mandates, "but only a tool created by the courts." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 382; 596 NW2d 153 (1999). Their goal is to promote fairness, "not lighten the loads" of our courts "by precluding suits whenever possible." *Id*. at 383. The doctrines are, in other words, "flexible." *Qualls*, 434 Mich at 357 n30; *Riley* 431 Mich at 640. Their application will necessarily depend on the legal context in which they are being asserted, *Riley*, 431

Mich at 640, and involve a balancing act: the interest in conserving judicial resources versus "the interest in affording litigants a *full and fair* adjudication of the issues involved in their claims." *People v Trakhtenberg*, 493 Mich 38, 50; 826 NW2d 136 (2012) (emphasis in original) (quoting *Storey v Meijer, Inc*., 431 Mich 368, 372; 429 NW2d 169 (1988)). See also *Howell*, 386 Mich at 48. There is no "automatic formula"; decisions must, instead, turn on justice and equity. *Trakhtenberg*, 493 Mich at 50 (citing *Blonder-Tongue Laboratories, Inc v Univ of Illinois Foundation*, 402 US 313, 333-34; 91 S Ct 1434; 28 L Ed 2d 788 (1971)).

Accordingly, even where their elements are arguably satisfied, this Court has declined to apply these judicial doctrines in a variety of situations, including when it "would be contrary to sound public policy," *People v Gates*, 434 Mich 146, 161; 452 NW2d 627 (1990); where there has a been "a subsequent change in the law," *Pike v Wyoming*, 431 Mich 589, 598-99; 433 NW2d 768 (1988); and where their application would subvert the intent of the Legislature, *Riley*, 431 Mich at 642, or otherwise be inconsistent with the statutory scheme it created, *JAM Corp v AARO Disposal Inc*, 461 Mich 161, 168-69; 600 NW2d 617 (1999). As earlier, this Court's jurisprudence in this regard is also consistent with the general rule and exceptions articulated in the Restatement. See Restatement Judgments, 2d, Exceptions to the General Rule Concerning Splitting, §26 (1982); Restatement Judgments, 2d, Exceptions to the General Rule of Issue Preclusion, §28 (1982).

In this Court's formulation, the elements of res judicata are:

> (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999)]

Likewise, the elements of collateral estoppel are:

> (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel. [*Monat v State Farm Ins*

> *Co*, 469 Mich 679, 683-84; 677 NW2d 843 (2004) (internal quotations and brackets omitted)]

The burden of proving the applicability of these doctrines is on the party asserting them. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

The Court of Appeals rightly concluded that the Insurers failed to meet their burden of establishing each of these elements because (1) this litigation and the Wayne County Litigation did not involve the same parties or their privies and (2) Spectrum Health's and Mary Free Bed's claims were not and could not have been decided in the Wayne County Litigation. Moreover, even if their elements had been satisfied, their application would be inequitable here both in that it would render the assignments effectively null and void without giving Spectrum Health and Mary Free Bed an opportunity to be heard and because the basis of the Wayne County judgment in favor of MetLife has been subject to a change in the law.

A. Spectrum Health and Mary Free Bed and Myers are neither the "same party" nor privies.

Together, the Insurers argue that Spectrum Health and Mary Free Bed and Myers are privies on essentially three grounds: (1) they claim that assignors and assignees are always in privity; (2) they argue that Myers and Spectrum Health and Mary Free Bed are in privity under this Court's definition of the term in *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004); and (3) they argue that Myers and Spectrum Health and Mary Free Bed should be *considered* privies because of the "unique nature" of no-fault claims (i.e., because even after the assignment, the patient still possesses the right to pursue other benefits, such work loss, attendant care, or for treatment by other providers). State Farm, alone, goes one step further, claiming that Myers and Spectrum Health and Mary Free Bed are not just privies, but actually the very same party. None of these positions withstand scrutiny.

1. **An assignment does not create *perpetual* privity.**

This Court's jurisprudence is clear: for an assignee to be bound by a judgment against his assignor, that judgment must have come *before* the assignment:

> A privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgement through or under one of the parties, as by inheritance, succession, or purchase. [*Howell*, 386 Mich at 43 (emphasis added).][3]

Privity is created by an assignment, but only inasmuch as an assignee takes the property assigned subject to pre-existing defenses. An assignee "stands in the shoes" of his assignor, has the same rights, and is subject to the same defenses as existed at the time of the assignment. *Shah v State Farm Mut Auto Ins Co*, 324 Mich App 182, 161; 920 NW2d 148 (2018). This includes any judgment that exists when the property is assigned. Assignors and assignees are not, however, privies in perpetuity, such that an assignor can alter the assignee's rights after the assignment. To hold otherwise is to reject a century of this Court's assignment jurisprudence, from *Jacobs*, *Kudner*, and *Hogan* to *Aultman*, *Howell* and *Sloan*.

This Court's jurisprudence in this regard parallels that of the Supreme Court of the United States, which has explained:

> The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes cum onere. From this it follows that nothing which the grantor can do or suffer *after* he has parted with the title can affect rights previously vested in the grantee, *for there is no longer privity between them*. [*Postal Telegraph*, 247 US at 474-75 (emphasis added).]

The general rule articulated in American Jurisprudence buttresses the point:

[3] State Farm's position that this language from *Howell* is dicta is incorrect. This Court later affirmed the *Howell* definition of privity in *Sloan v Madison Heights*, 425 Mich 288, 295-96; 389 NW2d 418 (1986). It has similarly been cited and applied by the Court of Appeals in a variety of cases. See, e.g., *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984).

> [A] person to whom a party to an action has made an assignment or has granted property or an interest therein before the commencement of the action is not regarded as in privity with the assignor or grantor so as to be affected by a judgment rendered against the assignor or grantor in the action, unless that person is made a party to the action. [46 Am Jur 2d, Judgments, §569]

In this same vein, the Insurers complain that privies are not limited to those who acquire an interest after a judgment; privity can also come into being, they argue, by virtue of an assignment alone. (State Farm's Application, p 30) (MetLife's Application, p 13.) The Insurers confuse the issue. Spectrum Health and Mary Free Bed have never argued that privity arises in one way and one way only: after a judgment has been entered. Privity most certainly can arise by assignment. Where it does, however, that privity encompasses only those equities and defenses (including judgments), existing *at the time of the assignment*. An assignee may be bound by *pre*-assignment judgments against his assignor, because estoppel runs with the property, but not *post*-assignment acts, omissions or even judgments. This is because once the assignor has parted with title, "there is *no longer privity* between them." *Postal Telegraph*, 247 US at 474-75 (emphasis added).

The Insurers perpetual privity argument fails.

2. **Myers and Spectrum Health and Mary Free Bed do not qualify as privies under *Adair*.**

The Insurers also complain that the Court of Appeals did not cite and analyze the definition of privity this Court discussed in *Adair*. There, the Court stated that "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." 470 Mich at 122. This requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are *presented* and *protected* by the party in the litigation. *Id*.

Despite this complaint, neither of the Insurers actually analyzes this language and applies it here. Neither asserts that Myers, and Spectrum Health and Mary Free Bed, *actually* had a "working

functional relationship" such that Spectrum Health and Mary Free Bed somehow controlled or influenced him in the Wayne County Litigation. They did not. Neither even asserts that Myers himself thoroughly litigated the issues so as to protect not only his own, but also Spectrum Health's and Mary Free Bed's interests. Whether and to what extent he even opposed the Insurers' motions in Wayne County is not part of the record in this case, and he certainly did not appeal any adverse ruling as to preserve the claim. Instead, the Insurers gloss over the issue, assuming that simply because there was an assignment, the standard is satisfied. Not so.

The Insurers also admit that the *Adair* definition of privity and the "full and fair opportunity to litigate" element of collateral estoppel are corollaries. (State Farm's Application, p 44) (MetLife's Application, p 23.) State Farm's reliance on *Monat* in this context is, as a result, misplaced, as this Court's analysis there actually favors Spectrum Health and Mary Free Bed. The *Monat* Court explained that the due process element of collateral estoppel is not to be given mere judicial lip service. Courts must, instead, "proceed cautiously" when determining whether a litigant has had a "full and fair opportunity to litigate" a question. 469 Mich at 686 n4. The *Monat* Court even rejected the notion that the issue could ever be analyzed with an automatic formula (as is the Insurers' "assignment equals full and fair opportunity" position):

> Determining whether a party has had a full and fair chance to litigate an issue in an earlier case is of necessity not a simple matter because . . . as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, the decision will necessarily rest on the trial court's sense of justice and equity. [*Id.* at 683 n2 (quoting *Blonder-Tongue Laboratories*, 402 US at 333-34 (internal brackets removed)).]

State Farm's reliance on *Monat* is doubly misplaced, inasmuch as *Monat* involved neither an assignment nor collateral estoppel otherwise being asserted against someone who was *not a party* to the prior suit. The plaintiff in *Monat* first filed a third-party negligence case against the driver that rear-ended him. 469 Mich at 681. When his insurer got wind of that suit, it stopped paying benefits,

causing him to file a separate first-party action against the insurer. *Id.* The plaintiff litigated and lost his negligence case, with the jury specifically finding that he had suffered no injury. *Id.* The insurer in the second action then sought to use that finding to collaterally estop the plaintiff's first-party claim. *Id.* The primary issue before this Court was whether to abandon the mutuality requirement of collateral estoppel when the doctrine is being asserting defensively. And in analyzing that issue, this Court repeatedly stressed that the *same plaintiff* had *already* had a full and fair opportunity to litigate his injury. *Id.* at 681, 686-87, 691, 695. *Monat* simply did not deal with the issue presented here.

State Farm speculates that, had the Wayne County Litigation resulted against the Insurers, Spectrum Health and Mary Free Bed would certainly be seeking to bind them to that ruling. (State Farm's Application, p 46 n33.) That speculation does not justify State Farm's positon. But since it raises the point, there *is* one critical distinction between *that* scenario and this case: State Farm *did have* a full and fair opportunity to litigate Mr. Myers' eligibility because it *was* a party to the Wayne County Litigation.

It is also noteworthy that both Insurers cite *Baum v Baum*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2017 (Docket No. 333173) (AT App'x SF464-472), in this regard. As an unpublished opinion from an inferior court, this case is of marginal relevance here. That said, the issue *Baum* was whether the plaintiff could bind her brother-in-law, Howard, to a finding in her prior divorce proceedings that her husband, David, had fraudulently transferred certain assets to him. Consistent with this Court's rejection of an automatic formula, the *Baum* panel stressed that it would be improper to find a "substantial identity of interests" between Howard and David simply because they were brothers; that would, the panel explained, "eliminat[e] the need for legal analysis of whether David *actually* functioned as Howard's privy." (AT App'x SF469) (emphasis added). Instead, the panel analyzed the issue and, as part of that analysis, explained:

> Absent the family court's finding of fraud, we find no evidence that David was Howard's alter ego during the divorce, or that Howard controlled David's defense, or that the two had a "working functional relationship." [*Id.*]

To reiterate, then, the issue must actually be analyzed. Spectrum Health and Mary Free Bed have *not* had a full and fair opportunity to litigate here.

Although obvious, it bears repeating: Spectrum Health and Mary Free Bed were not parties to the Wayne County Litigation. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor*, 553 US at 892 (rejecting the doctrine of preclusion by "virtual representation"). This case is no exception. Spectrum Health and Mary Free Bed had no control or influence over Myers' actions in the Wayne County Litigation. They were not his alter ego. They did not share the same attorney. Indeed, the Insurers have failed altogether to present *any* evidence that Spectrum Health and Mary Free Bed and Myers had a "working functional relationship." That is because they did not.

Nor did Spectrum Health and Mary Free Bed, and Myers, possess a "substantial identity of interests" simply by virtue of the assignments, such that they represented the "same legal right," as the Insurers opine. Quite to the contrary, it is *because* of the assignments that they did *not* represent the same legal right. In issuing the assignments, Myers gave up all of his rights, benefits and causes of action relating to Spectrum Health's and Mary Free Bed's bills. Those rights belong *solely* to Spectrum Health and Mary Free Bed. Myers had no authority to pursue those benefits in the Wayne County Litigation. The fact that he did not assign to Spectrum Health and Mary Free Bed *other* rights (for wage loss or attendant care, for example), does not change this analysis. It serves to demonstrate the point. The evidence necessary to establish those claims differs from what Spectrum Health and Mary Free Bed need establish to succeed on their claims. Put another way, whether or not Myers needed replacement services had no bearing on whether his weeks and months of care with Spectrum Health

and Mary Free Bed were medically necessary. Whether any attendant care claim he asserted was viable had no bearing on whether or not Spectrum Health's and Mary Free Bed's charges were reasonable. Indeed, State Farm's application all but concedes this flaw in its position that assignment equates to automatic privity. (State Farm's Application, p 37) ("Plaintiffs' argument might have merit had the Wayne County Circuit Court ruled specifically that the treatment provided by Plaintiffs was not reasonable, necessary, or for the care, recover, or rehabilitation of Myers' accident-related injuries.")

A recent case in the United States District Court for the Eastern District of Michigan demonstrates the dangers of the Insurers' "assignment equals automatic privity" position here. *Massengale v State Farm Mut Auto Ins*, Case No 2:18-CV-11366-TGB, 2019 WL 4640307 (September 24, 2019 ED Mich) (AE App'x 4.) At issue in *Massengale* was whether a finding in litigation between a chiropractor-assignee and defendant no-fault insurer that there had been no injury could bind the injured person herself in her own, separate suit against the insurer. The Court found no "substantial identity of interests" under the *Adair* standard, explaining as follows:

> This lack of a "substantial identity of interests" also makes sense pragmatically. Because Spine Rehab sued to collect on a $7,500 bill for chiropractic services—and Massengale has since accumulated medical bills totaling over $300,000—it cannot be said that Spine Rehab shared a "substantial identity of interests" to prove at trial the full scope of all of Massengale's possible injuries arising from the accident. It was only obligated to demonstrate that Massengale sustained a particular injury to her body necessitating *Spine Rehab's* services in order to collect no-fault PIP benefits from State Farm. Indeed, Spine Rehab only proffered the testimony of the Spine Rehab chiropractor who treated Massengale and the State Farm claims representative who processed and denied Massengale's claim for benefits. It did not put forward any other evidence indicating that Massengale was injured in the car accident. While State Farm may have fully litigated Plaintiff's medical history and proffered testimony from three independent medical experts who testified to their belief that Massengale was not injured *at all* by the accident, the proper inquiry is not whether State Farm—but rather whether Plaintiff, as a non-party—had a "full and fair opportunity to litigate" in the first action. In light of the limited scope of Plaintiff's assignment of rights to Spine Rehab to

> collect no-fault PIP benefits, the Court finds that Spine Rehab and Plaintiff did not share a sufficient "identity of interests" to conclude that privity existed for purposes of Plaintiff's claim for no-fault PIP benefits, UIM benefits and Medicare damages based on *all* of her medical bills and alleged injuries. [*Id.* at *6 (internal citations omitted) (emphasis in original).]

Because Myers and Spectrum Health and Mary Free Bed do not represent the same legal right, and the Insurers presented no evidence to establish a "working functional relationship," the Insurers have not met *their* burden of establishing privity under the *Adair* standard. *Baraga*, 466 Mich at 269.

3. **The no-fault act and our court rules support the Court of Appeals' conclusion that privity did not exist here.**

The Insurers attempt to distinguish more than a century of this Court's assignment jurisprudence, and argue for privity in perpetuity for medical provider assignees in the no-fault context, on the theory that the injured person only assigns to his provider a *portion* of his claims. Without the benefit of preclusion, they argue, insurers will be subject to "multiple trials" in "multiple venues" by not only the injured person, but "the myriad of medical providers who file separate claims for PIP benefits." (MetLife's Application, p x.) The Insurers entirely ignore the fact that this Court has already provided a means through which they can protect themselves from this parade of horribles: joinder under MCR 2.205.

By failing to take advantage of this court rule, the Insurers failed to avail themselves of this remedy. All parties knew that this litigation and the Wayne County Litigation were proceeding independently. If the Insurers had wanted Spectrum Health and Mary Free Bed to be bound to the Wayne County Litigation, they could and should have sought joinder. Having failed to do so, they cannot now invoke res judicata and collateral estoppel against those they failed to join. State Farms repeatedly states in its application that it "sought to join" Spectrum Health and Mary Free Bed to the Wayne County Litigation. That is not correct. State Farm did nothing of the sort. MetLife filed, in Kent County, a motion for change of venue, relying in support on MCR 2.222(A) and an argument that

transfer was "*for the convenience of parties and witnesses*." (AE App'x 5 at 6.) Neither of the Insurers sought, in the Wayne County Litigation, to join Spectrum Health and Mary Free Bed as necessary parties under MCR 2.205.

a. Both the no-fault act itself, and our court rules, contemplate and permit claim-splitting.

As set forth above, the no-fault act and this Court's decision in *Covenant* make clear that persons injured in motor vehicle accidents are free to assign their rights to their medical providers so as to permit those providers to proceed directly against no-fault insurers as proper assignees. MCL 500.3143; *Covenant*, 500 Mich 217 n40. Such assignments are not invalid simply because they are partial. Our Court of Appeals, in *Henry Ford Health Sys v Everest Nat'l Ins Co*, 326 Mich App 398; 927 NW2d 717 (2018), recently analyzed and rejected that very argument.

Looking to the text of the act, the Court explained:

> [U]nder the no-fault act, PIP benefits are payable as loss accrues, MCL 500.3142(1), and become overdue if not paid within 30 days of receipt of reasonable proof of the fact and of the amount of loss sustained, MCL 500.3142(2). In other words, the act *contemplates and requires* a *multitude* of performances (i.e., payments) by the insurer. [*Id*. at 408 (emphasis added)].

Like *Covenant*, the Court also looked to §3143 itself: "If this Court were to hold that the assignment at issue in this case was an unenforceable partial assignment, it would effectively render the insured's right to assign a claim for past or presently due benefits meaningless." *Id*. at 410. Clearly, the no-fault act contemplates otherwise.

So too, the *Henry Ford Court* noted, do our court rules:

> To the extent that a proper disposition of benefits sought by the healthcare provider requires the presence of an additional party or parties, modern joinder rules provide a method for maintaining a joint cause of action. [*Id*. at 408.]

Necessary joinder under MCR 2.205 has, in fact, "*replaced* the common-law rule against splitting a cause of action." *Id*. at 407 (quoting *United Servs Auto Ass'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992) (emphasis added)). The rule provides:

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such an interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests. [MCR 2.205(A)]

Importantly, this rule is mandatory and the burden of raising it is on the defendant. *United Servs Auto Ass'n*, 195 Mich App at 89. See also *Rite-Way Refuse Disposal, Inc v Vanderploeg*, 161 Mich App 274, 281; 409 NW2d 804 (1987) ("It is the defendant's duty to join necessary parties under MCR 2.205."). This distinguishes the rule from MCR 2.209, regarding intervention, which State Farm cites, complaining that Spectrum Health and Mary Free Bed *could have* intervened in the Wayne County Litigation. (State Farm Application, p 19.) Intervention is permissive, not mandatory. It is not as though Spectrum Health and Mary Free Bed were sitting on their rights; they were already protecting their rights as proper plaintiffs in a proper venue, having filed a valid lawsuit to recover those claims on the same day as Myers. State Farm cites no authority for the proposition that Spectrum Health and Mary Free Bed were obligated to *also* intervene in the Wayne County Litigation in order to avoid the application of res judicata and collateral estoppel here. In fact, such position was rejected in *Richards v Tibaldi*, 272 Mich App 522, 536-37; 726 NW2d 770 (2006):

> Here defendants acquired an interest *before* the first lawsuit and the notice of lis pendens were filed. Only the recording of defendants' deed occurred after the commencement of the suit. MCR 2.209, which addresses intervention, does not mandate that a party intervene in an action under certain circumstances. And MCR 2.205, while arguably indicating that defendants should have been deemed necessary parties for purposes of the earlier lawsuit, does not change the fact that defendants were not made parties. . . . Plaintiff cites no authority for the proposition that MCR 2.205 requires nonparties to intervene on

> their own when they realize they have an interest in the subject matter of litigation. [*Id*. at 536-37.]

b. Res judicata and collateral estoppel do not apply where the party invoking them could have sought joinder but failed to do so.

Where, as here, a party fails to seek joinder under MCR 2.205, res judicata and collateral estoppel do not apply. By failing to seek joinder, the defendant effectively "acquiesces" in the splitting of the cause of action and, thus, waives those defenses. *United Servs Auto Ass'n*, 195 Mich App at 89-90. In a case rejecting a defendant's effort to invoke res judicata against a nonparty, our Court of Appeals explained it as follows:

> Because joinder is mandatory under MCR 2.205(A), rather than permissive, joinder is required for the benefit of the defendant and thereby places on the defendant the burden of objecting to misjoinder. Thus, the defendant must make a timely assertion of the position that separate suits violate the rule prohibiting the splitting of actions, modernly known as the joinder rule. If the defendant fails to make such a timely assertion, he waives his right to make such a claim; in effect, the defendant acquiesces in splitting causes of action by not raising timely objection. [*Id*. (internal citations and quotations omitted).]

In *Howell*, this Court too recognized the point:

> As noted by the commentators and the courts, many of the problems giving rise to res judicata have been ameliorated by liberalized rules of practice in federal and state jurisdictions allowing joinder of parties. [386 Mich at 48-49]

See also *Allstate Ins Co v Hayes*, 442 Mich 56, 67 n12; 499 NW2d 743 (1993) ("[I]f the insurer wishes to obtain a judgment that would bind the alleged tort victim, the insurer must make the victim a party to the action for declaratory judgment.") and *Central High School Athletic Ass'n v Grand Rapids*, 274 Mich 147, 153; 264 NW 322 (1936) ("We have grave doubts that a declaratory judgment would be res judicata of anything with only the present parties before us. All interest persons should be before the court.") In *JAM Corp*, this Court similarly recognized that the doctrines cannot be rigidly applied over a statutory scheme that would *itself* permit splitting. 461 Mich at 168-70 (holding that summary

proceedings for possession of property under MCL 600.5750 would not bar later claims of implied contract and unjust enrichment). Accord *Richards*, 272 Mich App at 532-33 (declining to apply res judicata where it would be inconsistent with MCR 3.411(H), in actions to determine interests in land).

The point is also buttressed in articulations of the general rule. American Jurisprudence makes clear the necessity of joinder, stating that an assignee who obtains his interest "before the commencement of an action" by his assignor is "*not* regarded as in privity with the assignor" and not bound by a judgment rendered against the assignor, "*unless he is made a party to the action*." (46 Am Jur 2d, Judgements, §569 (emphasis added)). The Restatement of Contracts is in agreement:

> (1) Except as stated in Subsection (2), an assignment of a part of a right, whether the part is specified as a fraction, as an amount, or otherwise, is operative as to that part to the same extent and in the same manner as if the part had been a separate right.
>
> (2) If the obligor has not contracted to perform separately the assigned part of the right, no legal proceeding can be maintained by the assignor or assignee against the obligor *over his objection*, unless all the persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder. [Restatement Contracts, 2d, Partial Assignments, §326 (emphasis added).]

The Restatement comments clarify that, where an obligor has notice of an assignment, a judgment against the assignor does not bar a subsequent action by the assignee. The purpose of joinder, it goes on, is to "protect the obligor against multiple actions in a case of partial assignment" by entitling "him to require joinder of all the obligees." *Id*. at comment *c*.

The Restatement of Judgments §55, regarding assignments, similarly describes the rule. An obligor can protecting himself in the case of partial assignment by objecting to the action being maintained "*unless* all persons holding interests in the original obligation are joined as parties" and that *if they are joined*, "they are bound." Restatement, §55, comment *c*.

Even more, in *Monat*, this Court directed our courts to consider the factors set forth in the Restatement of Judgments when determining whether preclusion should apply, one of those factors being: whether "[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, *could have effected joinder* in the first action between himself and his present adversary." 469 Mich at 683 n2 (quoting Restatement §29, subsection (3) (emphasis added)).

Since both State Farm and MetLife failed to seek joinder under MCR 2.205, they cannot turn around and invoke res judicata or collateral estoppel against the party they failed to join on theory that the assignment that party received was partial. All parties knew that these two matters were proceeding independently. The Insurers had a means to protect themselves from the possibility of inconsistent rulings and failed to take advantage. Res judicata and collateral estoppel do not apply.

4. **Myers and the Hospital are not the "same party".**

While MetLife argues only privity, State Farm goes one step further and argues that, as his assignees, Spectrum Health and Mary Free Bed actually "*are Jacob Myers,*" that they "possess no separate or independent identity" of their own and *that* is why they must be bound by the Wayne County Litigation. (State Farm's Application, p 24.) In support, State Farm cites various cases, none of which holds or otherwise stands for the broad proposition that assignors and assignees are legally indistinguishable and must be treated as identical parties for all purposes. State Farm's "same party" argument is without merit.

To accept State Farm's argument that assignors and assignees are the same party is to reject this Court's assignment jurisprudence set forth above. It would mean, in fact, that an assignment is not really a "transfer" at all, but a merging of identities. Contra *Kim*, 493 Mich at 113 n26. An assignee wouldn't be *divesting* himself of anything, and could continue to prosecute the claims he's assigned in his own right, in his own name, and bind his assignee to judgments issued even after the assignment. Contra *Moore*, 103 Mich at 389; *Blumenthal*, 110 Mich at 44; *Saginaw Fin Corp*, 256 Mich at 443; and

Aultman, 115 Mich at 154. The assignor, even after the assignment, could take actions or make admissions that create even new defenses that did not exist at the time of the assignment, and the assignee, now *being* the assignor in the eyes of the law, would be subject to them. Contra *Warner*, 6 Mich at 136; *Jacobs*, 195 Mich at 23; *Kudner*, 135 Mich at 243; *Hogan*, 5 Mich at 61-62. The assignee would no longer be entitled to real party in interest status on the claims he has been assigned. Contra *Kearns*, 340 Mich at 582-83. MCR 2.116(C)(7)'s permitting dismissal on the grounds of "assignment . . . before commencement of the action" would be null and void, the assignor and assignee now being interchangeable persons. The list goes on and on. There is, in other words, a reason State Farm fails to cite any case actually holding that assignees and assignors are always the same party: its argument turns assignment law on its head.

In making its "same party" argument, for example, State Farm cites three unpublished cases: *Cauff v Fieger, Fieger, Kenney & Johnson, PC*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2009 (Docket No. 281442); *Liberty Bidco v Prod Stamping, Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2002 (Docket No. 226609); and *Kelley v Heppler*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 1997 (Docket No. 187925). None of these cases holds that assignors and assignees are the same party. To the contrary, each case involved a *post*-suit assignment, meaning they accord with the rule described in *Howell*: a privy is one who, *after rendition of a judgment*, acquires an interest in the subject matter affected by that judgment. 386 Mich at 43. They do not support State Farm's "same party" argument.

State Farm also suggests that Spectrum Health and Mary Free Bed can have no independent identity because, as assignees, their claims are purely "derivative" of Myers' claim. State Farm cites *Shah* for this proposition, but the word "derivative" appears nowhere in the case. Nor has this Court's decision in *Jones v Chambers*, 353 Mich 674; 91 NW2d 889 (1958), though it does use the term once,

ever been so broadly interpreted to mean that assignors and assignees are always the "same party" for purposes of res judicata and collateral estoppel. That is because they are not.

Before *Covenant*, our courts did sometimes refer to a provider's claim as "derivative" of the patient's claim. *Covenant* clarified that this was wrong and that, for a provider to proceed in Court, an assignment was required. The import of that, however, is that by executing the assignment the patient has *divested* himself of the claim, and only the *provider*, as owner and real party in interest, has a right to pursue it. What the provider holds is not merely derivative of something the patient still possesses; it *is* the claim and one which the patient no longer owns. Indeed, as *Covenant* explained, a "claim" is merely "a demand for something due or believed to be due" or "a right to something." 500 Mich 211 n31 (citing Merriam-Webster's Collegiate Dictionary (11th ed)). A provider has a "claim" under the no-fault act if it "has a right to payment of PIP benefit form a no-fault insurer" and one way to obtain that right, the opinion is clear, is by way of assignment. *Id*. at 217 n40. Yes, a healthcare provider stands in the patient's shoes *at the time of the assignment*. But, once that assignment is made, the patient takes off his shoes and the provider stands in them alone, going forward.

This is also why the trial court's reliance on *TBCI* was mistaken. *TCBI* was a pre-*Covenant* case, decided at a time when providers were pursuing no-fault insurers *directly* but without the benefit of their own, express statutory cause of action and without an assignment. *TBCI* did not consider assignment-based claims, nor discuss how res judicata and collateral estoppel may or may not impact them. It certainly did not impose a "derivative" stamp onto all assignment-based claims such that assignors and assignees must now be viewed as identical and interchangeable persons.[4] This is also

[4] It bears mention here that the trial court's reliance on *TBCI* was improper for a separate reason. In its reliance, the court essentially adopted a formula (medical provider plus patient equals automatic res judicata). Indeed, the trial court's entire ruling was one sentence: "The law is clear and the answer is plain, the health care provider is barred from litigating a claim for payment of medical expenses against an insurer when the patient's claims have been dismissed with prejudice against the insurer. See *TCBI, PC v State Farm Mutual Automobile Insurance Company*, 289 Mich App 39 (2010)." (AT App'x MET48). The court did not actually analyze any of the elements of res

true of *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517; 895 NW2d 188 (2016), which both Insurers cite. The case came down before *Covenant* and did not involve assignment-based claims.

State Farm advances the novel argument that Spectrum Health and Mary Free Bed had a right to appeal the judgments against Myers in the Wayne County Litigation. It cites no authority for this proposition that an assignee is required to monitor and then timely appeal from its assignor's post-assignment litigation, to which it is not a party, in order to avoid the preclusive effects of res judicata and collateral estoppel. Again, it is the defendant's duty to *add* necessary parties to litigation if he wishes them to be bound. MCR 2.205; *United Servs Auto Ass'n*, 195 Mich App at 89.

To have standing to appeal, one must be an "aggrieved party." MCR 7.203(A). See also *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). Spectrum Health and Mary Free Bed were neither a party, nor aggrieved, by the Wayne County Litigation, which did not involve or effect their rights. *Id*. at 291-92 (to be "aggrieved" a litigant must have "suffered a concrete and particularized injury"). To say the hospitals were "aggrieved" by the Wayne County Litigation, puts the cart before the horse, *assuming* a preclusive effect that has not been established and would be improper under the law.

State Farm's theory also defies practical workability. Should Michigan citizens start claiming appeals from cases to which they are not parties, on the theory that they are somehow aggrieved by a judgment that does not apply to them, this Court and the Court of Appeals would rightly question by what basis in law or fact are they before the Court. The answer is: there is none.

B. Spectrum Health's and Mary Free Bed's claims could not have been resolved in the Wayne County Litigation.

The Court of Appeals also found the second element of res judicata lacking here: the matter contested in the second suit *could not have been resolved in the first*. See *Dart*, 460 Mich at 586

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judicata or collateral estoppel's "full and fair opportunity" requirement, nor even consider and balance the equities of the specific situation presented. Contra *Monat*, 469 Mich at 683 n2 and 686 n4.

(listing elements). While State Farm fervently argues that this litigation and the Wayne County Litigation arise out of the same transaction and share the same basic core of operative facts (i.e., the same motor vehicle accident); it misses the basis of the Court of Appeals' ruling:

> [B]ecause Myers assigned his rights to pursue the claims involving [Spectrum Health and Mary Free Bed], those issues could not be decided in the Wayne County action because Myers had divested himself of the pursuit of those claims through the assignments. [AT App'x SF6.]

The Wayne County Litigation, in other words, was brought by Myers and *Myers* had no authority to pursue benefits relating to Spectrum Health's and Mary Free Bed's charges because he had already assigned those rights away. Because *he* could not discharge Spectrum Health's and Mary Free Bed's claims, those claims could not have been resolved in the Wayne County Litigation.

Stated differently, Myers and Spectrum Health and Mary Free Bed each possessed separate claims. See *Covenant*, 500 Mich at 211 n31 and 217 n40. Accord Restatement Judgments, 2d, Dimensions of "Claim" for Purposes of Merger and Bar, §24, comment *a* ("[I]f more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purposes of merger and bar.") Even under the broadest application of res judicata, preclusion is limited to those claims that *could have* been raised in the prior litigation, but were not. *Dart*, 460 Mich at 586. Accord *Nelson v Woodworth*, 363 Mich 244, 249; 109 NW2d 861 (1961) and *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1988). Because Myers could neither have raised nor discharged Spectrum Health's and Mary Free Bed's claims, res judicata is no bar here.

Again, the Court of Appeals' ruling and this Court's jurisprudence are in line with the Restatement of Judgments on Assignments:

> (1) A judgement in an action by either the assignee or the assignor against the obligor of an obligation that has been assigned precludes a subsequent action on the obligation by the other of them *if the person maintaining the action had power to discharge the obligation*. [Restatement, §55 (emphasis added).]

The comments explain further:

> If the action is brought by one who lacks authority to discharge the obligation (for example, an assignor after notice of assignment), it is the obligor's responsibility to raise that issue, if he fails to do so, the judgment does not discharge him, just as he would not be discharged by making a voluntary payment to the assignor after notice. [*Id.* at comment *a.*]

See also 46 Am Jur, 2d, Judgments, §570 (same). Because Myers had no power to discharge Spectrum Health's and Mary Free Bed's claims, those claims could not have been brought in the Wayne County Litigation. The Insurers could have moved to dismiss the claims Myers purported to bring, but had already assigned away. MCR 2.116(C)(7). They did not. Had the Insurers wished to avoid the possibility of inconsistent rulings on Myers', and Spectrum Health's and Mary Free Bed's, separate claims, they could have sought joinder. MCR 2.205. They did not.

C. The Insurers' "greater rights" arguments are a red-herring.

Both Insurers argue, throughout their applications, that Spectrum Health and Mary Free Bed are claiming to have rights *greater* than or *superior* to Mr. Myers' and seeking to use their status as assignees to "immunize them[selves] from any defenses State Farm or MetLife may have against Jacob Myers." (State Farm's Application, p 34.) This is simply not true.

Spectrum Health and Mary Free Bed have never denied that their claims are dependent on Myers' underlying eligibility for benefits. If he is ineligible based on facts that predate the assignments, then Spectrum Health and Mary Free Bed are also ineligible. There is also no dispute that that, to succeed on their claims, the hospitals must show that *Myers* suffered accidental bodily injury in a motor vehicle accident and he treated with them for those injuries. MCL 500.3105; MCL 500.3107; MCL 500.3113(b). Likewise, the Insurers are free to raise whatever defenses they had based on Myers' pre-assignment conduct. The point is, Spectrum Health and Mary Free Bed—as owners and real parties in

interest on *their* claims—must actually have the opportunity to respond to those defenses. As the Court of Appeals explained:

> To be sure, [the Insurers] can still assert any defense that they may have—including a claim of fraud to invalidate the policy and the violation of MCL 500.3113(b)—to defeat the claims by Spectrum Health and Mary Free Bed. What is clear, however, is that the trial court had no authority to deprive [Spectrum Health and Mary Free Bed] of their day in court on the ground that [they] were Myers' privies because Myers assigned his rights under the insurance policy to them. [AT App'x SF6.]

Contrary to the Insurers' assertions, Spectrum Health and Mary Free Bed are not claiming rights greater than what Myers himself possessed at the time of the assignments. They are only claiming their essential due process right to have their day in court. *Taylor*, 553 US at 884; *Postal*, 247 US at 476.

D. Even if their elements had been met, it would be plainly inequitable to apply the doctrines here.

Even if their elements *had* been met (which they were not), it would be plainly unjust to apply res judicata and collateral estoppel here. As the Court of Appeals noted, "in this instance, application of the doctrines would obviate the assignment and effectively render it null and void and deprive [Spectrum Health and Mary Free Bed] of the right to pursue their claims." (AT App'x SF6.) Spectrum Health and Mary Free Bed had a right to pursue their claims as proper assignees; application of the doctrines here extinguished that right without Spectrum Health and Mary Free Bed having an opportunity to be heard.

There is also an entirely separate reason application of the doctrines would be inequitable here: MetLife's denial (and the basis of the Wayne County Circuit Court judgment in its favor) was wrongful. MetLife argued, and the Wayne County Court agreed, that Myers was excluded from receiving benefits as an uninsured owner because neither he nor his co-owner, Watson, had *personally* insured the vehicle. (AT App'x MET31 and SF149, 151.) That argument and ruling were both based on a Court of Appeals' decision that was overruled by this Court. In *Dye*, this Court held that "an

owner or a registrant of a motor vehicle involved in an accident is *not* excluded from receiving no-fault benefits when someone *other* than that owner or registrant purchased no-fault insurance for that vehicle." 504 Mich at 192-93 (emphasis added). Rather, the owner still "maintained" insurance by procuring it through a third-party, and this Court expressly overruled *Barnes*, the decision upon which MetLife's argument exclusively relied. *Id.* MetLife's denial was wrongful from the start. It does not even argue otherwise. Jacob Myers is *not* excluded as an uninsured owner simply because Hyatt insured the vehicle. Under these circumstances, res judicata and collateral estoppel cannot be rigidly applied. *Pike v Wyoming*, 431 Mich at 589-99.

The Restatement of Judgements states as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *
>
> (2) The issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. [Restatement, §28.]

The comments explain further:

> A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position. [*Id*. at comment *b*.]

Three times now this Court has relied on this Restatement section. In *Young v Edwards*, 389 Mich 333, 338-40; 207 NW2d 126 (1973), the Court quoted this section and comment in full and held that res judicata did not bar an incumbent state senator from seeking an order of mandamus to place him on the primary ballot as a candidate for mayor of Detroit, even though he had previously brought

and lost a similar action, because of an intervening change in the law. Looking to the Restatement, the Court noted that (1) since the prior suit there had been a great deal of change "in the applicable legal context" and (2) application of res judicata would lead to an "inequitable administration of the laws" under which *this* legislator would be precluding from taking advantage of the change, while other state legislators would not. *Id.* at 340-41. This Court quoted the rule and its comment in full again in *Socialist Workers Party v Secretary of State*, 412 Mich 571, 583-587; 317 NW2d 1 (1982), and again held that res judicata did not apply given an intervening change in the law. And then a third time, in *Monat*, this Court relied on it again, expressly directing lower courts to consider it when deciding whether or not the doctrines should apply. 469 Mich at 683 n2.

This principle governs here. Whether Myers is excluded under §3113(b) is an "issue of law" and a "new determination is warranted to take advantage of an intervening change in the applicable legal context" and avoid an "inequitable administration" of laws. Restatement, §28. Even if their elements had been met (which they were not), res judicata and collateral estoppel should not be rigidly applied to bar Spectrum Health and Mary Free Bed from pursuing *their* claims now, when the law upon which the judgment against Myers was based has now been explicitly overruled.

IV. THIS COURT SHOULD NOT, IN THE ALTERNATIVE, RULE ON STATE FARM'S SUBSTANTIVE ARGUMENT.

In the alternative, State Farm requests that this Court hold that there is no genuine issue of material fact that it is not the responsible insurer. (State Farm's Application, pp 47-50.) The Court should decline this invitation. Neither lower courts ruled on the point. As a result, there is no record ruling for this Court to review. This Court should decline to make such factual determinations now in the first instance. See, e.g., *People v Alexander*, 500 Mich 1016; 896 NW2d 421 (2017); *People v Barritt*, 501 Mich 872; 901 NW2d 859 (2017); *People v Frederick*, 500 Mich 228, 243-44; 895 NW2d 541 (2017).

V. THE INSURERS HAVE FAILED TO SHOW THE REQUISITE GROUNDS FOR APPEAL TO THIS COURT.

Spectrum Health and Mary Free Bed deny that this case warrants this Court's review under MCR 7.305(B). To support their applications, the Insurers were required to show that this case involves a "legal principle of major significance to the state's jurisprudence," that the Court of Appeals' decision was "clearly erroneous and will cause material injustice" or that it "conflicts with a Supreme Court decision or another decision of the Court of Appeals." *Id*.

The Court of Appeals' unpublished decision did not break new legal ground and is not precedentially binding. MCR 7.215(C)(1). It was entirely consistent with its own and this Court's assignment jurisprudence. The non-assignment cases, like *TBCI* and *Dawoud*, on which the Insurers relied are distinguishable. There simply is no conflict to be resolved here. And, because MetLife's claim denial was legally erroneous under *Dye*, the Court of Appeals' opinion has caused *no* injustice, let alone a *material* injustice. Jacob Myers' actions in maintaining insurance on the vehicle, Spectrum Health's and Mary Free Bed's actions in proceeding against the Insurers as proper assignees in a proper venue, and the Court of Appeals' decision that res judicata and collateral estoppel did not bar Spectrum Health and Mary Free Bed from pursuing their claims were all consistent with our no-fault act and more than a century of this Court's assignment jurisprudence. The Insurers positions, on the other hand, are not only wrong, but would turn assignment law on its head.

Beyond that, the opinion also has a very narrow application. In response to *Covenant*, our Legislature amended the no-fault act. Under the amended MCL 500.3112, medical providers *do* possess their own statutory cause of action, irrespective of any assignments. See MCL 500.3112, as amended by 2019 PA 21 ("A health care provider listed in section 3157 may make a claim and assert a direct cause of action against an insurer, or under the assigned claims plan under sections 3171 to 3175, to recover overdue benefits payable for charges for products, services, or accommodations provided to

an injured person."). As of June 11, 2019, therefore, providers no longer have a need to proceed as assignees to properly pursue benefits under the act, as Spectrum Health and Mary Free Bed were required to do here. For all intents and purposes, then, the Court of Appeals' decision here is limited in its impact to the parties to this case. It is simply not a case of "major legal significance."

The Insurers are not helpless victims hopelessly facing "multiple trials" in "multiple venues" by, not only their insureds, but the "myriad" of medical providers seeking to recover their charges. They had a remedy all along; they simply elected not to pursue it. Our court rules provide a means by which no-fault insurers can protect themselves from the possibility of multiple trials and inconsistent rulings. Neither Spectrum Health and Mary Free Bed, nor this Court, are responsible for the Insurers' failure to take advantage of those legal rights.

RELIEF REQUESTED

For all of these reasons, Spectrum Health and Mary Free Bed respectfully request that this Court deny State Farm's and MetLife's applications for leave to appeal.

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Dated: August 13, 2020

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STATE OF MICHIGAN

COURT OF APPEALS

LIBERTY BIDCO, Assignee of ENAMELCOTE, INC.,	UNPUBLISHED July 9, 2002
Plaintiff-Appellant,	
v	No. 226609 Wayne Circuit Court
PRODUCTION STAMPING, INC.,	LC No. 99-939671-CK
Defendant-Appellee.	

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Plaintiff Liberty Bidco appeals as of right from the trial court's order granting defendant Production Stamping Inc.'s (PSI) motion for summary disposition pursuant to MCR 2.116(C)(6). We affirm.

I. Facts and Procedural History

On or about October 2, 1998, Enamelcote, Inc. and PSI entered into a written purchase agreement under which Enamelcote obtained the right to exclusively coat all of the products shipped out of PSI's New Baltimore, Chesterfield, and Oxford, Michigan facilities for a three-year period. Unfortunately, the relationship between Enamelcote and PSI appears to have quickly disintegrated. Specifically, on or about December 27, 1998, Enamelcote sued, amongst others, PSI in the Macomb Circuit Court. A first amended complaint was filed by right on February 17, 1999, and alleged that PSI failed to provide Enamelcote with one hundred percent of the coating business from the three facilities, as required by the October 2, 1998, agreement. The first amended complaint alleged breach of contract, unjust enrichment, and promissory estoppel.

On April 13, 1999, almost two months after the first amended complaint was filed in the Macomb Circuit Court case, Enamelcote assigned to Liberty Bidco its accounts receivable from PSI under the October 2, 1998, agreement. Thereafter, on December 17, 1999, Liberty Bidco, as "assignee of Enamelcote," filed a verified complaint in the Wayne Circuit Court alleging that PSI had breached the October 2, 1998, contract by failing to pay for services rendered. The Wayne Circuit Court complaint, like the Macomb Circuit Court first amended complaint, contained an allegation of breach of contract, account stated, unjust enrichment, and promissory estoppel. The undisputed evidence submitted in the Wayne Circuit Court case revealed that the

accounts receivable allegedly owed by PSI totaled $412,525.73, and was for shipments taking place between April 1998 and January 1999.

In lieu of filing an answer, PSI filed a motion for summary disposition in the Wayne Circuit Court case alleging that the case was barred because Enamelcote had already sued PSI for breach of the same contract in Macomb Circuit Court. In essence, PSI argued that because the assignment of accounts receivable from Enamelcote to Liberty Bidco took place after Enamelcote had filed a Macomb County action, Liberty Bidco was improperly splitting Enamelcote's cause of action against it.

As noted, the Wayne Circuit Court granted PSI's motion. The lower court reasoned that Enamelcote could not split its cause of action because it "cannot accomplish the same result by an assignment of his demand thereby enabling others to do what he could not do." Because there was a single cause of action, "all of the damages that arise out of that single cause of action include any accounts receivable as well as any future, or loss of the future business from this particular defendant." Liberty Bidco has appealed the order of dismissal, and we affirm.

II. Analysis

PSI argues on appeal, as it did in the trial court, that Liberty Bidco's complaint was properly dismissed because to allow two simultaneous cases to proceed based upon the alleged breach of the same alleged contract violates the rule against the splitting of causes of action. However, PSI's motion for summary disposition was filed pursuant to MCR 2.116(C)(6), and presumably granted under that subrule.

We review a trial court's grant of summary disposition de novo. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In the present case, defendant moved for summary disposition under MCR 2.116(C)(6), which provides for dismissal where "[a]nother action has been initiated between the same parties involving the same claim." *Sovran Bank v Parsons*, 159 Mich App 408, 412; 407 NW2d 13 (1987). In deciding whether summary disposition is warranted under this sub-rule, the trial court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties, MCR 2.116(G)(5), and determine whether the two lawsuits involved the same parties and are based on the "same or substantially same cause of action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983).

This Court has previously pointed out that MCR 2.116(C)(6) is the codification of the common law rule of the plea of abatement by prior action. *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). The purpose of this rule is to preclude parties from being harassed by new suits brought by the same plaintiff involving the same questions as those existing in pending litigation. *Id.* at 546, quoting *Chapple v Nat'l Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926); *Rowry v Univ of Michigan*, 441 Mich 1, 20-21; 490 NW2d 305 (1992) (Riley, J., concurring). To be applicable, the initial suit must still be pending at the time of the decision regarding the motion for summary disposition. *Fast Air, Inc*, *supra* at 549. Additionally, under this subrule, neither all the parties nor all the issues need be identical. *Id.* at 545 n 1, citing *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Rather, "[t]he two suits only have to 'be based on the same or substantially the same cause of action.'" *Id.*

The lower court determined, and PSI continues to argue on appeal, that under Michigan law, a plaintiff must present his whole cause of action in one suit. This statement of the law is, of course, correct. MCR 2.203(A); *Coniglio v Wyoming Valley Fire Ins Co*, 337 Mich 38, 46; 59 NW2d 74 (1953); *Arnold v Masonic Country Club*, 268 Mich 430, 434-435; 256 NW 472 (1934). "The primary reason for the rule against splitting a cause of action is that the defendant should not be unreasonably harassed by a multiplicity of suits." *Chatham-Trenary Land Co v Swigart*, 245 Mich 430, 435; 222 NW 749 (1929). Hence, the purpose of both a dismissal under MCR 2.116(C)(6) and 2.203(A) are the same: the elimination of a defendant having to defend multiple suits based on the same or substantially same cause of action.

We conclude that the motion for summary disposition was properly granted under MCR 2.116(C)(6). First, the Wayne Circuit Court case involved the same parties as the Macomb Circuit Court case. PSI was a defendant in both cases. As the assignee of Enamelcote's contractual right to receive payment under the October 2, 1998, contract, Liberty Bidco stood in the same shoes as Enamelcote. *Professional Rehabilitation Associates v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Therefore, Liberty Bidco and Enamelcote were essentially the same parties because Liberty Bidco was enforcing the same contractual rights as previously held by Enamelcote.

Second, it is undisputed that at the time the motion for summary disposition was heard, there was pending in the Macomb Circuit Court a first amended complaint against PSI for breach of the same contract at issue in the instant case. *Fast Air, Inc, supra* at 549. Both complaints also contained the very same causes of action: breach of contract, unjust enrichment, and promissory estoppel. Moreover, at the time Enamelcote filed its first amended complaint on February 17, 1999, it had not assigned the accounts receivable to Liberty Bidco. The evidence before the lower court established that not only did Enamelcote still have full rights to the accounts receivable, but also that the accounts receivable subsequently sought by Liberty Bidco through the instant case had already accrued by the time the first amended complaint was filed. Hence, pursuant to MCR 2.116(C)(6), dismissal was appropriate because it was undisputed before the trial court that another pending action existed involving the same parties and same claims. *Darin v Haven*, 175 Mich App 144, 149; 437 NW2d 349 (1989).[1]

Finally, we reject PSI's request for sanctions.[2] PSI has cited no authority in support of its assertion that Liberty Bidco should be sanctioned, and we will not search for law to support its

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[1] We note that the dismissal in this case should have been without prejudice, but the issue is not properly before us because plaintiff waived the issue before the circuit court, and the issue has become moot as the case previously pending in Macomb Circuit Court has now been settled. Furthermore, Enamelcote was required to bring all of its alleged breach of contract claims against PSI in its original compliant. MCR 2.203(A). The evidence revealed that the accounts receivables were due and owing by the time the first amended complaint was filed, and certainly before the assignment took place with Liberty Bidco. Hence, as the trial court reasoned, Liberty Bidco could not bring an action that its assignor could not bring. Dismissal was proper on this basis as well.

[2] Both parties utilize a significant portion of their briefs to argue the circumstances surrounding the entry of, and subsequent vacating of, the default judgment. All of this bantering by the

(continued…)

position. See *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray

(…continued)

parties is irrelevant, however, because neither party has properly raised as an issue on appeal the propriety, or lack thereof, in the entry of the default judgment.

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT S. MOSKALIK, JUDY K. MOSKALIK, and DOLORES ROYER,

Plaintiffs-Appellees,

v

CRAIG W. F. HILSINGER,

Defendant,

and

ELLIOTT HILSINGER,

Defendant-Appellant.

UNPUBLISHED
June 21, 2005

No. 251388
Branch Circuit Court
LC No. 00-000136-CH

DARLA SMITH, MICHAEL STAHL, MANDY STAHL, GLENN S. SHELBURNE, and SHERRY SHELBURNE,

Plaintiffs-Appellees,

v

CRAIG W. F. HILSINGER,

Defendant,

and

ELLIOTT HILSINGER,

Defendant-Appellant.

No. 251389
Branch Circuit Court
LC No. 00-003207-CH

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In these consolidated cases, defendant Elliot Hilsinger appeals as of right from the trial court's orders enforcing a 1957 consent judgment against defendant's predecessors in interest and declaring that plaintiffs hold private prescriptive easements over a strip of land adjacent to defendant's lakefront cottage.[1] We reverse and remand.

I. Facts

This matter arises from defendant's attempt to block public access to a strip of land on the north side of his cottage fronting Coldwater Lake, which his neighbors and members of the general public had long used for lake access and general recreation. Defendant's predecessors in interest had earlier attempted to reserve a portion of this lake access to themselves, which prompted the Township of Ovid to file suit in 1956. In that action, the township maintained that the disputed parcel was once a road end serving as a public access to the waters of Coldwater Lake. Defendant's predecessors denied that any such road ran to the lake since their having acquired the property, or that the strip in question had been maintained as a public access at any time during the previous forty years. Defendant's predecessors further asserted that they had maintained the grounds of the disputed parcel and "claim[ed] ownership to the Section line." That litigation ended in 1957 with a consent judgment, under which defendant's predecessors agreed to move an offending fence and to refrain from otherwise interfering with the right of the "public" to use the "highway" north of their property.

Defendant acquired title to the property in 1981 and in 1999 moved a fence, which had until that time separated the undisputed portion of defendant's property and the disputed strip, to what he regarded as the true northern border of his property. In doing so, defendant enclosed almost the entire lake access strip. Plaintiffs subsequently brought these actions, asserting prescriptive easement rights over the disputed strip, as well as standing to enforce the 1957 consent decree.

Following a bench trial, the court decreed that plaintiffs had established private prescriptive easements over the disputed strip, bringing full riparian rights. The court further held that the 1957 consent judgment controlled the instant actions through the doctrine of res judicata, and that the Smith, Stahl, and Shelburne plaintiffs had standing to enforce that judgment "as residents of Ovid Township, . . . and as parties affected by acts of the Defendants."[2] After also declaring that this was not an action to quiet title, the court permanently enjoined defendant from obstructing plaintiffs' use of the disputed strip for access to the lake or any other riparian purpose.

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[1] Because defendant Craig Hilsinger had earlier conveyed his interest in the subject property, including his potential interest in the disputed strip, to defendant Elliott Hilsinger, the former was dismissed as a party. Defendant Elliott Hilsinger is thus the only defendant involved in this appeal. Accordingly, unqualified references to "defendant" in this opinion will refer to Elliott Hilsinger exclusively.

[2] The court impliedly extended this reasoning to the remaining plaintiffs, having decreed in connection with them that defendant was bound by the 1957 order.

On appeal, defendant argues that the trial court erred in concluding that the 1957 judgment governs the instant actions through the doctrine of res judicata, and in declaring that plaintiffs have acquired private easement rights in the disputed parcel.

II. Res Judicata and Standing

This Court reviews a trial court's application of res judicata de novo, as a question of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Whether a party has standing to bring an action likewise involves a question of law reviewed de novo on appeal. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004). However, a trial court's factual findings with respect to these legal questions are reviewed for clear error. See *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

"Under the doctrine of res judicata, 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.'" *Wayne Co*, *supra*, quoting Black's Law Dictionary (6th ed, 1990), p 1305. "The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits." *Wayne Co*, *supra*.

Defendant argues that the trial court erred in finding identity of parties and issues, and in recognizing plaintiffs' standing to sue for enforcement of the 1957 consent decree. We agree.

A. Identity of Parties

Privity is defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." Black's Law Dictionary, *supra* at 1199. Accordingly, "the executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor." *Id*., citing *Litchfield v Crane*, 123 US 549; 8 S Ct 210; 31 L Ed 199 (1887). Not included in this list is constituent and politician, or member of the general public and governmental entity. Privity demands a closer relationship than obtains between a governmental entity and the general public. See, e.g., *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 458-459; 487 NW2d 799 (1992).

"In connection with the doctrine of res judicata," a person has privity "who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment." Black's Law Dictionary, *supra* at 1200. In this case, Ovid Township in 1956 asserted general rights on behalf of anyone who might desire access to Coldwater Lake. The instant plaintiffs, then, did not acquire their interests in enforcement of the 1957 consent decree through any acquisition of property rights, but instead simply join the rest of humanity as beneficiaries of the township's advocacy in the late 1950s. Consequently, the trial court erred in regarding plaintiffs as parties in privity with Ovid Township for purposes of declaring that plaintiffs were entitled to enforce the 1957 consent decree through the doctrine of res judicata.

B. Identity of Issues

The trial court also erred in regarding the earlier and present cases as having identical issues for purposes of declaring that the 1957 consent decree governed the present case through the doctrine of res judicata. Indeed, where evidence that establishes the existence of rights to a road contiguous to a lake is not the same as that which determines the existence of riparian rights, an earlier adjudication concerning the former is not res judicata in connection with a subsequent action to determine the latter. *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n*, 29 Mich App 64, 68-69; 185 NW2d 107 (1970). In this case, although there is considerable overlapping in the subject matter of the former and present cases, there are significant differences. The 1957 judgment arguably enjoins defendant (as a privy of his predecessors' interest in the land) from "interfering with the right of the public to use the highway lying North of the Defendants' property . . . , for ingress or egress to Coldwater Lake." However, there is no mention of general riparian rights, which are broader than the mere right to ingress and egress and which the trial court included for plaintiffs in the instant case. See, e.g., *Dyball v Lennox*, 260 Mich App 98; 680 NW2d 522 (2004).

Moreover, the general public cannot acquire prescriptive rights to private property for recreational purposes. *Comstock v Wheelock*, 63 Mich App 195, 199; 234 NW2d 448 (1975). "[E]stablishment of public recreation rights by prescription requires at a minimum governmental action to facilitate and control recreational use." *Kempf v Ellixson*, 69 Mich App 339, 343-344; 244 NW2d 476 (1976). Defendant testified that he never saw the pertinent township or road commission exercise any dominion or control over the disputed parcel. The Ovid Township supervisor similarly testified that, in response to plaintiff Smith's complaint about a deteriorating seawall on the disputed parcel, she informed Smith that the parcel "never was noted as Ovid Township Access," and thus that it was not the township's responsibility to repair the seawall.

The evidence concerning the existence of public rights in the disputed strip in 1957 says nothing about whether the municipality later abandoned such rights, either by extinguishing a public easement through the discontinuation of activities that establish and maintain such a thing, or by abandoning a public road to which the public had access rights only because it was public property or located on land subject to a public easement.

Because resolution of these questions was neither necessary nor possible in the earlier action, the trial court erred in regarding the earlier and present cases as having identical issues for purposes of declaring that the 1957 consent decree governed the present case through the doctrine of res judicata.

C. Standing

"'[P]ublic rights actions must be brought by public officials vested with such responsibility.'" *Gyarmati v Bielfield*, 245 Mich App 602, 605; 629 NW2d 93 (2001), quoting *Comstock*, *supra* at 202. In this case, the plaintiffs who testified conceded that they regarded the disputed parcel as a public access, and that they asserted no greater rights than those of the general public. Because private parties asserting public rights are asserting no greater rights than those of the general public, such private parties lack standing to assert such rights. *Comstock*, *supra* at 203. Rather, because public rights actions must be brought by public officials, it is such officials, and not their constituents, who have the prerogative to maintain or abandon, intentionally or otherwise, public rights in a lake access. Accordingly, the trial court erred in recognizing the standing of plaintiffs to assert rights in connection with the 1957 consent decree.

III. Private Prescriptive Easements

Defendant argues that the trial court erred in finding the existence of several private easements without determining the owner of the servient estate, and that the evidence did not support the conclusion that certain plaintiffs satisfied the elements for continuous usage. We agree that the court erred in failing to determine the owner of the fee in question, and in concluding that the evidence showed that the Shelburne and Stahl plaintiffs satisfied the continuous-usage element necessary for establishment of a private prescriptive easement.

"[E]quitable issues are reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error. However, the granting of injunctive relief is within the sound discretion of the trial court . . . ." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999) (internal quotation marks and citations omitted).

A. Owner of the Fee

"An easement is a right to use the land *of another* for a specific purpose." *Killips v Mannisto*, 244 Mich App 256, 258-259; 624 NW2d 224 (2001) (emphasis added). It therefore follows that a judicial action proclaiming the existence of an easement must include a determination, or acknowledgement if the matter is not in dispute, of the owner of the land subject to the easement. Here, however, both the 1957 consent judgment and the opinions below are vague with respect to ownership of the disputed strip. None unequivocally declares the location of the northern boundary of defendant's property. Again, before arriving at the 1957 consent decree, the Township of Ovid maintained that the disputed strip was a continuation of a public highway to the lake's edge, which defendant's predecessors in interest disputed. The earlier judgment seems to presuppose the township's view, describing the disputed parcel as "the highway lying North of the Defendants[']] property." But regarding the land as a highway does not resolve the question of ownership. "Unless a contrary intent appears, owners of land abutting a street are presumed to own the fee in the street to the center, subject to the easement." *Thies v Howland*, 424 Mich 282, 291; 380 NW2d 463 (1985); see also *Eyde Bros Development Co v Eaton Co Drain Comm'r*, 427 Mich 271, 282; 398 NW2d 297 (1986). Even recognizing the disputed parcel as a highway, then, leaves open the question whether the land is or was fully owned by the township or other governmental entity, or whether it existed as an easement over land owned by defendant's predecessors, with reversionary interests then retained by defendant.

In the instant case, defendant introduced a deed reflecting a 1958 transaction according to which defendant's predecessors in interest acquired title to "[a]ll interest in and to all land lying . . . north" of a certain line, thus apparently covering the disputed strip. However, there was no evidence to indicate that the conveyors were indeed the true owners of the disputed strip. Moreover, because the deed purports to cover all land north of a line, specifying no northern boundary, it appears to prove too much—as if the conveyance extended defendant's northern boundary indefinitely. The trial court, in its statements from the bench, observed the lack of substantiation in the title of the putative conveyor of the 1958 deed in the course of concluding that "[t]he Defendants . . . have no greater authority . . . than the Plaintiffs to assert ownership" of the disputed strip.

However, the written opinions below do not plainly state that defendant was never the owner of the disputed parcel. They provide that defendant may erect a fence, but "in the same

location of the prior fence, which was previously *perceived* as the North boundary of Defendants Hilsingers' property" (emphasis added), thus leaving unanswered the question of defendant's actual northern boundary. The orders further reiterate that "Defendants have no greater authority than Plaintiffs to assert ownership over the above-described easement property," which implies that defendant is not the owner at all, but merely has rights as a member of the general public, or joins plaintiffs in having prescriptive easement rights. Had the court intended to recognize defendant as owner of the disputed strip, subject to plaintiffs' easements, then it would have recognized some rights on defendant's part superior to those of plaintiffs, such as the right to reversion in connection with any future abandonment by the township of public rights, or by plaintiffs of their easements. The court's statements, then, taken as a whole, indicate that the court found that defendant owned no part of the fee in controversy.

The trial court thus declared the existence of private easements for plaintiffs without identifying against whom those easements exist, finding that defendant was not the owner of the disputed parcel while showing no resultant concern for the true owner's lack of participation in the case. "[P]ersons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests." MCR 2.205(A). In this case, to decide the question of a public access, pursuant either to general public ownership and dedication of a roadway, or a public easement, it was necessary to join Ovid Township as a party, to determine at least whether it had maintained or abandoned any such public access since establishing it in the 1957 consent decree. To decide the question of private easement, ownership of the disputed parcel should have been unambiguously determined, whether in defendant, some other private party, or Ovid Township or other governmental unit.

As things stand, the judgments below are invalid for declaring the existence of private easements while failing to identify the owner of the servient estate and declaring that the only participant in the case who did claim ownership was not the owner. In other words, the trial court erred in declining to treat this case as an action to quiet title, where title to the disputed parcel needed to be ascertained in order to determine the rights and responsibilities of the parties.

B. Hostile and Continuous Usage

"An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Killips*, *supra* at 258-259. The analysis for establishing a prescriptive easement differs from that for establishing adverse possession mainly in that the former does not require exclusivity while the latter does. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

In this case, the lack of a determination of the true owner of the disputed strip renders it technically impossible to adjudge whether any uses of that strip were hostile for the prescribed period. In particular, if the fee is in fact owned by a governmental unit that dedicated the fee to public use, and has since demonstrated no contrary intention, then general recreational uses of the land are not hostile to the interests of the owner. However, should the determination of defendant's northern boundary on remand show that boundary to encompass any part of the disputed parcel, the recreational uses to which plaintiffs have put the land may indeed prove the

element of hostility and continuous usage. In light of that possibility, we will consider the evidence of plaintiffs' usage histories as they relate to such possible interest on defendant's part.

1. Hostile Usage

"Hostile," for purposes of acquiring prescriptive rights, refers only to non-permissive use of the land that is inconsistent with the rights of the owner, such as would "entitle the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976), citing 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461.

Defendant testified that his neighbors used the disputed strip with his permission, granted in the interests of community goodwill. However, no plaintiff testified to having ever sought or received permission, while there was abundant testimony to the contrary. Because the trial court was not obliged to believe defendant's protestations of having granted permission, and there is no dispute that there has been widespread public use of the disputed strip, the trial court had a sound basis for regarding the public presence on the disputed strip as hostile to defendant's claim of ownership.

In reaching this conclusion, we reject defendant's assertion that because plaintiffs asserted that they used the strip with the understanding—mistaken in defendant's view—that it was a public access maintained by the municipality, their activities on the land could not have been hostile. Although a party who intends to exercise dominion only to the actual property line but fails to do so cannot establish adverse possession beyond that intention, a party intending to hold to a specific, recognizable boundary can establish adverse possession consistent with that intention. *Gorte v Dep't of Transportation*, 202 Mich App 161, 170; 507 NW2d 797 (1993). In other words, an adverse possession claim is not defeated by a claimant's mistaken belief that he or she was respecting a specific line believed to constitute the actual boundary. See *Connelly v Buckingham*, 136 Mich App 462, 470; 357 NW2d 70 (1984).

In this case, assuming for present purposes that the land belonged to defendant but that plaintiffs used it under the mistaken impression that it was a municipally provided public access, the evidence is nonetheless uncontroverted that the fence that had long separated defendant's residential area from the disputed strip was regarded as the boundary of a public right-of-way. Because plaintiffs used the land while respecting what was understood to be a specific boundary, their usage was hostile for purposes of establishing prescriptive rights, any mistaken understanding that it was a public lake access notwithstanding.

2. Continuous Usage

Defendant concedes that the Moskalik plaintiffs "arguably have established this element," and that plaintiff Royer "[l]ikewise . . . arguably met this burden of proof" on this element. These admissions, coupled with defendant's failure to point to any evidence or authority in assertion of contrary conclusions, constitute abandonment of any challenges to the trial court's conclusion that those plaintiffs satisfied the continuous-usage requirement for a prescriptive easement. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). However, concerning plaintiff Smith, defendant correctly points out that she owned her nearby parcel for only ten years before defendant blocked her access to the disputed strip with a fence in

1999, and that she thus must rely on her predecessor in interest to establish the requisite fifteen years of hostile land usage.

"A party may 'tack' on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate." *Killips, supra* at 259. "This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Id*. (citations omitted).

In this case, there is no evidence that any document of conveyance, for Smith or any other plaintiff, included a description of easement rights to the disputed parcel. However, Smith's predecessors in interest provided testimony indicating that the occupants of Smith's land had freely used the disputed area for decades and that they had indeed mentioned rights to the lake access as one of Smith's inducements to buy. This evidence afforded the trial court a sound basis for concluding that Smith, through tacking in connection with her predecessors in interest, satisfied the continuous-use element for a prescriptive easement.

However, the Stahls and the Shelburnes offered no testimony at all. That they had lived in the area for over fifteen years is not at issue, and while it may be logical to presume that they, along with the rest of the general public wishing access to Coldwater Lake, would have used the disputed strip, no such mere presumption is sufficient to establish private easement rights.

One witness, when asked about the Shelburnes' use of the disputed parcel, replied that "they still have their trailer there and their addition. And they come down a few times during the summer and use that. They go out there swimming and fishing and things." This falls short of providing an evidentiary basis for establishing that the Shelburnes had earned private prescriptive rights through fifteen years of usage hostile to the interests of defendant. For these reasons, the trial court erred in declaring that the Shelburnes had such rights.

The record likewise fails to disclose any significant description of the Stahls' usage of the disputed strip. But aside from this evidentiary deficiency, indications from the Stahls' attorney suggest that they lacked standing to claim a private easement at all.

Counsel reported that the Stahls "sold their interest in the property," and did so "in a fashion that would include presentation being made that successors in title, based upon an existing Court Order, would have access to the lake across the defined right-of-way." Taking counsel's representations at face value, we note that the Stahls both sold their property, thus abandoning any continuing interest in a private easement appurtenant, and informed their buyers that they were acquiring with the property use of the disputed parcel, thus indicating that the Stahls intended to maintain no such private easement as one in gross. It is thus the Stahls' successors in interest, not themselves, who have an interest in the outcome of this case. Although the Stahls' history of activity on the disputed strip would bear on the question of their successors' prescriptive rights, such rights nonetheless remain those of the successors, who have standing to assert the existence of a private easement on the disputed parcel stemming from ownership of a nearby lot. Counsel's concessions should have put the Stahls out of court. Consequently, the trial court erred in declaring that the Stahls had private prescriptive rights to the disputed parcel.

IV. Conclusion

The trial court erred in invoking the doctrine of res judicata, because the parties and issues involved in the 1957 litigation and the instant case are substantially different, and because plaintiffs, as private individuals, did not have standing to assert public rights earlier established by the Township of Ovid. The court further erred in declaring the existence of private easements to the disputed strip without determining the owner of the fee against whom those easements were won. The court additionally erred in finding that the Shelburne and Stahl plaintiffs had acquired private easement rights despite a dearth of evidence of their particular histories of usage of the disputed parcel, an error compounded in the case of the Stahls because they had alienated their interests and thus lacked standing to claim prescriptive rights.

For these reasons, we reverse the judgments below and remand this case to the trial court with instructions to determine unambiguously the northern boundary of defendant's property and the owner or owners of the fee in question, and to resolve again the questions of public or private rights according to those facts and the applicable principles of law, ensuring also that all necessary parties are participating.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN HEAD & SPINE INSTITUTE PC,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTO INS CO,

Defendant-Appellee.

UNPUBLISHED
January 21, 2016

No. 324245
Wayne Circuit Court
LC No. 13-004938-CZ

Before: STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

In this action under the No-Fault Act, MCL 500.3101 *et seq*., plaintiff Michigan Head & Spine Institute, P.C. (MHSI) filed the present lawsuit against defendant State Farm Mutual Auto Insurance (State Farm), seeking payment for medical services provided to Ashford Garley. The trial court granted summary disposition to State Farm under MCR 2.116(C)(7) based on the conclusion that MHSI's claims were precluded under the doctrines of res judicata and collateral estoppel by a prior federal action brought by Garley against State Farm. At the same time, the trial court denied MHSI's motion for partial summary disposition. MHSI now appeals as of right. Because res judicata bars MHSI's current claims, we affirm.

On December 15, 2011, Garley sustained bodily injury in a motor vehicle accident, after which he obtained medical services from several healthcare providers, including MHSI. Specifically, MHSI provided Garley with services between March 22, 2012 and May 23, 2012. At the time of Garley's accident, Garley's wife had a policy with State Farm, and it is undisputed that State Farm is highest in priority with respect to providing Garley with no-fault benefits. Nonetheless, State Farm failed to pay all of Garley's medical bills, including bills submitted by MHSI.

On August 13, 2012, Garley personally filed suit against State Farm in Wayne County Circuit Court, seeking benefits under the no-fault act. This case was later removed to federal court, and it ultimately resulted in a jury verdict in favor of State Farm in June of 2014. In particular, the jury concluded that Garley had sustained bodily injury in an auto accident, resulting in allowable expenses; but, the jury nonetheless determined that State Farm owed Garley $0. As part of a question submitted to the federal court, the jury explained: "we think all bills related to the accident have been paid and no more money is owed." Notably, MHSI was not a party to Garley's lawsuit and Garley did not specifically request payment of MHSI's bills.

However, it is uncontested that MHSI's treatment of Garley was considered during the federal action insofar as MHSI's medical records pertaining to Garley were introduced into evidence.

MHSI filed the present lawsuit in state district court, seeking payment of Garley's bills under the no-fault act. The case was later transferred to circuit court because the amount in controversy exceeded the district court's $25,000 jurisdictional limit. Thereafter, State Farm moved for summary disposition under MCR 2.116(C)(7) based on the applicability of res judicata and/or collateral estoppel. According to State Farm, MHSI stood in privity with Garley because MHSI sought no-fault benefits on behalf of Garley and such a claim was precluded because the question of State Farm's liability had been previously litigated in Garley's action against State Farm. MHSI opposed State Farm's motion and filed its own motion for partial summary disposition based on the application of res judicata and collateral estoppel. Although MHSI asserted that its claims were not precluded by the verdict in Garley's case, MHSI nonetheless asserted that portions of the jury's verdict should have a preclusive effect in this case. That is, in its motion for partial summary disposition, MHSI maintained that the jury verdict form in Garley's case demonstrated that the jury had concluded that (1) Garley had sustained accidental bodily injury arising out of the operation of a motor vehicle and that (2) Garley had incurred allowable expenses arising out of that accident.

Following a hearing, the trial court denied MHSI's motion for partial summary disposition and entered summary disposition in favor of State Farm under MCR 2.116(C)(7). The trial court concluded that State Farm was entitled to summary disposition for the reasons stated in State Farm's motion, i.e., based on the application of res judicata and collateral estoppel. MHSI now appeals as of right.

On appeal, MHSI argues that the trial court erred by granting summary disposition to State Farm and by denying MHSI's motion for partial summary disposition. According to MHSI, neither res judicata nor collateral estoppel entitle State Farm to summary disposition because MHSI was not a party to Garley's federal action and the issue of State Farm's liability with respect to MHSI's bills in particular was not actually litigated during the federal suit. Further, MHSI maintains that partial summary disposition should have been granted to MHSI because the jury actually determined that Garley suffered bodily injury arising from a motor vehicle accident that resulted in allowable expenses.

"This Court reviews de novo a trial court's decision to grant summary disposition." *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Under MCR 2.116(C)(7), dismissal of an action is appropriate because a claim is barred by a "prior judgment." See *RDM Holdings, LTD v Contl Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). The application of legal doctrines, such as res judicata and collateral estoppel, is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Simply stated, res judicata prevents "multiple suits litigating the same cause of action." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). Res judicata is a judicially created doctrine designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999) (quotation marks and citation omitted). Under this doctrine, a subsequent action is

barred when "(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). Res judicata has been broadly applied to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 121.

In this case, the parties do not dispute that Garley's federal lawsuit was decided on the merits and that it resulted in a final decision in State Farm's favor. Instead, MHSI argues that res judicata should not apply because MHSI was not a party to Garley's actions and because MHSI's bills were not submitted to the jury, meaning that the jury did not actually consider whether State Farm owed MHSI payment for services provided. These arguments implicate the issues of privity and whether MHSI's claims were, or could have been, raised in Garley's lawsuit.

With regard to privity, "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Id.* at 122. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id.* (quotation marks and citation omitted). Previously, this Court has specifically concluded that a healthcare provider, seeking payment under a no-fault insurance policy, stands in privity with an injured party who previously brought a lawsuit attempting to claim no-fault benefits under the same policy. *TBCI*, 289 Mich App at 44. In *TBCI*, this Court explained:

> [The healthcare provider], by seeking coverage under the policy, is now essentially standing in the shoes of [the insured]. Being in such a position, there is also no question that [the healthcare provider], although not a party to the first case, was a "privy" of [the insured]. [*Id.*]

As *TBCI* makes plain, in the case of healthcare providers and injured parties seeking benefits under a no-fault insurance policy, both the injured party and the healthcare provider share a common identity of interests in enforcing the provisions of the no-fault act and obtaining benefits under the policy. See generally MCL 500.3112; *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 397; 864 NW2d 598 (2014); *Mich Head & Spine Inst, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 447; 830 NW2d 781 (2013). That is, while a healthcare provider has independent standing to bring a lawsuit against a no-fault insurer, the fact remains that there is an "interdependence between the claims of a healthcare provider and an injured party," such that "a healthcare provider's eligibility to recover medical expenses is dependent upon the injured party's eligibility for no-fault benefits under the insurance policy." *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*, __ Mich App __, __; __ NW2d __ (2015), slip op at 8-9. See also *Moody v Home Owners Ins Co*, 304 Mich App 415, 440; 849 NW2d 31 (2014). For this reason, a healthcare provider seeking payment under a no-fault insurance policy stands in privity with an injured party who previously brought a lawsuit against the insurer attempting to claim benefits under the same policy. See *TBCI*, 289 Mich App at 44.

It follows that in this case, MHSI stands in privity with Garley. Both MHSI and Garley sought benefits under the same no-fault insurance policy. Both MHSI and Garley have a

common interest in obtaining a judgment against State Farm under this policy and, in particular, they have an interest in obtaining an award of medical costs arising from Garley's accident on December 15, 2011. They both share an interest in showing that Garley was injured in this accident and that he incurred allowable expenses payable by State Farm in accordance with the no-fault act. Indeed, MHSI's entitlement to payment is dependent on Garley's eligibility for no-fault benefits under the insurance policy. See *Chiropractors Rehab Group, PC*, slip op at 8-9. In short, by seeking payment from State Farm, MHSI stands in Garley's shoes and therefore stands in privity with Garley. See *TBCI*, 289 Mich App at 44.

Aside from the issue of privity, MHSI emphasizes on appeal that its bills were not specifically submitted to the jury for actual consideration and that, because the jury did not specifically reject payment of MHSI's bills, res judicata cannot apply. Although it appears that MHSI's bills were not introduced at Garley's trial, the fact remains that the jury did in fact conclude that Garley could recover nothing from State Farm. That is, the jury did consider the broader issue of State Farm's liability under the policy and the jury rejected Garley's claim for no fault benefits, meaning that MHSI, as Garley's privy, cannot relitigate this issue. See *Adair*, 470 Mich at 121. Cf. *TBCI*, 289 Mich App at 44.

Moreover, to the extent MHSI's particular bills were not introduced, this fact is not dispositive because these bills *could* have been submitted to the jury during Garley's action. In this respect, Michigan follows a broad approach to the application of res judicata, and it will be applied to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 121. To determine whether a claim could have been raised in a previous action, courts apply the "same transactional test." *Id.* at 123-125. Under this test, "[w]hether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation,* [and] whether they form a convenient trial unit. . . ." *Id.* at 125 (quotation omitted). "If the new claim or claims arise from the same group of operative facts as the previously litigated claim or claims, even if there are variations in the evidence needed to support the theories of recovery, [this Court] will treat the claims as the same and res judicata will apply." *Green v Ziegelman*, 310 Mich App 436, __; __ NW2d __ (2015), slip op at 5.

In this case, the same group of operative facts underlying Garley's lawsuit give rise to MHSI's current claims for payment of MHSI's bills. Both cases rest on Garley's entitlement to coverage under the State Farm no-fault policy, and in particular Garley's entitlement to benefits for payment of medical care. In both cases, Garley and MHSI assert a right to coverage based on injuries Garley sustained in an automobile accident in December of 2011. All the medical costs at issue in MHSI's case, which Garley incurred before May of 2012, arose before Garley filed his lawsuit in August of 2012. Cf. *Elser v Auto-Owners Ins Co*, 253 Mich App 64, 69; 654 NW2d 99 (2002). Moreover, all of MHSI's medical records pertaining to Garley were in fact introduced into evidence during Garley's trial. Given that the claims at issue clearly arise from the same operative facts, Garley plainly could have sought payment of MHSI's medical bills during his trial and, if MHSI felt its interests were not being adequately protected, MHSI could

have intervened in Garley's lawsuit to protect its rights.[1] See MCR 2.209; see also *Richards*, 272 Mich App at 531-532 ("The matter could have been resolved in the first suit had plaintiff added defendants as parties or had defendants intervened in the action."); *Tomalis v Tradesmen's Nat Bank of New Haven*, 19 Mich App 592, 594; 173 NW2d 259 (1969). In short, viewed pragmatically, MHSI's medical bills could easily have been addressed during Garley's federal lawsuit for no-fault benefits against State Farm.

In sum, res judicata applies in this case because Garley's lawsuit resulted in a final decision on the merits in State Farm's favor, MHSI is Garley's privy, the jury rejected Garley's claim for benefits, and State Farm's obligations with respect to the payment of MHSI's bills in particular could have been addressed during the previous litigation. See *Richards*, 272 Mich App at 531. In these circumstances, State Farm should not be faced with the costs and vexation of additional litigation, and the interests of judicial economy will be served by the application of res judicata to preclude MHSI's lawsuit. See *Pierson Sand & Gravel, Inc*, 460 Mich at 380.

Having determined that the trial court properly granted State Farm's motion for summary disposition based on the application of res judicata, we need not decide whether collateral estoppel also entitled State Farm to summary disposition and we need not consider MHSI's arguments regarding its motion for partial summary disposition.

Finally, we note briefly that MHSI argues that application of res judicata in this case will deprive MHSI of due process and its statutory right to reimbursement of medical expenses under MCL 500.3112. These issues are unpreserved because MHSI failed to raise them in the trial court, and they are improperly presented to this Court because they have not been included in MHSI's statement of the questions presented. Consequently, these issues need not be decided. See *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005); *Bouverette v Westinghouse Elec Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001).

In any event, these arguments are without merit. Although it is true that MHSI has standing to pursue claims for no-fault benefits under MCL 500.3112, this does not obviate the privity that exists between MHSI and Garley by virtue of their shared interests in obtaining benefits from State Farm, nor does it overcome the fact that MHSI's bills could have been presented during Garley's action. Thus, MHSI's standing under MCL 500.3112 does not prevent application of res judicata. Rather, if anything, MHSI's standing underscores MHSI's ability and failure to intervene in Garley's lawsuit. Likewise, with regard to due process, MHSI has not shown that application of the doctrine of res judicata violates principles of due process. As discussed, there was a shared identity of interests between MHSI and Garley, and this shared identity of interests would generally ensure that MHSI's rights were adequately protected. See *Beyer v Verizon N Inc*, 270 Mich App 424, 435; 715 NW2d 328 (2006). Moreover, if MHSI felt

[1] There has been no assertion that MHSI was unaware of Garley's lawsuit. Moreover, in September of 2012, while Garley's suit was ongoing, State Farm moved for summary disposition in the district court against MHSI based on the suit that had been filed by Garley. Clearly, by that time at the latest, almost 2 years before the conclusion of Garley's suit, MHSI knew of Garley's lawsuit and could have taken steps to intervene.

its interests were not adequately represented by Garley, it should have intervened in Garley's action against State Farm. See MCR 2.209. MHSI's failure to do so does not demonstrate a deprivation of due process.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

STATE OF MICHIGAN

COURT OF APPEALS

LYNN BETH BAUM,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

DAVID M BAUM, PC, DB ACQUISITIONS, LLC, DAVID M BAUM REVOCABLE TRUST, MADISON EQUITIES, LLC, NW PROPERTIES, LLC, and FRASER EQUITIES, LLC,

Defendants,

and

HOWARD BAUM,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellant/Cross-Appellee,

and

DAVID BAUM,

Defendant/Cross-Defendant.

UNPUBLISHED
October 16, 2017

No. 333173
Oakland Circuit Court
LC No. 2015-149725-CZ

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

PER CURIAM.

Lynn Beth Baum filed this lawsuit against a number of defendants: David Baum, her ex-husband; Howard Baum, David's brother; and six entities owned by one or both of the Baum brothers. She seeks to recover more than one million dollars that David allegedly transferred improperly to Howard before and after Lynn filed for divorce. The Baum's divorce judgment included a determination that David's transfers to Howard had been fraudulent, and awarded Lynn the right to take legal action to recover the money David removed from the marital estate.

Before the divorce judgment entered, Howard sued Lynn and David in the circuit court, contending that the money David transferred to him represented partial repayment of multiple loans Howard had extended to the couple during the course of their 20-year marriage. Howard's breach of contract case was twice dismissed without prejudice and remains dismissed without prejudice.

This background brings us back to Lynn's lawsuit. Howard filed a counterclaim, asserting that Lynn owes him for her half of multiple loans he alleges that he extended during the Baums' marriage. Dueling motions for summary disposition followed. The circuit court found that the divorce judgment's findings that no debt existed and that the transfers had been fraudulent precluded Howard from pursuing his counterclaim, but rejected Lynn's contention that the contract case's dismissal also precluded Howard's countersuit. Howard and Lynn appeal these rulings. Because neither the divorce judgment nor the dismissal has preclusive effect as to Howard, we reverse regarding the first ruling and affirm the second.

I. THE DIVORCE ACTION AND HOWARD'S BREACH OF CONTRACT CLAIM

Lynn sued David for divorce in April 2012. Her complaint averred that soon after she advised David of her plan to file for divorce, he transferred virtually all of their liquid marital assets to Howard or accounts controlled by Howard. Lynn filed a motion for return of the funds; the family court granted the motion and appointed a receiver.

Shortly thereafter, Howard sued Lynn and David in the Oakland Circuit Court, alleging that they owed him hundreds of thousands of dollars for repayment of loans he had made to them. According to Howard, the Baums regularly borrowed money to pay for their children's private school tuition, home renovations, medical expenses, and family celebrations. Lynn responded with a counterclaim against Howard and a cross-claim against David, asserting that the loan claim was fabricated to justify David's looting of the marital estate. The receiver in the divorce case intervened in Howard's contract action and moved to consolidate the cases in the family court. David opposed this motion, and the family court judge denied it.

Howard's contract case went nowhere, however, as Howard fired his attorney and failed to appear at a status conference, resulting in dismissal of the matter "without prejudice." The circuit court's order provided that the case could be reinstated on a showing of good cause and the payment of Lynn's fees and costs. Howard attempted to reinstate the matter, but the circuit court was unsatisfied with his effort and again dismissed it without prejudice. Howard took no further action to pursue his breach of contract case.

Meanwhile, the Baums' divorce proceeded to arbitration. The arbitrator defaulted David based on his failure to cooperate during discovery and disallowed his testimony. Nevertheless, the arbitrator permitted David to contest whether the transfers to Howard represented payments for enforceable marital debts. Ultimately, the arbitrator found that David had withdrawn approximately $1.2 million from various marital accounts and paid Howard more than $1 million. The arbitrator noted the absence of

> any promissory notes or other documentation of a loan or series of loans by Howard . . . to David [and/or Lynn]. There is no evidence of any specific amount of loaned money. There is no evidence that there were any terms of repayment, such as balance owed and interest rate. There is no evidence of how Howard . . . paid money to David [and/or Lynn] or to providers such as the children's private schools.

The arbitrator concluded, "There is no legally recognized marital debt to Howard Baum. All of the money removed from the accounts described above is part of the marital estate." He further found that David's

> withdrawals of money from the marital estate and transfers of money to [Howard] constitutes fraudulent activity as defined by the [Uniform Fraudulent Transfers Act] UFTA. As such, there is a Chose in Action to recover the fraudulently transferred assets. This Chose in Action is awarded to Lynn. . . . In the event that any of the fraudulently transferred assets are recovered, Lynn . . . shall receive the first $742,650.80 of the recovered assets (60% of the monies taken from the marital estate by David . . .), plus her reasonable attorney fees and costs incurred in the recovery process. Further, it is held that David['s] actions in transferring the marital monies to himself and his brother created a debt to Lynn . . . which David . . . owes to her in the amount of $742,650.80.

The family court adopted the arbitrator's findings in its default judgment of divorce. That judgment provides, in part:

> There is no legally recognized marital debt owed to Howard. . . .
>
> [David's] withdrawals of funds from the marital estate and the transfer of funds to [Howard] constitutes fraudulent activity as defined by [UFTA]. [Lynn] is awarded a Chose of Action to recover the funds [David] removed from the marital estate. The money transferred from [David] to himself and to Howard . . . and entities owned by Howard . . . constitute fault and therefore, [Lynn] is awarded 60% and [David] is awarded 40% of those funds.
>
> [Lynn] is awarded 60% of the monies [David] withdrew from the marital estate, which as of the date of the Arbitration Award is $742,650.80. In the event that any of the fraudulently withdrawn money/assets are recovered, [Lynn] shall receive the first $742,650.80 of the recovered assets, and she shall be awarded reasonable attorney fees and costs incurred with the recovery process.
>
> [David's] fraudulent withdrawal of marital funds has created a debt due to [Lynn] which [David] shall owe in the amount of $742,650.80.

II. THIS CASE

Following the entry of the default judgment of divorce, Lynn filed this action against Howard, David, and entities owned or controlled by them. Her complaint sets forth claims of fraudulent transfers, fraud, piercing the corporate veil, common-law and statutory conversion, unjust enrichment, and racketeering. Howard filed a countercomplaint against Lynn and a cross-claim against David alleging breach of contract, account stated, and unjust enrichment. His allegations essentially restate his complaint in his abandoned contract case.

In lieu of answering Howard's counterclaim, Lynn filed a motion for summary disposition under MCR 2.116(C)(8), (C)(7), and (C)(10). She argued that the circuit court's involuntary dismissal of Howard's contract action operated as a judgment on the merits, precluding him from relitigating his claims as a counter-plaintiff in her case. Lynn also contended that no evidence supported Howard's loan allegations or any of his other counterclaims.

In a written opinion, the circuit court ruled that because the dismissal of Howard's contract case had been "without prejudice," it did not operate as an adjudication on the merits for res judicata purposes. But the court found that Howard's privity with David during the divorce proceedings meant that Howard could not assert that he was the couple's creditor "because the doctrine of res judicata prevents this Court from making a finding in conflict with the finding in the Divorce Action." The court then granted summary disposition to Lynn on this ground.

Howard (and only Howard) applied for leave to appeal, and this Court granted the application. *Baum v Baum*, unpublished order of the Court of Appeals, entered November 16, 2016 (Docket No. 333173). Lynn filed a cross-appeal, alternatively arguing that the circuit court should have granted her motion for summary disposition regarding the dismissal in the contract case.

III. GOVERNING LEGAL PRINCIPLES

We review de novo the circuit court's summary disposition ruling. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). We also review de novo questions of law, including "the application of legal doctrines, such as res judicata and collateral estoppel." *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

In general, res judicata bars a subsequent action when "the first action was decided on the merits," "the matter contested in the second action was or could have been resolved in the first" action, and "both actions involve the same parties or their privies." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). "[A] dismissal without prejudice is not a dismissal on the merits." *Grimmer v Lee*, 310 Mich App 95, 102; 872 NW2d 725 (2015). Rather, the term "without prejudice" signifies that a litigant retains a right to take further legal action and " 'that the dismissal is not intended to be *res adjudicata* of the merits.' " *Id.*, quoting *McIntyre v McIntyre*, 205 Mich 496, 499; 171 NW 393 (1919).

Collateral estoppel limits the relitigation of issues rather than claims. Its elements are: (1) "a question of fact essential to the judgment" that was "actually litigated and determined by a valid and final judgment;" (2) the same parties or their privies "had a full and fair opportunity to

litigate" that issue, and (3) the party "taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004) (quotation marks, citations, and alteration omitted).

IV. APPLICATION

Here and in the circuit court, the parties have framed the legal issue presented as whether res judicata bars Howard's counterclaim. Collateral estoppel is the more apt doctrine regarding the preclusive effect of the family court's findings of fraud and the absence of a debt. The core question presented in Howard's appeal is whether these factual determinations bar him from pursuing a contrary theory of recovery in his counterclaim; in other words, Howard seeks to relitigate an *issue* rather than the divorce itself.[1]

The misnomer is of no consequence, however. Both res judicata and collateral estoppel require an identity of parties in the first and second proceedings, or privity between a party to the first action and the party sought to be bound in the second. And regardless of the label, Howard and David were not in privity during David's divorce.

A. PRECLUSION AND THE DIVORCE ACTION

We begin with res judicata, as that is the legal ground relied on by the parties. With regard to the preclusive effect of the Baums' divorce, two of the three elements of res judicata are easily satisfied: the action was decided on the merits, and the matter of the fraudulent character of the alleged debt was resolved in the judgment. Howard, however, was not a party to the divorce action. Nor does the *evidence* before us demonstrate that he and David were in privity during that proceeding.

In *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004), the Supreme Court espoused "a broad approach to the doctrine of res judicata;" the opinion primarily focused on the first two elements of the doctrine rather than the meaning of "privity." Regarding that concept, the Court stated:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. [*Id*. at 122 (citations omitted).]

Examples of such parties in interest include "a principal to an agent, a master to a servant, or an indemnitor to an indemnitee," or someone who inherits or acquires the party's interest after judgment is rendered. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003) (citation omitted). In two of our most recent elaborations on the subject, this Court

[1] As to Lynn's cross-appeal, we agree that res judicata is the correct doctrine.

reiterated, "For purposes of res judicata, parties are in privity with each other when they are so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013) (quotation marks and citation omitted). "[A] privy is one who, after the judgment, has an interest in the matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529-530; 866 NW2d 817 (2014).

Rather than sharing a "substantial identity of interests" during the divorce, Howard and David's interests were diametrically opposed; Howard allegedly was a creditor and David his debtor. The factual findings of the arbitrator and the family court that the debt did not exist and that the Baum brothers colluded to impoverish Lynn paint an unsavory—vulgar and repulsive, even—picture. The compelling nature of this picture may tempt a court to overlook that the alignment of interests identified by the court is, fundamentally, a *finding*. Using that finding to establish privity in a subsequent case puts the cart before the horse. Were we to merely affirm the trial court, we would permit the family court's findings in the judgment of divorce to carry the day, thereby eliminating the need for legal analysis of whether David actually functioned as Howard's privy. Absent the family court's finding of fraud, we find no evidence that David was Howard's alter ego during the divorce, or that Howard controlled David's defense, or that the two had a "working functional relationship." Throughout that proceeding, Howard steadfastly maintained that David owed him hundreds of thousands of dollars, evidencing an obvious conflict in the two brothers' interests. And we have located no authority supporting that a fraternal relationship, standing alone, may establish privity.

The United States Supreme Court's thoughtful consideration of privity in a fairly recent opinion reinforces our conclusion. While we recognize that the Supreme Court's interpretation of res judicata principles does not bind Michigan courts, we find its analysis helpful in elucidating why Howard was not David's privy during the divorce action.

In *Taylor v Sturgell*, 553 US 880, 884; 128 S Ct 2161; 171 L Ed 2d 155 (2008), the Court addressed the "virtual representation" exception to the general res judicata rule excluding nonparties from the preclusive effect of a prior judgment. "Virtual representation" had been adopted by a number of the federal circuit courts, albeit in different iterations. *Id*. at 884-885. *Taylor* involved a lawsuit under the federal Freedom of Information Act seeking documents from the Federal Aviation Administration regarding F-45 airplanes. *Id*. at 885-886. An initial lawsuit, brought by Greg Herrick, was dismissed on a summary judgment, a decision that was affirmed by the Tenth Circuit. *Id.* at 886-887. Less than a month later, Herrick's friend, Brent Taylor, brought the same FOIA claim in the district court for the District of Columbia. *Id*. at 887.

The district court dismissed Taylor's lawsuit as precluded by Herrick's action, and the District of Columbia Circuit Court affirmed. *Id*. at 888-889. In finding "virtual representation," the district court relied on the facts that Herrick and Taylor were "close associates" in the antique aircraft community, Herrick had sought Taylor's help in restoring his F-45, the men were represented by the same lawyer, and the two had shared the documents voluntarily produced by the FAA during Herrick's suit. *Id*. at 889. The D.C. Circuit affirmed, announcing a five-factor test for "virtual representation" consisting of "identity of interests," "adequate representation" in the prior adjudication, "a close relationship between the present party and his putative

representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party in the first case." *Id*. at 889-890 (quotation marks and citations omitted).

The Supreme Court unanimously reversed the D.C. Circuit, highlighting that the federal law of preclusion "is, of course, subject to due process limitations," and that "[t]he application of claim and issue preclusion to nonparties . . . runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.' " *Id*. at 891, 893 (citation omitted). The Court continued:

> Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." [*Id*. at 893 (citation omitted).]

Notwithstanding these general principles, the *Taylor* Court recognized six discrete categories of exceptions to the rule against nonparty preclusion. One of the exceptions roughly corresponds to the privity framework articulated in *Adair* and other Michigan cases.[2]

Under Michigan law, parties are in privity for res judicata purposes if the first litigant represents the same legal right as the second asserts, the parties share "a substantial identity of interests," or enjoy "a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation." *Adair*, 470 Mich at 122 (quotation marks and citations omitted). *Taylor* supplies a similarly structured exception. "[I]n certain limited circumstances," the Supreme Court posited, preclusion applies when a nonparty was "adequately represented by someone with the same interests who [wa]s a party to the suit." *Taylor*, 553 US at 894 (quotation marks and citation omitted, alteration in original). Such "representative" suits include class actions, and lawsuits "brought by trustees, guardian, and other fiduciaries[.]. *Id*. The Supreme Court emphasized that "adequate representation" by another is demonstrated "only if (at a minimum) one of . . . two circumstances is present." *Id*. at 897. Those two circumstances, also referred to by the Court as "procedural protections," are: "(1) The interests of the nonparty and her representative are aligned, and (2) either the nonparty understood herself to

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[2] The six categories comprising exceptions to the rule against nonparty preclusion are: (1) an initial suit in which others agree to be bound by the judgment; (2) litigation conducted in the first instance by a person with a preexisting "substantive legal relationship" with a subsequent claimant, such as "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor;" (3) adequate representation in the initial suit by someone with the same interests, such as class actions and suits brought by trustees, guardians, or other fiduciaries; (4) a nonparty who "assumed control" over the litigation in which a judgment was rendered; (5) a nonparty who later brings suit as an agent for a party is bound by the initial judgment; and (6) "special statutory scheme[s] may 'expressly foreclose[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process.' " Taylor, 553 US at 893-895 (citations omitted, second and third alterations in original).

be acting in a representative capacity or the original court took care to protect the interests of the nonparty[.]" *Id*. at 900 (citations omitted).

The D.C. Circuit erred, the Court ruled, by applying "an expansive doctrine of virtual representation" that created, "in effect, a common-law kind of class action." *Id*. at 901 (quotation marks and citation omitted). Permitting preclusion on a virtual representation theory "based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections" would "circumvent[]" due process. *Id*. The Court specifically rejected the D.C. Circuit's notion that privity is established when the "relationship between a party and a non-party is 'close enough' to bring the second litigant within the judgment." *Id*. at 898. This "amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance," the Court explained. *Id*.

Under the privity formulation of either *Adair* or *Taylor*, David and Howard were not sufficiently connected to qualify as privies. Nothing in the record substantiates that David intended that his litigation actions (and deliberate inactions) during the divorce proceedings would bind his brother's claim for repayment of the alleged loans. No evidence was presented in this case that Howard controlled the divorce proceedings on David's behalf, or that David acted as Howard's agent in that litigation, or that David was legally accountable to Howard. The two have no legal relationship that has been brought to our attention. Nor does the record support that the family court "took care to protect" Howard's interests in collecting the alleged debt.

Our collateral estoppel analysis leads to the same conclusion. Indisputably, the existence of a debt and whether David's transfers to Howard were fraudulent constituted questions of fact essential to the divorce judgment. But the second element of collateral estoppel requires that the same parties or their privies had a full and fair opportunity to litigate those issues. For the reasons we have elucidated, David was not Howard's privy during the divorce. Accordingly, Lynn may not use the family court's factual findings to bar Howard's counterclaim in this case.

B. PRECLUSION AND HOWARD'S BREACH OF CONTRACT ACTION

Lynn urges us to find that even if the divorce case does not preclude Howard's counterclaim, his failed effort to prosecute a breach of contract action against her and David does. While this case and the contract case involve the same parties and claims, the contract case was not decided on the merits. As noted, "[a] dismissal *with* prejudice amounts to an adjudication on the merits and bars a further action based on the same facts. But a dismissal *without* prejudice is not a dismissal on the merits." *Grimmer*, 310 Mich App at 102. "Our Supreme Court has described that the term 'without prejudice' signifies 'a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be *res adjudicata* of the merits.' " *Id*., quoting *McIntyre*, 205 Mich at 499.

We reverse the grant of summary disposition in Lynn's favor regarding the preclusive effect of the divorce judgment's factual findings, and affirm the denial of summary disposition with regard to the contract case. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

LMJ

Court of Appeals, State of Michigan

ORDER

LaWanda Dawson v State Farm Mutual Automobile Insurance Company

Docket No. **342652**

LC No. **17-003054-NI**

Christopher M. Murray, Chief Judge, acting under MCR 7.211(E)(2), orders:

The motion to substitute parties is GRANTED. This Court's record will reflect that Farmers Insurance Exchange is the defendant-appellee in this matter.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY - 9 2018
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

VHS HARPER-HUTZEL HOSPITAL INC, doing business as DETROIT MEDICAL CENTER,

Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 23, 2019

No. 340923
Wayne Circuit Court
LC No. 16-003010-NF

LUCIA ZAMORANO MD, PLC,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

No. 340969
Wayne Circuit Court
LC No. 16-000391-NF

SUMMIT PHYSICIANS GROUP and SUMMIT MEDICAL GROUP,

Plaintiffs-Appellants,

v

No. 341385

Wayne Circuit Court
LC No. 15-016965-NF

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

LANELL OLIVER,

Plaintiff,

and

OAKWOOD HEALTHCARE INC, THE PAIN CENTER PLLC, and INTERVENTIONAL PAIN CENTER PLLC,

Intervening Plaintiffs,

and

OAKLAND MRI,

Intervening Plaintiff/Appellant,

v

No. 341408
Wayne Circuit Court
LC No. 16-008468-NF

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Before: MURRAY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals healthcare providers challenge the circuit court's decision denying their motions to amend their complaints to comply with *Covenant Med Ctr, Inc, v State Farm Mut Auto Ins Co*, 500 Mich 191, 218; 895 NW2d 490 (2017). The ruling in *Covenant* determined that the plaintiffs herein had no independent right to sue for personal injury protection (PIP) benefits. In Docket No. 340923, VHS Harper-Hutzel Hospital Inc., doing business as Detroit Medical Center (DMC), appeals by right the circuit court's October 18, 2017 Order Denying VHS Harper-Hutzel Hospital's Motion to File First Amended Complaint. In Docket No. 340969, Lucia Zamorano MD PLC (Zamorano), and Docket No. 341385, Summit Physicians Group PLLC (Summit), appeal by right the circuit court's October 17, 2017 Order Denying Provider's Motions for Leave to File Amended Complaint. In Docket No. 341408,

Oakland MRI (Oakland) appeals by right the circuit court's November 11, 2017 Order Denying Oakland MRI's Motion for Leave to File Amended Complaint. We affirm in all four cases.

I. BACKGROUND

The facts are undisputed. On March 7, 2015, pedestrian Lanell Oliver (the decedent) was struck by a Dodge Dakota truck while walking across the street at the crosswalk. The decedent did not have no-fault insurance. The driver of the Dodge Dakota, Carolyn Cook-Richards, was insured with a no-fault policy through defendant State Farm Mutual Automobile Insurance Company (State Farm). The decedent submitted a claim to State Farm for medical expenses and lost wages that was denied. On July 6, 2016, the decedent filed a breach of contract complaint for PIP benefits against State Farm under the No-Fault Act, MCL 500.3101 *et seq*. The healthcare providers also submitted their bills for services and treatment to State Farm for direct payment. The healthcare providers individually filed suit against State Farm when payment was not forthcoming. On September 3, 2016, the decedent died.

On January 9, 2017, State Farm filed a Motion to Dismiss Pursuant to MCR 2.202 wherein State Farm argued that the decedent's claims had to be dismissed because the decedent died on September 3, 2016, and as of the date of the motion, there was no substitution of a representative or other party to continue the decedent's claims. On February 28, 2017, the court granted partial summary disposition to State Farm ordering that only the decedent's claims be dismissed without prejudice pursuant to MCR 2.202. The healthcare providers' claims were allowed to continue.

On May 25, 2017, our Supreme Court decided *Covenant*, *supra,* which held that "[a] healthcare provider possesses no statutory cause of action under the no-fault act against a no-fault insurer for recovery of PIP benefits." The Court determined that, while MCL 500.3112 "undoubtedly allows no-fault insurers to directly pay healthcare providers for the benefit of an injured person, its terms do not grant healthcare providers a statutory cause of action against insurers to recover the costs of providing products, services, and accommodations to an injured person." *Id.* at 195–196. The Court footnoted that its decision was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Id*. at 217 n 40.

On July 28, 2017, an order was issued consolidating the healthcare provider's cases in the trial court. On August 16, 2017, a personal representative was appointed to the decedent's estate. Accordingly, the healthcare providers obtained assignments of benefits from the personal representative of decedent's estate, and then moved the trial court for leave to amend their complaints to pursue payment from State Farm as assignees. The trial court denied the motions to amend on the ground that amendment would be futile.

II. LEAVE TO AMEND

A. STANDARD OF REVIEW

"Decisions concerning the meaning and scope of pleading, and decisions granting or denying motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454

Mich 639, 654; 563 NW2d 647 (1997). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 442; 814 NW2d 670 (2012). Leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2). A motion to amend a complaint "should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowing the amendment, or futility of amendment." *Boylan v Fifty Eight, LLC*, 289 Mich App 709, 728; 808 NW2d 277 (2010). "The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006), lv den 477 Mich 868 (2006), recon den 477 Mich 1035 (2007).

"[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are ... reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Questions of statutory interpretation are also reviewed de novo. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

B. ANALYSIS

1. THE ANTI-ASSIGNMENT CLAUSE

The healthcare providers first argue that the trial court erred in finding that State Farm's anti-assignment clause barred the estate's assignment of rights. We agree.

Insurance policies are contracts and are thus "subject to the same contract construction principles that apply to any other species of contract." *Rory*, 473 Mich at 461. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties...." *Id.* Absent ambiguity, contractual provisions are "to be enforced as written unless the provision would violate law or public policy." *Id.* at 468-469. Determining whether a contract provision violates "Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." *Id.* at 470-471 (quotation marks and citation omitted). "In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id.* at 471 (quotation marks and citation omitted).

An assignment is defined as "[t]he transfer of rights or property." Black's Law Dictionary (7th ed), p 115. "An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *First of Am Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996). ''Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004). Further, Michigan law will enforce unambiguous contractual provisions against assignments. See *Employers Mut Liab Ins Co v Mich Mut Auto Ins Co*, 101 Mich App 697, 702;

300 NW2d 682 (1980) (finding that an anti-assignment provision was enforceable to void coverage under the policy). State Farm argues that the anti-assignment clause in its insurance policy prohibited the assignment from the personal representative to the healthcare providers. The insurance policy states, ''No assignment of benefits or other transfer of rights is binding upon *us* [State Farm] unless approved by *us*." This language clearly prohibits the assigning of benefits or the transfer of rights to anyone without State Farm's approval. It is uncontroverted that State Farm did not approve the assignments from the personal representative to the healthcare providers.

The healthcare providers contend that the anti-assignment clause did not apply to the decedent because he was not a "named insured" under the policy, the decedent's benefits derived from statute and not contract, and the clause violates public policy. The policy defines "named insured" as the first person named on the Declarations Page and his or her ***spouse***. The policy further states,

> ***Insured*** for Personal Injury Protection Coverage means:
>
> 1. ***you*** or any ***resident relative***; and
>
> 2. any other ***person*** while ***occupying*** or injured as a ***pedestrian*** by:
>
> a. ***your car*** . . .

Under the policy, "pedestrian" is defined as "a ***person*** who is not ***occupying*** a motor vehicle." According to the plain language of the policy, the decedent, as a pedestrian, was an insured under the policy and therefore subject to the anti-assignment clause. In this case, however the decedent's benefits derive from both statute, MCL 500.3115(1)(a)[1], and contract. Given that the language of the policy is clear and that the contract applies to this decedent, the clause must be enforced against the healthcare providers, who as assignees stand in the decedent's position, unless the clause would violate the law or public policy, which it does. *Rory*, 473 Mich at 468-469.

In *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 200; 920 NW2d 148 (2018), the Court held that an anti-assignment clause that sought to prohibit the assignment of an accrued cause of action after the loss occurred was unenforceable as a violation

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[1] MCL 500.3115(1)(a):

> (1) Except as provided in subsection (1) of section 3114,1 a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

of public policy. In this case, there is no dispute that the estate's assignments to the healthcare providers occurred after the loss and accrual of the claim. The decedent was injured on March 7, 2015. The healthcare providers rendered medical services for which they sought payment before the decedent's death on September 3, 2016. The first assignment was not issued until August 22, 2017, to healthcare provider DMC. The assignment was otherwise valid in so far that it sought only to assign past and present benefits and not those in the future, in accord with MCL 500.3143.[2] Applying *Shah*'s holding here, the trial court erred in finding that the insurance policy's anti-assignment clause was enforceable against the healthcare providers. The clause violated Michigan's public policy by preventing the post-loss assignment of an accrued cause of action.

The Court's holding was grounded in the following holding from our Supreme Court in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880):

> The assignment having been made after the loss, did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—*secured in this State by statute*—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [*Id*. at 254 (emphasis added)].

State Farm challenges the Court's decision in *Shah* on the basis that the Court wrongly analyzed *Roger Williams*. State Farm additionally argues that the holding in *Roger Williams* is inapplicable because *Roger Williams* involved an absolute assignment and the healthcare providers have partial assignments, that under *Roger Williams* there was no continuing obligations by an insured party, and that the assignments would expand State Farm's liability with the request for no-fault attorney fees. This Court is bound to follow the decisions of our Supreme Court "except where those decisions have *clearly* been overruled or superseded." *Assoc Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). State Farm has not demonstrated that some 183 years later, *Roger Williams* has been clearly overruled or superseded. Further, these arguments are necessarily new on appeal as they are in response to the *Shah* decision that was not decided until after the trial court's dismissal of the healthcare providers' claims and their claims of appeal. State Farm's additional arguments to defeat *Roger Williams*' application are moot given our final disposition of this case.

State Farm's contention that the assignments seek to expand its liability by seeking no-fault attorney fees is disingenuous where State Farm was exposed to the same liability pre-*Covenant* when the healthcare providers had a direct statutory cause of action as it is post-*Covenant* where insureds are permitted to assign their benefits to medical providers. We further find this issue waived where it could have been, but was not raised below. See *Walters v Nadell*,

[2] "An agreement for assignment of a right to benefits payable in the future is void." MCL 500.3143.

481 Mich 377, 38; 751 NW2d 431 (2008) (citation omitted) (''Michigan generally follows the 'raise or waive' rule of appellate review.").

2. RELATION BACK

The healthcare providers next argue that the trial court erroneously found that their amendments were in fact supplemental pleadings that did not relate back to the date of the original complaint. We disagree. The rule concerning the relation back of amended pleadings is in MCR 2.118(D), and provides, in pertinent part, that

> an amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

There is no relation back for supplemental pleadings. *Grist v Upjohn Co*, 1 Mich App 72, 84; 134 NW2d 358 (1965).

MCR 2.118(E) governs supplemental pleadings and provides, in pertinent part, that

> [o]n motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense.

Further, the "relation-back doctrine does not apply to the addition of new parties." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (quotation marks and citation omitted).

The healthcare providers' motions to amend were supplemental pleadings. The healthcare providers did not intend for the pleadings to add a new claim or defense, but rather to assert an alternative theory of standing to pursue their actions for payment against State Farm. As such, in filing the pleadings, the healthcare providers sought to state an event, i.e. the assignment, which had happened since the date of the original pleading. Further, the healthcare providers sought to file the pleading as a different party. The healthcare providers brought their original actions on their own behalf. After the filing, *Covenant* held that they could not sue State Farm directly. The assignments substituted the healthcare providers in the decedent's place. The healthcare providers were no longer pursuing the claim on their own behalf, but as assignees—a different party. The pleading in this case would not relate back because it was a supplemental pleading and added a new party.

3. THE ONE-YEAR-BACK RULE

Even had there been no determination that the healthcare providers sought to file a supplemental pleading, their amendments were barred by the one-year-back rule. The one-year-back rule in MCL 500.3145(1) provides, in pertinent part, that ''the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action

was commenced.'' The rule ''is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought.'' *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 203; 815 NW2d 412 (2012). Further, the one-year-back rule is not subject to tolling. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 593; 702 NW2d 539 (2005).

"[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Professional Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). According to *Shah*, the date of the assignment is the controlling date for purposes of applying the one-year-back rule. 324 Mich App at 205 ("Through the assignment, plaintiffs only obtained the rights Hensley actually held at the time of the execution of the assignment . . ."). In the case of each healthcare provider, the last date of treatment was more than one year before the date of the assignment. As assignees, the healthcare providers were "entitled to recover only and just as . . . [the] assignor, might had no assignment been made." *Ward v Alpine Tp*, 204 Mich 619, 631; 171 NW 446 (1919). Thus, even had the decedent filed a direct cause of action, for example on September 28, 2017, he would not be entitled to recover any benefits for treatment he received from Summit before September 28, 2016. The same conclusion is reached for each healthcare provider. To quote our Supreme Court in *Jones v Chambers*, 353 Mich 674, 681-682; 91 NW2d 889 (1958):

> The assignment created nothing. It simply passed to plaintiffs' insurer rights already in existence, if any. If plaintiffs' insured had no rights, then plaintiffs' insurer acquired none by virtue of the assignment. To rule otherwise would be to give such an assignment some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought. [Quotation marks omitted.]

The trial court's conclusion that it would have been futile to grant the healthcare providers' motions to amend was not an abuse of discretion. The proposed pleadings were legally insufficient to state a viable cause of action.

4. EQUITY

Zamorano and Summit additionally raise equity arguments that were not preserved below. This Court need not review issues raised for the first time on appeal. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 710 (2005). "[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citations omitted). Zamorano and Summit fail to argue any of these considerations apply; therefore, we decline review.

Affirmed.

/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

THE MEDICAL TEAM, INC.,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 25, 2020

No. 345449
Washtenaw Circuit Court
LC No. 17-000394-NF

Before: BORRELLO, P.J., and METER and SWARTZLE, JJ.

PER CURIAM.

In this action for personal protection insurance (PIP) benefits under the no-fault insurance act, MCL 500.3101 *et seq*., defendant, Auto-Owners Insurance Company, appeals as of right the trial court's stipulated order for dismissal and entry of a consent judgment in favor of plaintiff, The Medical Team, Inc. (Provider), entered into by agreement between the parties after the trial court's decision denying Auto-Owners' motion for summary disposition and preserving Auto-Owner's right to appeal that ruling. Auto-Owners had argued that res judicata or collateral estoppel barred Provider's claim for reimbursement, which had been assigned to it by the insured, Richard Kalamas. Auto-Owners contended that it was entitled to summary disposition because the Wayne Circuit Court had dismissed Kalamas's claim for first-party PIP benefits on the basis that Kalamas had made fraudulent statements that triggered the fraud-exclusion clause of the underlying insurance policy. On appeal, Auto Owners argues that res judicata or collateral estoppel bars Provider's claims because they are entirely dependent on Kalamas's eligibility for PIP benefits and that the trial court erred as a matter of law by denying its motion for summary disposition. For the reasons set forth in this opinion, we reverse.

I. BACKGROUND

In May 2017, Provider filed a complaint in the Washtenaw Circuit Court against Auto-Owners in which Provider alleged that it had provided attendant care services to Kalamas in relation to an April 2012 motor vehicle accident. Provider further alleged that Kalamas had assigned to it the right to collect the expenses incurred by Provider on Kalamas's behalf but that Auto-Owners had refused to pay the charges.

Provider acknowledged in the filing of its complaint that another civil action arising out of the same transaction or occurrence remained pending in the Wayne Circuit Court, referencing a lawsuit that had been filed in that court by Kalamas against Auto-Owners. It appears that these two separate, parallel actions arising out of the April 2012 motor vehicle accident—an action in the Wayne Circuit Court involving Kalamas's individual claims against Auto-Owners and the instant action in the Washtenaw Circuit Court involving Provider's claims against Auto-Owners that had been assigned to Provider by Kalamas—continued to proceed simultaneously against Auto-Owners. On November 20, 2017, the Wayne Circuit Court entered a stipulated order in that lawsuit indicating that Kalamas's claims for bills relating to services provided by Provider were dismissed without prejudice.

As especially pertinent to the issue presented in this appeal, the Wayne Circuit Court entered an order in Kalamas's case on April 18, 2018, granting summary disposition in favor of Auto-Owners on the ground that Kalamas did not have any PIP coverage under the policy because he had made fraudulent statements related to the accident that triggered a fraud-exclusion clause in the policy.[1] The order provided in relevant part as follows:

> **IT IS HEREBY ORDERED** that Plaintiff Richard Kalamas made fraudulent statements in connection with the subject accident and therefore all claims for No-Fault PIP Benefit are barred in accordance with the terms of the policy.

In accordance with this ruling, the Wayne Circuit Court dismissed Kalamas's complaint against Auto-Owners with prejudice. The order provided that it resolved all pending claims and closed the case.

Subsequently, on June 4, 2018, Auto-Owners moved for summary disposition under MCR 2.116(C)(10) in the instant case against Provider that was proceeding in the Washtenaw Circuit Court. Auto-Owners argued[2] that res judicata barred Provider's claims, citing the summary disposition order by the Wayne Circuit Court ruling that Kalamas was ineligible for any PIP benefits under his insurance policy.[3] Auto-Owners essentially contended that Provider's claim for reimbursement was entirely dependent on Kalamas's underlying claim for benefits against Auto-Owners and that because the trial court in the Wayne Circuit Court action had determined that Kalamas was not entitled to PIP benefits, as a matter of law, neither was Provider. Auto-Owners

[1] This clause stated as follows:

> **We** will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct with respect to procurement of this policy or to any **occurrence** for which coverage is sought.

[2] Auto-Owners raised other arguments as well that are not relevant to our resolution of this appeal.

[3] Auto-Owners attached a copy of this order to its motion for summary disposition.

maintained that Provider could not relitigate in the Washtenaw Circuit Court action whether Kalamas was entitled to PIP benefits.

In its response, Provider primarily took issue with the substantive and procedural correctness of the Wayne Circuit Court's summary disposition ruling.[4] Provider did not, however, deny its awareness of those proceedings.[5] Provider also argued that Auto-Owners in the instant case had failed to timely plead fraud as an affirmative defense.

With respect to the application of res judicata specifically, Provider made two main arguments in opposition. First, Provider argued that this doctrine should not be applied under these circumstances because "there was not an adequate opportunity to obtain a full and fair adjudication in the Wayne County action and Mr. Kalamas was denied due process of law." In support of this argument, Provider maintained that Kalamus had died approximately one month before Auto-Owners moved for summary disposition in the Wayne Circuit Court action, that the trial court in that case was never informed of Kalamas's death,[6] that a personal representative was never appointed on Kalamas's behalf, and that Kalamas's attorney did not respond to the summary disposition motion or appear for the hearing on the motion. Provider further contended that Kalamas's attorney in the Wayne Circuit Court action was actually responsible for making the fraudulent statements at issue without Kalamas's participation.

In its second argument against application of res judicata, Provider argued that it could not have litigated its claims in the Wayne Circuit Court action because the parties in that action, including Auto-Owners, had agreed that Provider's bills would be excluded from that action and the Wayne Circuit Court had entered a stipulated order to that effect.

Auto-Owners filed a reply brief, clarifying that its motion for summary disposition was actually being brought under MCR 2.116(C)(7) and that the primary basis of its motion was res judicata, not fraud. Auto-Owners maintained that Provider was attempting to make an impermissible collateral attack on the Wayne Circuit Court's order.

The trial court denied summary disposition in the Washtenaw Circuit Court action, holding as follows:

[4] Provider seemingly alleged that Kalamas's attorney in the Wayne Circuit perpetrated the fraud. Provider also indicated that Kalamas was deceased by the time the summary disposition hearing was held in the Wayne Circuit Court and that his attorney did not respond to the summary disposition motion filed by Auto-Owners in that case or appear at the hearing on that motion. Nonetheless, as we explain in more detail below, the propriety of the resolution in the Wayne Circuit Court proceeding is not before us at this juncture.

[5] The parties agree that Provider was fully aware of the Wayne Circuit Action.

[6] Auto-Owners, in its reply, attached a pleading that had purportedly been filed in the Wayne Circuit Court action contradicting this assertion. Provider conceded at the summary disposition motion hearing that the Wayne Circuit Court was informed of Kalamas's death.

> [Provider] had a right to pursue benefits that had been assigned to it. I understand that a Wayne County Judge made a determination with prejudice as to Mr. Kalamas' right to recover and determined, based on an unopposed motion for summary disposition, that Mr. Kalamas had committed fraud. [Provider] disputes that Mr. Kalamas committed fraud in any event, but even if he did commit fraud, [Provider] was not a party to that action and can't be bound by the result in that case. There's not an identity of parties or interests and I would deny the motion for summary disposition.

The trial court added that "[i]f this matter had been adequately or vigorously litigated in Wayne County, I might have a different view of it." The trial court further held that it was "inherently unfair to use the dismissal in the Wayne County case to bar a claim here by another party over some of the same issues," especially in light of Kalamas's death during those proceedings. Additionally, the trial court reasoned:

> Okay, there was no estate opened. The estate was not substituted as a party plaintiff. There was no response filed to the motion for summary disposition and nobody showed up on behalf of the plaintiff to argue to the motion. I don't find that—that that's a situation that should be used against [Provider] in this case.

The trial court also remarked that, although it accepted that Provider was aware of the Wayne County proceedings and defendant had pleaded collateral estoppel as an affirmative defense, it was still "offensive" that Auto-Owners failed to specifically plead facts supporting its assertion of collateral estoppel or res judicata as an affirmative defense in the Washtenaw County action. Defense counsel responded, "there's been no prejudice to the plaintiff because they participated in depositions, they were put on notice during case evaluation, [and] they had all this information as soon as we had it." Defense counsel stated further that "at the time of filing our affirmative defenses, obviously we didn't know about all this information. We went through discovery and then, we learned it."

The trial court also denied Auto-Owners' subsequent motion to amend its affirmative defenses, reasoning as follows:

> I'm denying the motion for leave to amend, it's true that leave should be freely granted; however, this case um—is set for trial in four weeks and I do find that the amendment would prejudice the Plaintiff. The fact that it was known—that some—something was known by Plaintiffs with respect to what was going on in Wayne County doesn't mean that Plaintiff has to be prepared to defend it when it's not been pled; so for those reason's I'll deny the motion.

The trial court denied Auto-Owners' motion for reconsideration. As previously noted, the trial court entered a stipulated order for dismissal and consent judgment. Auto-Owners now appeals.

II. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a summary disposition motion de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). We also review de novo the question whether a subsequent action is barred by res judicata. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The application of collateral estoppel also presents a question of law that is reviewed de novo. *King v Munro*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 341714); slip op at 2.

Summary disposition may be granted under MCR 2.116(C)(7) on the basis of res judicata or collateral estoppel. *Id*. When deciding a motion under MCR 2.116(C)(7), the trial court "should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *Id*. (quotation marks and citation omitted).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher*, 300 Mich App at 139-140 (quotation marks and citations omitted).]

III. ANALYSIS

As Auto-Owners correctly notes, a medical provider's action for reimbursement for services provided to a person injured in a motor vehicle accident is dependent on the validity of the injured insured's underlying claim for PIP benefits from the no-fault insurer; if the injured insured's claim fails, then so does the medical provider's derivative claim. See, e.g., *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 521-524; 895 NW2d 188 (2016); *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 393-394, 399; 838 NW2d 910 (2013). As a general matter, it is now well settled that a provider has no independent statutory cause of action against a no-fault insurer for recovery of PIP benefits. See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 195-196; 895 NW2d 490 (2017). Rather, the provider's normal recourse is to seek payment directly from the injured person. See *id*. at 217.

Alternatively, as our Supreme Court explained in *Covenant*, an injured person retains the ability to assign his or her right to past or presently due benefits directly to the provider. See *id*. at 217 n 40. This is what occurred here, with Provider's cause of action against Auto-Owners proceeding on the basis of an assignment from Kalamas.

When such an assignment occurs, the provider, as assignee, "stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). Therefore, in the no-fault insurance context, because the assignee-provider "stands in the shoes of the assignor," the assignee-provider only

"possesses whatever right [the assignor] would have to collect past due or presently due benefits" from the no-fault insurer. See *Prof Rehab Assoc v State Farm Mut Auto Ins Co (On Remand)*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

The resolution of this appeal hinges on an application of general principles of the law relating to assignments in the context of res judicata. "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair*, 470 Mich at 121. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id*. "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010) (quotation marks and citation omitted).

In *TBCI*, this Court held that a medical provider seeking recovery of first-party benefits from an insurance provider was "essentially standing in the shoes" of the injured insured and, therefore, a "privy" of that individual. *TCBI*, 289 Mich App at 40, 41, 44. "A privy of a party includes a person so identified in interest with another that he represents the same legal right . . . ." *Id*. at 44 (quotation marks and citation omitted; ellipsis in original). Accordingly, where a previous lawsuit by the injured insured resulted in a judgment that the injured insured committed fraud in connection with a claim pursuant to an insurance policy and, as a result, lost legal entitlement to any claim of coverage under the policy, res judicata barred any attempt by the medical provider to relitigate that issue in its own separate lawsuit seeking reimbursement for services provided to the injured insured. *Id*. at 41, 44. We further noted that the prior judgment in the insured's lawsuit was a final judgment on the merits and that "there is no question" that the medical provider's claims could have been resolved in the previous lawsuit. *Id*. at 43; see also *Adair*, 470 Mich at 121, 124-125 (stating that our Supreme Court has adopted a "broad approach to the doctrine of res judicata" by holding that it not only bars claims already litigated but also "every claim arising from the same transaction" that could have been raised through the exercise of reasonable diligence and further explaining that under this "transactional test" followed in Michigan, "the determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in [the previous lawsuit]"). This Court held in *TBCI* that the trial court had therefore properly dismissed the medical provider's lawsuit on res judicata grounds. *TBCI*, 289 Mich App at 44.[7]

In this case, the Wayne Circuit Court entered a judgment that "all" of Kalamas's claims for PIP benefits were barred, under the terms of his insurance policy with Auto-Owners, based on

[7] Although *TBCI, PC* was a pre-*Covenant* case and, accordingly, did not specifically address a policyholder's claim as assigned to the provider, we conclude that the same result must apply in this case because Provider's claims as assignee were nonetheless necessarily and entirely derivative and dependent on Kalamas's rights under the insurance policy. See *Dawoud*, 317 Mich App at 524 ("[I]f an insured's claim is substantively barred on the merits, any derivative claims necessarily fail as well.").

Kalamas's fraudulent statements. The Wayne Circuit Court therefore dismissed Kalamas's action against Auto-Owners with prejudice.[8] As we explained in *Grimmer v Lee*, 310 Mich App 95, 102; 872 NW2d 725 (2015), "[a] dismissal *with* prejudice amounts to an adjudication on the merits and bars a further action based on the same facts." See also MCR 2.504(B)(3). Provider sought reimbursement based on services it allegedly provided to Kalamas on the theory that it had been assigned to right to collect Kalamas's PIP benefits for those services. Provider thus possessed only the rights Kalamas possessed and was clearly Kalamas's privy. *Dawoud*, 317 Mich App at 521-524; *Burkhardt*, 260 Mich App at 653; *TCBI*, 289 Mich App at 44. Finally, considering that Provider's claim necessarily depended on showing that Kalamas was entitled to the PIP benefits for which Provider sought reimbursement, Provider's claim could have been resolved as part of the same lawsuit. *Adair*, 470 Mich at 121, 124-125; *TCBI*, 289 Mich App at 43. In summary, because Kalamas's claim was "substantively barred on the merits, any derivative claims necessarily fail as well." See *Dawoud*, 317 Mich App at 524.

Hence, Provider's claim was barred by res judicata and the trial court erred by denying Auto-Owners' motion for summary disposition. *Adair*, 470 Mich at 121. The trial court erroneously based its decision on considerations that were outside of the proper legal test, as set forth by our Supreme Court, for determining whether res judicata operated to bar Provider's claim. *Id*. The trial court's conclusion that Provider was not Kalamas's privy because there was no "identity of parties or interests" is directly contrary to binding precedent of both our Supreme Court and this Court. *Covenant*, 500 Mich at 217 n 40; *Burkhardt*, 260 Mich App at 653; *Prof Rehab*, 228 Mich App at 177; *Dawoud*, 317 Mich App at 521-524. In essence, the trial court in this case based its ruling on its view that the Wayne Circuit Court decision was wrong. However, assuming without deciding that the Wayne Circuit Court erred in rendering its decision,[9] that fact standing alone would be an insufficient basis to avoid the application of res judicata. See *Hackley v Hackley*, 426 Mich 582, 591-592; 395 NW2d 906 (1986) (opinion by BOYLE, J.), superseded on other grounds by statute as stated in *Glaubius v Glaubius*, 306 Mich App 157, 175-177; 855 NW2d 221 (2014).

Similarly, Provider's appellate arguments essentially amount to improper challenges to the propriety of the Wayne Circuit Court action. As an initial matter, Provider's arguments are founded on the misperception that Auto-Owners was asserting fraud as a defense in this case when, in actuality, Auto-Owners was merely relying on the preclusive effect—under the doctrine of res judicata—of the Wayne Circuit Court's ruling that Kalamas was not entitled to any PIP benefits under the insurance policy, which necessarily prohibited Provider from collecting any PIP benefits on Kalamas's behalf as his assignee. Provider raises multiple arguments in this case for why it believes the Wayne Circuit Court's ruling was erroneous, but these arguments are nothing more than an attempt to use the instant case as a vehicle for relitigating the issue that was already decided in the Wayne Circuit Court action regarding whether Kalamas was barred from receiving PIP benefits under the insurance policy. Consequently, Provider's arguments amount to an

[8] We further note that our search located no indication that an appeal of the Wayne Circuit Court's decision was ever sought.

[9] Clearly, we cannot decide whether the Wayne Circuit Court erred since that court's decision is not before us in this case.

impermissible collateral attack on the Wayne Circuit Court's judgment in that lawsuit. See *Worker's Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 474; 853 NW2d 467 (2014) ("It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding.").

Provider further appears to believe that Kalamas's assignment of his right to obtain benefits based on the services provided by Provider somehow insulates Provider's claim from the effect of the Wayne Circuit Court judgment. However, an assignee cannot obtain any greater right than the assignor had with respect to past due or presently due benefits from the no-fault insurer. See *Prof Rehab*, 228 Mich App at 177. An assignment does not have "some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought." *Jones v Chambers*, 353 Mich 674, 682; 91 NW2d 889 (1958) (quotation marks and citation omitted).

Lastly, to the extent that the trial court believed that Auto-Owners could not rely on res judicata because it had not sufficiently pleaded it as an affirmative defense, the trial court did not provide a sufficient basis for denying Auto-Owners leave to amend its pleadings. Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2). Furthermore,

> [t]he allowance of an amendment is not an act of grace, but a right of a litigant seeking to amend "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive . . ., repeated failure to cure deficiencies . . ., undue prejudice . . ., futility of amendment, etc." [*Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973) (citation omitted; alteration in original).]

In this case, we note that Auto-Owners could not have pleaded facts supporting res judicata as an affirmative defense until after the Wayne Circuit Court had issued its summary disposition ruling and that Auto-Owners moved for summary disposition on that basis in this case within two months of the Wayne Circuit Court's decision. That this was close in time to when the trial was scheduled, which was an apparent concern of the trial court, did not make this an *undue* delay. "[I]n the absence of a showing of either bad faith or actual prejudice, mere delay does not warrant denial of a motion to amend." *Id*. at 663-664. In this case, there was no indication of bad faith on the part of Auto-Owners, and there was no indication of "actual prejudice" to Provider other than the fact that its claim would be barred by the operation of res judicata. However, "[t]he possible prejudice . . . must stem from the fact that the new allegations are offered *late* rather than in the original pleading, and not from the fact that the opponent may lose his case on the merits if the amendment is allowed, whereas he may win it if the amendment is denied." *Id*. at 658 (quotation marks and citation omitted). Therefore, we conclude that the trial court abused its discretion by denying Auto-Owners' motion for leave to amend its pleadings regarding the assertion of res judicata. See *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006) ("The grant or denial of leave to amend pleadings is within the trial court's discretion.").

Reversed and remanded for further proceedings consistent with this opinion. We do not

retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Brock A. Swartzle

STATE OF MICHIGAN

COURT OF APPEALS

ROBERTS ORTHOPEDIC SERVICES,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 4, 2021

No. 349786
Wayne Circuit Court
LC No. 18-009627-NI

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7). Plaintiff argues that the trial court erred in finding that the federal court's order in *Omar v Allstate Ins Co (Omar I)*, opinion of the United States District Court for the Eastern District of Michigan, issued March 14, 2019 (Case No. 17-cv-13400), which granted summary disposition to defendant in a case based on the same accident at issue here, barred plaintiff's claim against defendant under the doctrine of res judicata. We affirm the order of summary disposition in favor of defendant.

I. UNDERLYING FACTS

In September 2016, Danny Omar was a passenger in a vehicle driven by Marletta Boyd when the vehicle was hit by another car. Omar consequently suffered bodily injuries from the accident. He then sought and received medical treatment for his injuries from plaintiff. Because Omar did not have insurance at the time of the accident, he submitted a claim for no-fault benefits under Boyd's insurance policy with defendant. In 2017, Omar sued defendant, alleging that defendant failed or unreasonably refused to pay plaintiff no-fault benefits in accordance with Boyd's insurance policy. After removing Omar's case to federal court, defendant filed a motion for summary judgment on April 19, 2018. *Omar I*, p 1.

In February 2018, while the federal court action was pending, plaintiff and Omar entered into an assignment of rights agreement, in which Omar assigned to plaintiff "all rights and privileges to and remedies for payment of health care services, products, or accommodations ("services"), provided by Assignee to Assignor to which Assignor is or may be entitled under

Chapter 31 of the Insurance Code (MCL 500.3101, et seq), the No-Fault Act." The assignment further stated, in part:

> Assignor hereby certifies its understanding that while Assignee may, pursuant to this assignment, pursue payment from a person or entity other than Assignor, this agreement may be revoked by Assignee if it determines, or a determination is made pursuant to judicial proceedings, that Assignor lacks coverage or that the services subject to this assignment are not payable by any such person or entity for any reason under Chapter 31 of the Insurance Code (MCL 500.3101, et seq), any applicable policy of insurance, and/or due to any actions or conduct of Assignor.
>
> Assignor and Assignee agree that in the event any terms or provisions of this agreement are declared invalid or unenforceable by any Court or Federal or State Government Agency having jurisdiction over the subject matter of this agreement, the remaining terms and provisions that are not affected thereby shall remain in full force and effect.

After the assignment was executed, plaintiff sued defendant in Wayne Circuit Court, alleging that defendant unreasonably refused to pay plaintiff for the medical services provided to Omar in accordance with defendant's statutory and contractual obligations. Defendant denied plaintiff's claims for no-fault benefits and asserted that any claim by plaintiff was barred, and that any subsequent assignment of rights was invalid due to fraudulent statements or misrepresentations by Boyd, which voided the underlying insurance policy.

Meanwhile, the federal court granted defendant's motion for summary judgment in *Omar I*,[1] finding there was no genuine dispute of material fact that Boyd's policy was obtained through material misrepresentation and, as a result, Omar was not entitled to recover no-fault benefits from defendant. *Omar I*, op at 1-2. The federal court further stated:

> Regardless, the equities here weigh in favor of rescission. The Court gave all parties the opportunity to brief how [*Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018),] applies to the case. In doing so, [Omar and plaintiff-providers] failed to provide evidence as to why the equities weigh in favor of forcing Defendants to pay Omar's claim, whereas Defendants provided significant evidence of Omar's dishonesty in conjunction with his claim. Defendants provided evidence that Omar stated in his deposition that his last day of work was the day of the accident and that he had never been sick before, but that five months before the accident, in conjunction with a Social Security claim, he stated that he had stopped working in 2012 due to back and knee problems. Given the evidence of Omar's wrongdoing in connection with his claim, and in the absence of wrongdoing by

[1] "Michigan's standards for summary disposition mirror the standards for summary judgment in federal court." *Estate of Taylor by Taylor v Univ Physician Group*, 329 Mich App 268, 277 n 2; 941 NW2d 672 (2019).

> Defendants, the equities weigh in favor of rescission. [*Id*. at 2 n 2 (citations omitted).]

Consequently, Omar was not entitled to receive any no-fault benefits from defendant. *Id*. at 2.

Omar filed a motion for reconsideration in federal court, arguing there was no evidence that he participated in any fraud related to the procurement of Boyd's policy and, as a result, the equities should have balanced in his favor. The federal court denied Omar's motion, stating that Omar's innocence in the procurement of Boyd's policy did not tip the equities in Omar's favor. *Omar v Allstate Ins Co (Omar II)*, opinion of the United States District Court for the Eastern District of Michigan, issued October 30, 2019 (Case No. 17-cv-13400), p 1. The federal court reasoned that because *Bazzi* does not limit the "[c]ourt's equity analysis to the parties' conduct during the procurement of the policy[,]" the federal court properly considered Omar's misconduct while pursuing his claim for no-fault benefits and defendant's lack of wrongdoing in the balance of equities. *Id*. at 2. Plaintiff did not appeal the federal district court's judgment against it.

Following the entry of the summary judgment order in federal court, defendant filed a motion for summary disposition in this case, noting that the federal court ruled defendant was entitled to rescind Boyd's policy and have it declared void *ab initio* because Boyd made misrepresentations in her application for the policy. Once rescinded, defendant argued, neither Omar nor plaintiff was entitled to no-fault benefits from defendant under Boyd's policy. Plaintiff responded, arguing that defendant failed to present any argument that the equities favored rescission of Boyd's policy as to plaintiff's claims. The trial court in this case, in granting summary disposition, stated that it was doing so "because of the federal court order."

Plaintiff filed a motion for reconsideration, arguing that insurance policies are not automatically void *ab initio* when an innocent third party is involved and, as a result, the trial court committed a palpable error by granting defendant's motion without properly weighing the equities. The trial court denied plaintiff's motion for reconsideration. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). "MCR 2.116(C)(7) permits summary disposition 'because of release, payment, prior judgment, [or] immunity granted by law.' " *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015), quoting MCR 2.116(C)(7) (alteration in original).

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence . . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by

> documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Furthermore,

> [w]e must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. But when a relevant factual dispute does exist, summary disposition is not appropriate. [*Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012) (citations and quotation marks omitted).]

B. ASSIGNMENT

Before turning to the dispositive issue of res judicata in this case, we must first address the issue of assignment and the effect of Omar's assignment of his claims to plaintiff in this case. It is well-settled that a medical provider has no independent statutory cause of action against a no-fault insurer for recovery of no-fault benefits. *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 218-219; 895 NW2d 490 (2017). Instead, the medical provider's default recourse is to seek payment directly from the injured person. *Id*. at 217.

An injured person, however, retains the ability to assign his or her right to past or presently due benefits directly to the provider. *Id*. at 217 n 40. When such an assignment occurs, the provider, as assignee, "stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). As a result, since the provider-assignee "stands in the shoes of the assignor," the provider-assignee only "possesses whatever right [the assignor] would have to collect past due or presently due benefits" from the no-fault insurer. *Prof Rehab Assoc v State Farm Mut Auto Ins Co (On Remand)*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Indeed, because a medical provider stands in the shoes of the assignor-insured, "if an insured's claim is substantively barred on the merits, any derivative claims necessarily fail as well." *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 524; 895 NW2d 188 (2016). As discussed above, the federal court in *Omar I* concluded that Omar was not entitled to any no-fault benefits from defendant because, in part, the equities balanced in favor of rescinding defendant's insurance contract with Boyd. Consequently, Omar's claim for no-fault benefits, which was premised on the same insurance contract, was substantively barred on the merits and any derivative claim plaintiff has must similarly fail. See *id*.

C. RES JUDICATA

Plaintiff argues that res judicata does not apply in this case because the federal court in *Omar I* ruled on a different claim for no-fault benefits than is at issue in this case. We disagree. The federal court in *Omar I* concluded that rescission of Boyd's policy was appropriate and, therefore, that Omar was not entitled to any no-fault benefits from defendant based on the same contract; it never reached the derivative issue of which specific no-fault benefits Omar arguably would have been entitled to if there had been a valid contract. *Omar I*, op at 2. Plaintiff, as

assignee, had the identical rights Omar had prior to assignment; as the federal court found, the fact that Omar had no right to collect benefits doomed plaintiff's derivative claim. Res judicata is a judicial doctrine constructed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed2d 308 (1980). The "main purpose" of res judicata "is to insure finality in a cause of action." *Rogers v Colonial Fed S & L Ass'n of Grosse Pointe Woods*, 405 Mich 607, 617; 275 NW2d 499 (1979), overruled in part on other grounds by *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007). Michigan courts consistently apply the principle broadly in practice. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999).

This broad application encompasses claims previously litigated, as well as "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v Dart*, 460 Mich 573, 586-587; 597 NW2d 82, 88 (1999). Res judicata bars a party's subsequent action if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). Finally, "the burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Orders of summary disposition are generally adjudications on the merits. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418-419; 733 NW2d 755 (2007). The federal court's order granting summary judgment to defendant in *Omar I*, op at 2, had the same effect as an order of summary disposition, see *Estate of Taylor by Taylor v Univ Physician Group*, 329 Mich App 268, 277 n 2; 941 NW2d 672 (2019). The federal court in *Omar I* addressed the merits of Omar's claim for no-fault benefits, weighed the equities, and decided that rescission of Boyd's insurance contract was appropriate; the federal court thus granted summary judgement. *Omar I*, op at 2 n 2. Thus, the federal court's decision in *Omar I* was a decision on the merits and fulfills the first requirement for res judicata to apply here. See *Washington*, 478 Mich at 418-419; *Adair*, 470 Mich at 121.

The second requirement of the doctrine of res judicata is that both actions must involve the same parties or their privies. *Adair*, 470 Mich at 121. Privies are parties "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Id*. at 122. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in litigation." *Id*. (citation omitted).

In the federal case, Omar, as plaintiff's assignor of rights, certainly "represent[ed] the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122. As assignee, plaintiff had "all rights and privileges to and remedies for payment" which Omar had, see Assignment, not more and not less. Plaintiff argues that he and Omar are not privies because the legal right at issue in *Omar I* is different from the legal right at issue here because, in *Omar I*, Omar sought no-fault benefits for different services than those for which plaintiff is seeking reimbursement in this case. But plaintiff's argument misses the mark. Plaintiff's claim rests entirely on the proposition that Omar could recover under Boyd's insurance contract, and could convey that right of recovery to plaintiff; the threshold question therefore is whether Omar had any rights under the insurance

contract, because without such rights neither his claim, nor plaintiff's derivative claim based on Omar's rights, had any force. Thus, the issue in *Omar I* was whether defendant's insurance contract with Boyd should be rescinded; because it concluded that Boyd's contract should be rescinded, the federal court never reached the derivative issue of whether Omar would have been entitled to any specific no-fault benefits if the underlying contract had been valid. *Omar I*, op at 2. Indeed, by rescinding Boyd's insurance contract with defendant, the *Omar I* court held that defendant was not liable to pay *any* no-fault benefits that arose from the accident in which Omar and Boyd were involved because, as a matter of law, the contract of insurance never existed. *Id*.

Here, plaintiff seeks to relitigate that same issue and for us to consider whether Boyd's insurance contract with defendant should be rescinded and whether plaintiff, standing in Omar's shoes, is entitled to any no-fault benefits. But before we can address whether defendant is responsible for the specific no-fault benefits at issue in this case we would first have to determine whether Omar, and by extension plaintiff, was entitled to any no-fault benefits at all. Omar litigated that exact issue in *Omar I* and the federal court ruled against him. Thus, Omar and plaintiff are in privity because they had not only a substantial identity of interests in whether Boyd's insurance contract with defendant was rescinded, they had the identical interest—plaintiff did not have even a potentially valid claim unless Omar did.

Plaintiff also argues that its assignment of benefits from Omar protects plaintiff from the effect of the federal court's order because, based on the assignment, Omar could not make a claim in *Omar I* for the no-fault benefits at issue in this case. We need not reach that specific issue because, even with the assignment, Omar and plaintiff are in privity. As discussed earlier, an assignee cannot obtain any greater right than the assignor had with respect to past due or presently due benefits from the no-fault insurer. *Prof Rehab Assoc*, 228 Mich App at 177. "To rule otherwise would be to give such an assignment some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 205; 920 NW2d 148 (2018) (quotation marks and citation omitted). Indeed, plaintiff stands in the shoes of Omar, by way of the assignment; and the federal court's ruling in *Omar I* that Omar was not entitled to any no-fault benefits applies equally to plaintiff, due to the rescission of defendant's insurance contract with Boyd. Simply put, plaintiff and Omar are privies because they each sought a determination, in different cases, that Omar was entitled to no-fault benefits, and the federal court ruled against their position on the merits.[2]

Finally, for the doctrine of res judicata to bar the relitigation of a claim, the matter in question must have been decided in the first case, or be one which could have been so decided. *Adair*, 470 Mich at 121. The test for this element is the "transactional" test. *Id*. at 124. The "transactional" test provides that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of

[2] Plaintiff's position is that a contract can be rescinded as to some claims, but not as to other claims. However, the effect of rescission is that the entirety of the contract, as a legal matter, never existed. *Bazzi*, 502 Mich at 408. As such, *any* claim grounded on the contract, not just some possible claims, necessarily fails.

relief." *Id*. (citation omitted). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . ." *Id*. at 125 (citation and quotation marks omitted; alterations in original). See also *Washington*, 478 Mich at 420 (quoting *Adair*'s statement of the transactional test).

Plaintiff's claim here and Omar's claim in *Omar I* both arise from the same accident and the same insurance policy. Indeed, plaintiff's claim could have been resolved as part of *Omar I* because plaintiff's claim necessarily depended on showing that Omar was entitled to receive no-fault benefits. See *Adair*, 470 Mich at 124-125. The underlying issue raised by Omar and plaintiff in their respective suits was whether innocent third parties, whom they alleged to be Omar and plaintiff, could collect no-fault benefits from defendant despite rescission of Boyd's policy as void *ab initio*. *Omar I*, op at 1-2. Because the federal court addressed and answered this issue in *Omar I*, deciding Omar's claim was "substantively barred on the merits, any derivative claims," such as plaintiff's claims here, "necessarily fail as well." *Dawoud*, 317 Mich App at 524; *Omar I*, op at 1-2. Thus, plaintiff's claim for no-fault benefits was barred by res judicata.

We also note that plaintiff asserts that the federal court erred in finding that Omar was not an innocent-third party. Plaintiff's recourse, depending on the exact timing of the federal court's entry of judgment and the assignment, was either for Omar to appeal the summary judgment order, or for plaintiff, as assignee, to intervene and do so. But Omar did not appeal the federal court order, nor did plaintiff try to do so either, instead choosing to essentially use this lawsuit as a substitute for a federal appeal. That is precisely the type of litigation the res judicata doctrine is intended to bar. Plaintiff's position is that, because it did not like or agree with the outcome in federal court, it could simply pursue the same legal theories in the Michigan courts, with the prospect of a more congenial outcome from plaintiff's perspective. Had plaintiff appealed to a federal court of appeals, it may have obtained just such an outcome. Application of res judicata principles, however, bars us from awarding any such relief to plaintiff.

III. CONCLUSION

For the reasons stated in this opinion, the trial court did not err by granting summary disposition to defendants based on the res judicata doctrine. Because plaintiff's claim was barred by res judicata, we need not decide whether a balancing of the equities regarding rescission was appropriate here, because the underlying contract was rescinded and thus legally never existed. Consequently, we do not address the rescission issue, nor do we balance the equities any further. Thus, the trial court's order granting summary disposition to defendant is affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Jonathan Tukel