STATE OF MICHIGAN

COURT OF APPEALS

ABDULLAH HAMDI,

Plaintiff/Counter-Defendant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant/Cross-Defendant/Appellant,

and

AL NISH MOHAMMED d/b/a 2 M'S CHALMERS AUTO REPAIR, INC.,

Defendant,

and

NATIONAL CASUALTY COMPANY,

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

and

AQEEL ALZIRGANY and AYAT TRUCKING, INC.,

Defendants.

UNPUBLISHED
October 7, 2014

No. 314255
Wayne Circuit Court
LC No. 12-002583-NF

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v

No. 316334

Oakland Circuit Court
LC No. 2012-129205-CK

NATIONAL CASUALTY COMPANY, PEOPLES INSURANCE AGENCY, LTD., and JM WILSON CORPORATION,

Defendants-Appellees,

and

AYAT TRUCKING, INC., and AQEEL ALZIRGANY,

Defendants.

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v

No. 317008
Oakland Circuit Court
LC No. 2012-129205-CK

NATIONAL CASUALTY COMPANY, PEOPLES INSURANCE AGENCY LTD., and JM WILSON CORPORATION,

Defendants-Appellees,

and

AYAT TRUCKING, INC. and AQEEL ALZIRGANY,

Defendants.

Before: GLEICHER, P.J., and SERVITTO and KRAUSE, JJ.

PER CURIAM.

In docket no. 314255, defendant/cross-defendant, Citizens Insurance Company of America ("Citizens") appeals as of right a trial court order granting summary disposition in favor of National Casualty Company ("National") and finding that Citizens was the highest priority insurer for purposes of a motor vehicle accident involving plaintiff Abdullah Hamdi ("Hamdi") and was thus responsible for payment of Hamdi's no-fault insurance benefits. In docket no.'s 316334 and 317008, Citizens appeals as of right the trial court's grant of summary disposition in

favor of National, Peoples Insurance Agency Ltd. ("Peoples") and JM Wilson Corporation ("JMW"), and its finding that Citizens' second complaint was frivolous. We affirm.

Hamdi was injured in a one-vehicle accident on April 16, 2011, in Arizona while driving a semi truck or "tractor" and attached trailer, in the course of his employment. At the time of the accident, Hamdi was employed with Ayat Trucking, Inc. as an interstate commercial truck driver and the tractor and trailer he was driving were owned by Al Nish Mohammed d/b/a 2 M's Chalmers Auto Repair, Inc. ("2 M's"), but were leased to Aqeel Alzirgany d/b/a Ayat Trucking ("Ayat") for a 12 month period. Citizens was the insurer of the tractor under a policy obtained by 2 M's and National was the insurer of the trailer under a policy obtained by Ayat.

Hamdi initiated a lawsuit against Citizens, National, Ayat Trucking, Aqeel Alzirgany, and 2 M's seeking payment of no-fault insurance benefits after both Citizens and National denied benefits. A priority dispute ensued between Citizens and National and resulted in National filing a cross-claim against Citizens seeking, primarily, a declaration as to the priority of these two insurers. The trial court granted National's request for relief on summary disposition, finding that Citizens was the insurer legally responsible for payment of Hamdi's no-fault benefits as the first in priority insurer. The trial court directed Citizens to pay Hamdi's PIP benefits and it did so, after which Hamdi dismissed its claims against Citizens, resolving that case (docket. no. 314255).

Citizens thereafter filed an action against National, Ayat, Aqeel Alzirgany, Peoples and JMW in Oakland Circuit Court arising out of the same incident. Citizens alleged in its complaint that National was the highest insurer in priority and sought a declaration of the same and reimbursement for the no-fault benefits that Citizens had paid to Hamdi thus far, as well as recovery from Ayat and Aqeel Alzirgany, alleging that they were required to insure both the tractor and trailer. Citizens also claimed that Peoples and JMW were negligent in failing to procure the insurance coverage on the tractor as required under the lease agreement presented to them, causing Citizens to wrongly pay no-fault benefits. The trial court granted summary disposition in favor of National based upon res judicata and collateral estoppel and awarded it sanctions against Citizens for filing a frivolous action. The trial court further granted summary disposition in favor of Peoples and JMW and denied Citizens' request to amend its complaint on grounds of futility.

Docket No. 314255

Citizens first contends that the trial court erred in finding that it, and not National, was the first in order of priority for purposes of providing Hamdi's no-fault benefits based upon relevant statutory language and that summary disposition should thus have been granted in favor of Citizens. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the proffered evidence fails to establish a genuine issue regarding any material fact,

the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Issues of statutory interpretation are reviewed de novo. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). The applicability of a statute is also a question of law that is reviewed de novo. *Id*.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). To ascertain such intent, we first focus on the language of the statute itself. *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009).

> If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute. The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute. If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Id*.

Judicial construction is only appropriate when an ambiguity exists in the language of the statute; that is when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Lansing Mayor v Pub Serv Comm'n*, 470 Mich 154, 166; 680 NW2d 840 (2004).

There is no dispute that Ayat leased both the tractor and trailer under a twelve month lease or that it provided both to Hamdi in the course of his employment. MCL 500.3101 provides, in relevant part:

> (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.
>
> (2) As used in this chapter:
>
> ***
>
> (e) "Motor vehicle" means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped, as defined in section 32b of the Michigan vehicle code, 1949 PA 300, MCL 257.32b. Motor vehicle does not include a farm tractor or other implement of husbandry

> which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, 1949 PA 300, MCL 257.216. Motor vehicle does not include an ORV.
>
> ***
>
> (h) "Owner" means any of the following:
>
> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

Under the above, Citizens is correct that Ayat was considered an owner of both the tractor and the trailer (the trailer qualifying as a motor vehicle) and was required to maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance for both the tractor and the trailer. Ayat did obtain insurance on the 1998 Great Dane trailer through its National policy via a change endorsement on April 15, 2011 (the day before the accident). However, the 2002 Kenworth tractor was not actively added to the National policy until April 18, 2011 (two days after the accident). Thus, at the time of the accident, the only active policy of insurance on the tractor was a policy obtained by 2 M's issued by Citizens. While Ayat may have had an obligation to obtain insurance on the tractor, the fact that it did not does not make National liable. A court will not hold an insurance company liable for a risk that it did not assume. *Citizens Ins Co v Pro–Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007).[1]

In any event, Citizens' contention concerning priority ignores the plain reading of MCL 500.3114(3), which both parties agree governs this matter. That provision provides:

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

[1] Citizens contends that because Ayat obtained insurance through National on the trailer, it necessarily also obtained National insurance on the tractor due to policy language. Citizens did not raise this argument before the trial court and the trial court did not rule on this argument. The argument not being preserved, we need not address it. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002), mod 468 Mich 881 (2003).

Taking the statute piece by piece, there is no dispute that Hamdi [an employee] suffered an accidental bodily injury. There is also no dispute that he did so while an occupant of a motor vehicle, as he was driving the tractor, with the trailer attached, on a roadway. "Occupying" a motor vehicle for purposes of MCL 500.3114 means to be in or upon the vehicle. *Farm Bureau Mut Ins Co v MIC General Ins Corp*, 193 Mich App 317, 324; 483 NW2d 466 (1992).

The specific motor vehicle Hamdi was occupying was the tractor. A tractor and a trailer are two separate and distinct motor vehicles under the No-Fault Act. See, *Kelly v Inter-City Truck Lines, Inc*, 121 Mich App 208, 211; 328 NW2d 406 (1982)("a semi-trailer, whether attached to a cab or freestanding, is a "motor vehicle" under the no-fault act"); *Citizens Ins Co of America v Roadway Exp, Inc*, 135 Mich App 465, 471; 354 NW2d 385 (1984)(". . . a trailer remains a separate 'motor vehicle' when it is hooked up to a tractor."). This fact is also made clear by the specific language in the No-Fault Act as well as the requirement that a tractor and trailer be separately insured.

The tractor was owned by Hamdi's employer, Ayat, by virtue of the 12 month lease under application of MCL 500.3101. Pursuant to MCL 500.3114(3), then, Hamdi "shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle." The insurer "of the furnished vehicle" is Citizens, given that *the* furnished vehicle, i.e., the one Hamdi was occupying at the time of the accident and the one provided by his employer, was the tractor. There is simply no other way to read the plain and unambiguous language of this statute.

Much as Citizens would like us to read the statute otherwise, "the insurer" is not tied to the employer, but is, instead, tied to the furnished vehicle. The language in MCL 500.3114(3) entitling the injured to PIP benefits from "the insurer of the furnished vehicle" is markedly different from, for example, the language in MCL 500.3114(4) which provides that the injured shall receive PIP benefits ". . . from insurers in the following order of priority: (a) The insurer of the owner or registrant of the vehicle occupied . . . ." Clearly, the legislature recognizes a distinction between an insurer of a furnished vehicle and the insurer of an owner or registrant. Had the legislature intended MCL 500.3114(3) to apply to the insurer of the owner or registrant of the furnished vehicle it would have so stated. It did not. It explicitly stated that an injured party was entitled to PIP benefits simply from the insurer of the furnished vehicle. The insurer of the furnished vehicle is Citizens.

Citizens directs us to *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 26; 800 NW2d 93 (2010) in support of its position that National should be considered first in priority, but *Besic* actually runs contrary to Citizens' stance. In that case, Besic was driving a tractor and trailer that he owned personally but leased to MGR Express. MGR obtained liability insurance on the tractor from Lincoln Insurance and Besic obtained a "bobtail" policy from Clearwater insurance.[2] Citizens insured Besic's household vehicles. Besic was in an accident in Ohio and a priority dispute ensued amongst the three insurance companies concerning PIP benefits. The

[2] Bobtail insurance is as a policy that insures the tractor and driver when the tractor is operated without cargo or a trailer.

trial court found that Clearwater was the responsible insurer and this Court affirmed. Lincoln's policy was for liability only, and did not afford PIP coverage. Clearwater's policy, even though it was a bobtail policy, expressly provided PIP benefits. This Court found that because Besic was self-employed, MCL 500.3114(3) applied. This Court determined that Besic suffered accidental bodily injury while an occupant of a motor vehicle owned by his employer and thus he would receive PIP benefits from the insurer of the furnished vehicle under that statute. "In light of the fact that only Clearwater extended PIP benefits to the truck involved in Besic's accident, it has first priority to pay Besic's first-party benefits." *Id*. at 32.

Similarly, in this case, the lessor of the vehicle (2 M's in this case; in *Besic* it was Besic) obtained a policy on the tractor that provided PIP benefits and the lessee (Ayat in this case, MGR Express in *Besic*) did not. Citizens contends that its policy, just as in *Besic*, was a bobtail policy. In *Besic*, that fact was irrelevant. It is irrelevant here as well. The relevant fact is that the injured party was occupying a motor vehicle owned or registered by his employer. If so, the injured party is entitled to PIP benefits from the insurer of the furnished vehicle, whoever that insurer may be, and regardless of whether that insurer is the insurer of the employer.

Citizens also refers us to *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 85; 549 NW2d 834 (1996). However, the issue presented in that case was "whether § 3114(3) of the no-fault act applies when the injured person is operating an insured vehicle in the course of self-employment." The trial court held that it does, and that the insurer of the vehicle involved in the accident is solely responsible for no-fault benefits and the Supreme Court agreed. Thus, *Celina* sheds no light on the facts before us, except, perhaps much to Citizens' dismay, to reconfirm that it is the insurer of the vehicle that is responsible for payment of the PIP benefits-not the insurer of the employer.

It is clear that National did not have a policy of insurance in place on the tractor and that Citizens did. Consistent with the relevant statutory language, Citizens, being the undeniable insurer of the tractor, is the first in priority under MCL 500.3114(3). The trial court did not err in finding that Citizens was the first in order of priority for payment of PIP benefits and its entry of summary disposition orders regarding the same are affirmed.

Citizens next argues that the trial court erred in denying its motion for leave to file a notice of non-party fault as to Peoples, Ayat's insurance agency. Citizens sought to assert that Peoples erroneously failed to include the tractor that Hamdi was driving at the time of the accident in the National policy purchased by Ayat. Citizens thus claimed that Peoples was a proximate cause or the proximate cause of Hamdi's lack of no-fault insurance coverage and sought to request that the jury assess fault as to Peoples. The trial court properly denied the motion.

MCR 2.112(K), governing notices of nonparty fault provides:

> (1) *Applicability*. This subrule applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

> (2) *Notice Requirement.* Notwithstanding MCL 600.6304, the trier of fact shall not assess the fault of a nonparty unless notice has been given as provided in this subrule.
>
> (3) *Notice.*
>
> (a) A party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault. A notice filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty.
>
> (b) The notice shall designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault.
>
> (c) The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

First and foremost, Hamdi did not allege that he lacked no-fault insurance coverage as claimed by Citizens. In his complaint, he alleged that he did have no-fault coverage, either from Citizens or National, or both and that both refused to pay him benefits under the same. The reasoning behind Citizens request to file its notice thus fails.

Second, under MCR 2,112(K)(1), notices of nonparty fault apply only to "actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304" apply. Hamdi's claim was for first party no-fault benefits. "A claim for no-fault benefits is not a tort claim, nor is it comparable to one." *Atkins v Suburban Mobility Authority for Regional Transp*, 492 Mich 707, 718; 822 NW2d 522 (2012).

Third, Citizens, citing *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003), is correct that MCL 600.2957, containing provisions concerning comparative negligence, applies to a tort action alleging an insurance agent's failure to procure adequate insurance. That case, however, instructs that the trial court correctly denied Citizens' motion for leave to file its notice of nonparty fault.

In *Holton*, a homeowner underwent significant remodeling, including a new roof on his home. The homeowner then contacted its insurance agent to increase the coverage on the home, given the increased value after the extensive renovations. *Id*. at 319. Shortly thereafter, a roof fire caused damage exceeding the amount of the homeowner's insurance coverage. The homeowner sued his insurance agent for, among other things, failure to procure adequate insurance. *Id*. at 320. Thus, the primary cause of action was negligence against the insurance agent. Notably, a panel of this Court found that the trial court properly rejected the insurance agent's notice of nonparty fault (and thus an allocation of fault) against the roofing construction company and plaintiff because plaintiff's action sought recovery for the insurance agent's

negligent failure to procure adequate insurance. *Id*. at 321-322. The insurance agent could not request that liability for the lack of adequate insurance coverage be apportioned to anyone else because defendants were the only parties potentially responsible for plaintiffs' lack of insurance coverage. Thus, consideration of fault with regard to the roofing work or the fire was improper. The *Holton* court opined:

> Stated simply, plaintiffs' claim is that their damages occurred because of inadequate insurance coverage, not because of the home fire. Their action is premised on defendants' alleged liability for negligence resulting in the lack of proper insurance coverage. Defendants have proffered no evidence showing that plaintiffs' or the contractor's alleged negligence in causing the fire is a factor in whether the resulting property damage would be covered under plaintiffs' homeowner's insurance, which defendants allegedly failed to provide. That is, on the evidence before us, the cause of the fire is no more relevant in this case than it would be if it related to a purely accidental event, such as a lightning strike. A defendant attempting to mitigate his liability through a comparative fault defense has the burden of alleging and proving that another person's conduct was a proximate cause of the plaintiff's damages. *Id*. at 325-326.

Plaintiff Hamdi initiated this action solely for first party no-fault benefits under the Michigan No-Fault Act, MCL 500.3101 *et seq*. Plaintiff thus claimed that he was damaged because those who insured the vehicle that he was in at the time of his accident refused to pay the PIP benefits they contractually agreed to pay. Under no factual scenario could Peoples be responsible for the first party no-fault insurance benefits Hamdi was seeking. It is not a no-fault insurer.

Hamdi did not allege negligence on the part of National, Citizens, or, for that matter, Peoples. There can be no tort liability unless the defendant owed a duty to the plaintiff. *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002). Even if Peoples was negligent in failing to add the tractor to the National policy, it still did not result in Hamdi having *no* PIP benefits or in Citizens' failure to pay the same. It simply shifted the order of priority, which affected Citizens. Thus, Peoples actions resulted in no damages to plaintiff. Denial of Citizens request to file a notice of nonparty fault as to Peoples was appropriate.

Citizens next asserts that the trial court erred in denying its motion for relief from the stipulated order of dismissal it entered into with Hamdi, which closed the case. We disagree.

This court reviews a trial court's decision to grant relief from a judgment or order for an abuse of discretion. *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of reasoned and principled outcomes. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

Citizens moved for relief from the order pursuant to MCR 2.612(C)(1)(a) and (f), seeking to have the case reopened so that the trial court could resolve Citizens' pending motion for reconsideration. Those subrules provide as follows:

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

***

(f) Any other reason justifying relief from the operation of the judgment.

"Mistake" for purposes of MCR 2.612(C)(1)(a) has been understood by this Court to mean "mutual mistake." See *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984). The trial court has the authority to vacate the judgment if it finds that both parties shared a mistaken belief that led to their consent to a settlement. *Villadsen v Villadsen*, 123 Mich App 472, 477; 333 NW2d 311 (1983). The mistake may also be that of the trial court. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005). However, relief from judgment is generally granted only "when the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice." *Gillispie v Bd of Tenant Affairs of Detroit Housing Comm*, 145 Mich App 424, 428; 377 NW2d 864 (1985). "Well-settled policy considerations favoring finality of judgments circumscribe relief under MCR 2.612(C)(1)." *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010).

It is a longstanding rule that parties are bound by their stipulations. See *Thompson v Continental Motors Corp*, 320 Mich 219, 224-225; 30 NW2d 844 (1948). However, because a stipulation is a type of contract, a party seeking to avoid a stipulation may use contract defenses. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997). Accordingly, a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage. *Id.*

In this matter, there is no indication that the *stipulating parties*, that is the parties to the contract, were acting under mistake, fraud, or that either was given an unconscionable advantage over the other. Citizens has not alleged that Hamdi was mistaken in any way or contributed to Citizens' mistake or that the trial court made a mistake. Rather, Citizens simply entered the dismissal with the remaining party prior to the trial court's denial of its motion for reconsideration. The trial court, at the hearing on plaintiff's motion for relief from judgment, indicated that it had prepared an order denying reconsideration but that Citizens had the dismissal entered prior to the court's signing of the order denying reconsideration. Notably, "MCR 2.612(C)(1)(a) was not designed to relieve counsel of ill-advised or careless decisions." *Limbach*, 226 Mich App at 393. This appears to have been a careless decision on Citizens' part, to which MCR 2.612(C)(1)(a) would not provide relief.

Citizens also moved for relief under MCR 2.612(C)(1)(f), the catch-all provision for relief from judgment or order. To grant relief under this subsection, three requirements must be fulfilled: "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the

judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).

In this case, (3) has not been met. Nevertheless, it appears that Citizens' primary concern with having the trial court enter an order denying reconsideration was to ensure that its appeal of the trial court's summary disposition rulings was considered timely. Indeed, National raised a jurisdictional challenge to Citizens' appeal, based upon timeliness. Under MCR 7.204(A)(1)(b), a claim of appeal is timely, and the Court therefore has jurisdiction, if the claim of appeal is filed "within 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period." For the instant case to be considered timely, therefore, the December 17, 2012, order must be considered an order disposing of a motion for reconsideration or other relief from the order appealed from that was filed within the initial 21-day appeal period. The trial court granted summary disposition in favor of National and declared that Citizens was obligated to pay the no-fault benefits on August 17, 2012. On September 6, 2012, Citizens filed a timely motion for reconsideration of that order. While the October 2, 2012, dismissal order was the final order and the initial 21-day period commenced on that date, the fact that the motion for reconsideration was filed prior to that date, and thus prior to the expiration of the 21-day period is treated by this Court as timely filed so as to suspend the time for filing a claim of appeal until the motion was decided. As a result, Citizens has achieved the justice it sought in its motion for relief from judgment or order.

Docket No.'s 316334 and 317008

Citizens asserts that National was not entitled to summary disposition pursuant to MCR 2.116(C)(7) because neither res judicata nor collateral estoppel apply. We disagree.

A motion for summary disposition may be brought on the ground that an action is barred by res judicata or collateral estoppel. MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In reviewing a motion under MCR 2.116(C)(7), a court must accept "[t]he contents of the complaint . . . as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich at 119. The application of a preclusion doctrine is a question of law that is reviewed de novo. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Res judicata prevents "multiple suits litigating the same cause of action." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). Specifically, the doctrine bars a second, subsequent action when "(1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first." *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001). Res judicata is broadly applied, barring 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.

With respect to res judicata, Citizens does not dispute that both Citizens and National filed cross motions for summary disposition in the Wayne County case and that the same were

decided on the merits by the trial court, nor does it dispute that both actions involved the same parties or their privies. Citizens thus does not dispute the existence of elements (1) and (3) of res judicata. Citizens argues, however, that the summary disposition rulings were not final as to the ultimate payee of no-fault benefits to Hamdi such that elements (2) and (4) are lacking. In support of its claim, Citizens relies on Judge Borman's statements on the record at the summary disposition hearings where, according to Citizens, Judge Borman opined that her decision did not preclude Citizens from seeking reimbursement from National in subsequent litigation.

At the hearing, Judge Borman stated, "There may be two owners here. You may be able to after you finish paying . . . . You got to start paying on this and stop disputing priority. You may be able to go back against National who is also an owner, but you insured the furnished vehicle, and there is insurance there. . . . Then maybe you can come back against National who should have also had insurance because you're both owners." National, recall, issued a policy to Ayat, as an owner, on the trailer. Thus, it appears that Judge Borman made a misstatement and was actually referencing the fact that *Ayat* should have had insurance on the tractor because National is clearly not an "owner." Judge Borman additionally stated, "And I don't even know that you're in the business of leasing because . . . this is a repair shop. It doesn't say we're a leasing company. It says we're a repair company. You may be on the hook too. Go back—but start paying and then sue them." In this paragraph, Judge Borman was telling Citizens to pay Hamdi and then sue *Ayat*. Judge Borman also told Citizens:

> This is a furnished vehicle. You insured it for first party benefits. You're one of the owners. He's probably the other owner. I mean the guy that—what's his name, the employer?
>
> Citizens' counsel: Al-Zirgany and Ayat.
>
> Judge: Yeah, he should have insured it. He did it a couple of days later. And, you know, you may be able to collect from him. But the fact remains, you insured it.
>
> ***
>
> Judge: I read that. You're also an owner. You're both owners.
>
> Citizens' counsel: I get it. Judge, but here's the reality.
>
> Judge: He should have gotten it. He didn't get it. Go sue him.

Judge Borman did state to National's counsel, when ruling, ". . . I mean, you probably owe too." National's counsel responded, "Your Honor, there is no coverage. In fact, it's not disputed." To which she responded, "You're an owner. There's no coverage, that's true. So to that extent, I will grant summary disposition in your favor. That does not mean that your insured is not responsible . . . . I will not reform the contract to say that you covered the owner, the real owner, I mean, the employer. I will not reform the contract to say that you have to make first party coverage for the lessor and the employer of the injured party, okay. That doesn't mean that your insured isn't responsible and I don't know, maybe there's an agent who goofed here."

From the above, it becomes clear that when Judge Borman was referencing National and indicating that it probably owed and told Citizens it could sue, the judge was referencing National's insured—Ayat. Citizens' reliance on the Wayne County judges "encouragement" or "directive" to sue National is thus misplaced.

Judge Borman was called upon, by virtue of Hamdi's lawsuit against both National and Citizens and then by the cross-motions for summary disposition, to determine who was first in order of priority to pay Hamdi's PIP benefits. The parties briefed the issue extensively. The judge then issued orders on August 17, 2002, the first of which explicitly states, "National Casualty Company is hereby dismissed as a defendant in this lawsuit because Citizens and not National Casualty is the highest priority insurer for the motor vehicle accident on April 16, 2011, involving Abdullah Hamdi and for reasons stated on the record." A second order issued on the same date states that "Citizens Ins. Co. of America shall provide no-fault coverage to plaintiff Hamdi forthwith as Defendant Citizens is first in priority and shall pay PIP benefits outstanding to date." These decrees were final decisions as to who was the first priority insurer responsible for payment of Hamdi's PIP benefits.

In its "complaint and request for declaratory judgment" in the later, Oakland County matter, Citizens asserted in its claim pertaining to National that "Pursuant to MCL 500.3114(3), Defendant National Casualty Company is the No-Fault insurer in highest priority" and asked the Oakland Circuit Court to "determine the relative rights, obligations, and priorities of the No-Fault insurers with respect to Abdullah Hamdi's claim for No-Fault benefits . . . ." That is the exact issue that the trial court resolved with finality in the Wayne County litigation. Res judicata thus barred Citizens' claim against National.

Collateral estoppel also barred Citizens' claim against National. "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Generally, collateral estoppel requires that three elements 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." *Monat v State Farm Ins Co*, 469 Mich 679, 682–684; 677 NW2d 843 (2004).

Again, Citizens relies on the statements made by Judge Borman on the record, asserting that the judge specifically preserved the issue of priority for a later date. Not only were these oral pronouncements by the trial court misinterpreted by Citizens, the explicit August 17, 2012, orders holding that Citizens was the first priority insurer require a finding that this issue was actually litigated and determined by a final and valid judgment, the parties had a full and fair opportunity to litigate the issue, and mutuality of estoppel exists. Citizens certainly is, or should be, aware that a court speaks through its written orders. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009).

For the same reason, the trial court did not err in denying Citizens claim for subrogation against National. Subrogation is "the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to

the debtor." In order for Citizens to be entitled to subrogation from National, Citizens would have had to pay National's debt. The prior Wayne County ruling was and is that Citizens was first in priority for payment of the benefits. It thus did not pay National's debt owed to Hamdi and Citizens' argument for subrogation is simply another way of arguing that National was first in priority, which is a claim that is barred by res judicata and collateral estoppel.

Citizens next argues that the trial court erroneously granted summary disposition in favor of Peoples and JMW on Citizens' negligence claim because both of these insurance agencies failed to procure the required insurance coverage on behalf of Ayat from National on the tractor, which caused Citizens to pay no-fault benefits when National would otherwise have been first in priority. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Duty can arise from a statute or a contract or by application of the basic rule of common law, which imposes an obligation to use due care or to act so as to not unreasonably endanger the person or property of others. *Id*. The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Michigan courts have recognized that an insurance agent owes a duty to procure the insurance coverage requested by an insured. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 38; 761 NW2d 151 (2008). Thus, Peoples and JMW, as insurance agents of Ayat, arguably owed Ayat a duty to procure the insurance coverage requested by Ayat. It must be recognized, however, that Citizens merely alleged that it "believed" that Ayat requested that these agents procure National coverage on the tractor at issue. There is no evidence provided by any party to substantiate this belief. The evidence indicates that Ayat contacted the agents on April 15, 2011, and obtained National coverage on the trailer. Ayat then contracted the agents two days after the accident to procure National coverage on the tractor. Peoples provided an affidavit indicating that it had not been provided a copy of Ayat's lease showing that it had leased both the tractor and trailer. Citizens provided no evidence suggesting otherwise. There was thus no breach of any duty to Ayat and thus no potential follow through liability to Citizens.

Citizens has also failed to establish any separate duty that Peoples or JMW owed to it, a third party. Citizens relies upon law establishing the duties an insurance agent owes to its client but has provided no law indicating that these duties extend to another non-party insurance company as a matter of law. It is not sufficient for a party to announce a position and then leave it up to this Court to discover and rationalize the basis for his claims and then search for authority to sustain his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Thus, summary disposition was appropriate in favor of these defendants.

Citizens also contends that the trial court abused its discretion in denying its motion for leave to file an amended complaint when it discovered that the National policy contained an error, namely the inclusion of a wrong form and/or a wrong designated symbol in the declarations for the "covered autos" included in the PIP coverage and an internal National

memorandum revealing the details of the errors in the National policy. According to Citizens, it should have been allowed to amend its complaint to allege negligence and/or fraud against National, Peoples, and JMW for failing or refusing to reveal the errors in the policy to Citizens.

A trial court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). Leave to amend may be denied for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

As previously indicated, the Wayne County court had already decided the matter of priority as between National and Citizens. Res judicata bars claims not only 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 response to Citizens' motion for summary disposition, National provided the affidavit of legal assistant Jacqueline Tanner, who swore that the "new evidence" relied upon by Citizens was provided to Citizens in response to discovery requests in the Wayne County case two months prior to the Wayne County judge's ruling on the parties' cross motions for summary disposition. Thus, it is not "new evidence" and could have been argued in the Wayne County action and is barred by res judicata. The requested amendment would thus have been futile as to National. Moreover, the issue of priority was still completely and fairly resolved, based upon application of the clear and unambiguous language of MCL 500.3114(3). As previously discussed, that provision provides:

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

The last phrase "insurer of the furnished vehicle" reflects back to "occupant of a motor vehicle owned . . . by the employer." What a National employee thought about an error in the policy designation symbol would not change the fact that Citizens was the insurer of the furnished vehicle, i.e., the vehicle that Hamdi occupied and that which was owned (by Citizens own argument) by Ayat, as Hamdi's employer.

As to Peoples and JMW, Citizens cannot establish that they owed it any duty on which to base a negligence claim. Citizens' effort to add counts for negligence and errors and omissions in procuring the policy of insurance implicates the same duty to Citizens which Citizens had already pleaded and which was rejected by the Oakland County Court. Thus, amendment would have been futile. The trial court did not abuse its discretion in denying Citizens' motion to amend its complaint.

Finally, the trial court did not err in finding that Citizens' complaint in this matter was frivolous and in awarding sanctions to National. We review a trial court's finding that an action is frivolous for clear error, and the amount of sanctions that the court awarded for an abuse of discretion. *In re Attorney Fees & Costs*, 233 Mich App 694, 701, 704; 593 NW2d 589 (1999).

MCR 2.114 provides, in relevant part:

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> **(D) Effect of Signature**. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> **(E) Sanctions for Violation.** If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> **(F) Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Pursuant to MCR 2.625(A)(2), "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591, in turn, provides that costs and fees awarded for a frivolous action include all reasonable costs actually incurred by the prevailing party, including court costs and attorney fees. MCL 600.2591(3) defines "frivolous" as meeting one of the following criteria:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Citizens sought a ruling that National was the first priority insurer responsible for payment of Hamdi's PIP benefits. This issue had already been directly and precisely ruled upon by the Wayne County Circuit Court. While Citizens attempts to argue that the Wayne County court specifically reserved ruling on the issue and directed it to bring an separate action against National, these claims misinterpret the Wayne County judge's oral statements and directly

contradict her written orders, through which the trial court ultimately speaks. After receiving two written orders explicitly stating that Citizens was the first priority insurer and directing it to pay PIP benefits, Citizens had no reasonable basis to believe that National was the first priority insurer or that the issue was not resolved. At that point, Citizens' sole avenue for relief was an appeal, which it has taken. Its position against National in the Oakland County Circuit Court was devoid of arguable legal merit and the Oakland County court did not commit clear legal error in finding the Oakland action against National to be frivolous. Citizens does not contest the amount of sanctions awarded. Thus, we need not address that issue.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause