

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLES MOODY,

Plaintiff-Appellant,

Supreme Court No. 149041

Court of Appeals No. 301783
consolidated with
Court of Appeals No. 301784

Supreme Court No. 144096

and

Court of Appeals Nos. 301783 & 301784

GET WELL MEDICAL TRANSPORT,
PROGRESSIVE REHAB CENTER and
CAROL REINTS, INC.,

Wayne Circuit Court No. 10-006722-AV

Plaintiffs-Appellants,

36th District Court No. 08-138983-NF
consolidated with
36th District Court No. 09-119255-NF

v.

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellee.

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MICHIGAN SUPREME COURT

DEFENDANT-APPELLEE HOME OWNERS INSURANCE COMPANY'S
BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT CHARLES MOODY'S
APPLICATION FOR LEAVE TO APPEAL

Proof of Service

149041

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**COUNTER-STATEMENT OF PROCEDURAL HISTORY,
GROUNDS FOR RELIEF AND RELIEF SOUGHT**

A. Counter Statement of Procedural History

This is a first party no-fault action arising out of an alleged November 21, 2007 motor vehicle accident which was filed by the Plaintiff-Appellant Charles Moody ("Appellant Moody") on September 15, 2008. **Exhibit A.** Plaintiffs-Appellants Get Well Medical Transport, Progressive Rehab and Carol Reints, Inc. ("Appellants Get Well Medical") filed a separate cause of action on June 11, 2009, also in the 36th District Court. **Exhibit B.** These matters were consolidated, without objection, before Judge Roberta Archer of the 36th District Court following a motion filed by Defendant-Appellee Home Owners Insurance Company ("Home Owners") on July 28, 2009.

This case proceeded to trial before Judge Archer on December 8, 2009. The jury rendered its verdict on January 8, 2010, and a Judgment was entered by Judge Archer on May 27, 2010. **Exhibit C.** On the same date, Judge Archer also awarded an attorney fee in the amount of \$49,700.00 to counsel for Appellants Get Well Medical, Nicholas Cirino. **Exhibit D.**¹

Home Owners brought an appeal of right in the Wayne County Circuit Court pursuant to MCR 7.101 and MCR 7.204. Home Owners' Claim of Appeal was properly filed on June 15, 2010. The Honorable Robert Colombo of the Wayne County Circuit Court heard oral arguments and ruled on Home Owners' appeal on October 19, 2010. **Exhibit F.** Judge Colombo's Order reversing the jury's verdict and remanding Appellants Moody's matter to the 36th District Court either for dismissal or transfer to the Wayne County Circuit Court for a new trial was entered on December 3, 2010. Judge Colombo's December 3, 2010 Order also

¹ The Court should note that Attorney Fortner on behalf of Charles Moody also filed a Motion for Attorney Fees which has not yet been heard before Judge Archer. Mr. Fortner claims that he is entitled to more than \$207,000.00 for the services he provided to Mr. Moody in prosecuting this cause of action. **Exhibit E.**

reversed and remanded Appellants Get Well Medical matter to the 36th District Court for a new trial. **Exhibit G.**

Pursuant to MCR 7.203(B)(2) both Appellants filed an Application for Leave to Appeal to the Court of Appeals on December 27, 2010. On September 1, 2011 the Court of Appeals denied Appellants' Application for failure to persuade the Court for the need of immediate appellate review. Appellants then filed a motion to reconsideration which was denied by the Court on September 16, 2011.

On November 3, 2011 Appellants filed an Application for Leave to Appeal the Court of Appeal's September 1, 2011 Order with this Court. On May 23, 2012 in lieu of granting leave, this Court remanded these cases to the Court of Appeals for consideration as if leave had been granted pursuant to the Court's authority under MCR 7.302(H)(1). On June 1, 2012 the Court of Appeals ordered the two matters to be consolidated for the efficient administration of the appellate process.

On February 25, 2014 the Court of Appeals issued a published opinion affirming the Circuit Court's decision as to both Appellant Moody and Appellants Get Well Medical. *Moody v. Home Owners Insurance Co.*, __ Mich. App. __, __ N.W.2d __ (2014). See Appellant Moody's Exhibit H; Appellants Get Well Medical Exhibit D. The Court remanded the matters back to the circuit court for further proceedings and awarded Appellee costs pursuant to MCR 7.219. Appellants Moody and Get Well Medical timely filed an Application for Leave appealing the Court of Appeals February 2014 Opinion on April 4, 2014.

B. Counter Statement for Grounds for Relief

Appellants contend that the issues involved in the instant Application for Leave to Appeal involve principles of major legal significance and that the implications of the Court of Appeals Opinion would result in a material injustice. See Appellant Moody's Application for Leave pp viii-ix; Appellants Get Well Medical's Application for Leave pp ix-xx. Although Home Owners does not dispute that the issues of subject-matter jurisdiction and attorney

misconduct are issues of legal significance, the Court of Appeals pointedly and accurately applied this State's jurisprudence to the facts in the instant matter and rendered an Opinion that is consistent with the Michigan Court Rules and this State's long standing jurisprudence.

The Court of Appeals Opinion affirms the application of the Court Rules involving subject-matter jurisdiction and long-standing jurisprudence that supports the proposition that a court sitting without jurisdiction must divest itself from the proceedings by either dismissing the matter or transferring it to a court with proper jurisdiction. Appellant Moody correctly points out that the particular of issue of presenting proofs to the trier of fact that far exceed the district court's jurisdictional limitation is one of first impression. However, this is most likely because no attorney would ever submit damages in excess of a district court's jurisdictional limit because every attorney practicing now or ever in the State of Michigan with the exception of Mr. Moody's attorney seeks to obtain the largest damage award possible for his or her client. The Court of Appeals further affirmed the trial court's obligation to control trial proceedings and instruct the jury regarding the law. Neither Appellant has provided this Court with any reason to usurp the Michigan Court Rules, well established Michigan jurisprudence or the Court of Appeals Opinion such that review by this Court is unnecessary and unwarranted.

Further, in addition to abrogating the Court Rules, the plain meaning of MCL 600.8301 and well established Michigan jurisprudence, Home Owners submits that a reversal of the Court of Appeals Opinion would re-open the flood gates for improper gamesmanship and forum-shopping. Litigants would be allowed to engage in filing frivolous lawsuits for the purpose of an attorney's self-gain in violation his/her ethical obligations to their client and duties as officers of the court.

The decision by the Court of Appeals also serves the interests of judicial economy. The Court aptly pointed out that No Fault provider suits belong to the underlying claimant and are thus identical to and derivative of the underlying claimant's cause of action against an insurer. Due to this identity the Court held Appellants Get Well Medical's action was merged with

Appellant Moody's claim. This decision effectively reduces ever rising caseloads by requiring identical derivative provider lawsuits be merged together under one claim where the rights and responsibilities of all parties involved can be determined in a single proceeding.

C. Counter Statement of Relief Sought

Home-Owners files the instant Brief in Opposition to Appellants Moody and Appellants Get Well Medical's Application for Leave to Appeal from the Court of Appeals dated February 24, 2014. *Moody v. Home Owners Insurance Co.*, __ Mich. App. __, __ N.W.2d __ (2014). See Appellant Moody's Exhibit H; Appellants Get Well Exhibit B. This Brief in Opposition is being filed pursuant to MCR 7.302(D)(1). Home Owners opposes both Appellants' Requests for Leave for the reasons set forth herein.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER THE COURT OF APPEALS AND CIRCUIT COURT ERRED IN HOLDING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLANTS' CAUSE OF ACTION, WHERE THE AMOUNT IN CONTROVERSY EXCEEDED \$25,000?

The Trial Court answered "Yes".

The Wayne County Circuit Court on appeal answered "No".

The Court of Appeals on Remand answered "No".

Defendant-Appellee answers "No".

Plaintiff-Appellant Charles Moody answers "Yes".

Plaintiff-Appellants Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc. answers "Yes".

- II. WHETHER THE COURT OF APPEALS AND CIRCUIT COURT ERRED WHEN IT REVERSED THE JURY VERDICT AS TO APPELLANT MEDICAL PROVIDERS SUIT AND REMANDED THEIR CAUSES OF ACTION BACK TO THE DISTRICT COURT FOR A NEW TRIAL?

The Trial Court was not presented with this issue.

The Wayne County Circuit Court on Appeal answered "No".

The Court of Appeals on Remand answered "No".

Defendant-Appellee answers "No".

Plaintiff-Appellant Charles Moody did not address this issue on appeal.

Plaintiff-Appellants Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc. answers "Yes".

- III. WHETHER THE COURT OF APPEALS AND CIRCUIT COURT ERRED IN ITS SUPPLEMENTAL/ADDITIONAL ORDER GRANTING A NEW TRIAL AFTER FINDING THAT COUNSEL FOR APPELLANT MOODY MADE COMMENTS IN HIS OPENING STATEMENT WHICH "TAINTED THE ENTIRE CASE" AND "DEPRIVED APPELLEE (HOME OWNERS) OF A FAIR TRIAL?"

The Trial Court was not presented with this issue.

The Wayne County Circuit Court on Appeal answered "No".

The Court of Appeals on Remand answered "No".

Defendant-Appellee answers "No".

Plaintiff-Appellant Charles Moody answers "Yes".

Plaintiff-Appellants Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc. answers "Yes".

COUNTER-STATEMENT OF FACTS

A. Introduction

The primary question before the Court of Appeals On Remand, which was addressed numerous times before and during the trial is whether a litigant can proceed in the district court, a court of limited jurisdiction, where prior to and at trial the litigant presents proofs of damages that far exceed the court's jurisdictional limits. Of course, this begs the question as to why, in this case, counsel would file a cause of action seeking No-Fault benefits in the district court when Mr. Moody's initial hospital bill alone exceeded \$25,000.00?

As more fully addressed below, Home Owners believes that the answer to this question is self-evident, in the fact that Attorney Cirino for Appellants Get Well Medical received an award of attorney fees from the trial court exceeding \$40,000.00, **Exhibit D**, and Attorney Fortner for Appellant Moody attempted to recover in excess of \$207,000.00 for his representation of Mr. Moody in this district court action. **Exhibit E**. The Court of Appeals correctly held that the district court must divest itself of authority when a litigant's amount in controversy exceeds the court's statutory jurisdictional limitations and either dismiss the matter or transfer it to a proper forum. This ruling prevents improper forum shopping and reduces the filing of frivolous suits based upon unethical gaming for self-benefit.

In ruling that Appellants Get Well Medical's consolidated provider suit was derivative of and identical to Appellant Moody's right of recovery, the Court of Appeal also appropriately interpreted the plain language in the No Fault Act, MCL 500.3101 et seq. In effect, the Court of Appeals decision promotes notions of judicial economy and public interest by reducing ever rising caseloads. Requiring identical derivative provider lawsuits to be merged together where the rights and responsibilities of all parties involved can be determined in a single proceeding promotes judicial expediency and reduces overall costs associated with litigation, a cost-saving that is ultimately passed on to the public consumer.

B. Counter Statement of Facts

Home Owners was the no-fault insurance carrier for the Appellant Moody's parents, Charlie and Marcia Wheeler, at the time of an alleged November 21, 2007 motor vehicle accident involving Mr. Wheeler's 24 year old son, Charles Moody. As the Court can see from the Declarations page attached as **Exhibit H**, the policy at issue references the named insureds Marcia and Charlie Wheeler of 33379 Sandpiper Drive, Romulus, Michigan 48174-6315. As Charles Moody is not a named insured on this policy, it would apply to him only if he was a relative, domiciled in the same household as one of the named insureds pursuant to MCL 500.3114(1). Charles Moody's domicile formed a significant portion of the three week trial in this case. As it is not an issue in Appellants' appeal, Home Owners will focus on the trial court's jurisdiction and the appellate courts' decisions to remand this matter for a new trial.

At trial, Mr. Moody testified that on November 21, 2009, he was walking near the area of West Grand Boulevard and Linwood in the City of Detroit when he was forced to step into the street to walk around a puddle. At that point he claims to have been struck by an unknown vehicle from behind, then robbed by the vehicle's passengers. Mr. Moody located a taxi, which took him to Henry Ford Hospital where he was treated for approximately 19 hours before being released on November 22, 2007. (Tr. Trans. Vol. IX, pp. 30-34). Mr. Moody's hospital records indicate that he arrived with complaints of "abrasion, bleeding and swelling". After numerous objective tests, he was released home with a diagnosis of "laceration-lip simple". Mr. Moody's bill for the services he incurred at Henry Ford Hospital on November 21 and November 22, 2007 totaled \$32,447.23. **Exhibit I**.

Home Owners had an extremely difficult time obtaining discovery from Appellant Moody's counsel's office in this case. Home Owners was forced to file a Motion to Compel Discovery on February 6, 2009, then a Motion to Dismiss Plaintiff's cause of action on May 22, 2009. A second Motion to Compel Discovery was required on June 2, 2009 and again on June 18, 2009. Prior to receiving any discovery from Appellant Moody, Home Owners filed

a Motion to Consolidate Appellants Get Well provider suit cause of action with Appellant Moody's pursuant to MCR 2.505(A). The matters were thereafter consolidated, *without* objection, on July 28, 2009.

After one additional Motion to Compel, Home Owners finally convinced the trial court to enter an Order compelling signed answers to Defendant's Interrogatories on October 6, 2009. **Exhibit J.** In the interim, Mr. Fortner submitted an Offer of Judgment pursuant to MCR 2.405 in the amount of \$24,000.00 on August 14, 2009. **Exhibit K.** It was not until October 12, 2009 that Home Owners received executed Answers to its Interrogatories from Mr. Moody. The Answers were provided 350 days after they had been submitted to Mr. Fortner, more than 21 days after the submitted Offer of Judgment, and just 61 days prior to the commencement of trial. **Exhibit L.**

Mr. Moody's October 12, 2009 Answers to Interrogatories raised many of the issues which eventually gave rise to this appeal. Up until the submission of these answers, Home Owners was content to allow this matter to remain in the 36th District Court as Mr. Moody's damages would obviously be limited to less than \$25,000.00. However, the October 12, 2009 Answers to Interrogatories revealed that Mr. Moody was claiming \$114,816.00 in wage loss benefits and 24 hour per day attendant care at the rate of \$16.00 per hour "from date of accident to present". **Exhibit L.** Calculated out, Mr. Moody's attendant care demand through these Answers to Interrogatories totaled \$265,344.00. When combined with the wage loss claim, Mr. Moody's claim rose to \$380,160.00. As indicated above, Home Owners was already aware that Mr. Moody's initial hospital bill alone exceeded \$32,00.00. Following receipt of the October 2009 discovery responses, Mr. Moody's known, base demand totaled \$412,607.23.²

² This obviously begs the question as to why, any attorney would file a first party No-Fault action in district court which involved damages at this level. Home Owners believes that the answer can be found in the attorney fee awards Mr. Fortner is so kind to attach to many of his briefs. The orders in **Exhibit M** alone total more than \$140,000 in attorney fees for Mr. Fortner from just three 36th District Court cases. In essence Mr. Fortner engaged in improper forum shopping in order to maximize his own profit, potentially to his own client's detriment.

The level of Mr. Fortner's demand raised concerns with Home Owners' counsel as to whether it was Mr. Fortner's intention to present a case for extravagant No-Fault benefits to the jury in violation of the trial court's subject-matter jurisdiction. Mr. Moody's Answers to Interrogatories quite clearly revealed that it was Mr. Fortner's "strategy" to present such a claim. Any award by the jury would almost certainly exceed the Court's jurisdictional limit resulting in a \$25,000.00 verdict and guaranteeing him an attorney fee pursuant to his Offer of Judgment.³ Home Owners cannot think of a more perfect example of the type of "gamesmanship" the Offer of Judgment rule is intended to avoid. Home Owners also notes for this Court that the 36th District Court does not refer cases for case evaluation, depriving Home Owners of the protection of MCR 2.405(E).⁴

Home Owners' counsel raised its concerns as to this "strategy" with the trial court during housekeeping prior to the commencement of trial on December 8, 2009. Counsel for Home Owners specifically asked the court to take judicial notice of the court's jurisdictional limit found at MCL §600.8301 (discussed *infra*). Home Owners was of the belief that if Mr. Fortner intended to present extravagant, unobtainable figures to the jury, it should have the right to explain to the jury that Mr. Fortner could not possibly believe those numbers because if he did, he would have filed this action in circuit court. (Tr. Trans. Vol. I, pp. 15-78).

Counsel for Home Owners also clearly expressed to the trial court their belief that should Mr. Fortner argue damages in excess of the court's jurisdictional limit, he would be violating Rules 3.1 and 3.3 of the Michigan Rules of Professional Conduct in that he would be presenting arguments to both the jury and court which he knew to be false. The premise of this

³ Pursuant to MCR 2.405(D) in the event an Offer of Judgment is rejected and the adjusted verdict is more favorable to the offeror than the average of the offer, the offeree must pay the offeror's costs incurred in prosecution of the action.

⁴ Subsection (E) prohibits an award of costs in cases that have been submitted to case evaluation and result in a unanimous award.

argument again being that if Mr. Fortner actually believed that his client was entitled to some \$412,607.23 in damages, he would have brought this action in circuit court. If he did not, he would be perpetrating a fraud upon the court. *Id.*

Finally, counsel for Home Owners made it clear to the trial court in no uncertain terms its belief that the amount in controversy in this case exceeded the trial court's jurisdictional limit as outlined by MCL §600.8301. Home Owners noted that in the event Mr. Fortner presented claims in excess of the court's jurisdictional limit, it would immediately move for summary disposition pursuant to MCR 2.116(C)(4) (discussed *infra*) as the court would then lack jurisdiction over the subject matter of this case. (Tr. Trans. Vol. I, p.36).

Counsel's intention in bringing this issue to the attention of the court prior to the commencement of trial was to avoid the necessity of trial and this very appeal. Counsel for Home Owners also informed the court that they had researched this issue, and were able to locate no Michigan case law on this specific subject, most likely because no attorney would ever submit damages in excess of a district court's jurisdictional limit because every attorney practicing now or ever in the State of Michigan with the exception of Mr. Moody's attorney seeks to obtain the largest damage award possible for his or her client. (Tr. Trans. Vol. I, pp. 42-44).

The trial court seemed to grasp during argument on December 8, 2009, that Mr. Fortner's "strategy" was nothing more than a game he regularly plays in order to obtain excessive attorney fees for himself, at the expense of his clients. The court even went as far as to directly ask Mr. Fortner if he was bringing his cause of action "in good faith". (Tr. Trans. Vol I, p. 67). This Court should note that Mr. Fortner never answered that question, but did state to the trial court that not only would he win this case, but "I believe you're going to award me interest, costs and attorney fees". (Tr. Trans. Vol I, p. 67). After several hours of argument, the trial court instructed the parties to brief this issue and report back the next morning for continued argument.

On December 9, 2009, counsel for Home Owners noted for the court that the dollar amounts contained within Mr. Moody's recent Answers to Interrogatories and the hospital bill both exceeded the Court's jurisdictional limit. Counsel for Home Owners also pointed out that the Michigan Court Rules contained a mechanism for the transfer of an action when a court discovers that it lacks subject matter jurisdiction, MCR 2.227 (discussed *infra*). Obviously, this Court rule would be unnecessary if subject matter jurisdiction was static and could not change as a case progresses. Regardless, the trial court ruled that the matter would not be transferred to circuit court and each Plaintiff's damages would be limited to \$25,000.00. (Tr. Trans. Vol II, pp. 48-49). The trial court's ruling remained even in light of the court repeatedly asking Mr. Fortner, a trial attorney with over 25 years of experience, if he intended to ask "the jury to you (sic) come back with an award greater than \$25,000.00". To which Mr. Fortner responded with "I don't know" on five separate occasions, the last coming after Mr. Fortner walked out of the court, without reason, during oral argument. (Tr. Trans. Vol II, pp.56-57, 59, 61, 68)

The trial court then went a step further and held that it could not prevent Mr. Fortner from presenting damages to the jury in excess of \$25,000.00 and that counsel for Home Owners would be prohibited from informing the jury of the Court's jurisdictional limit. The trial court therefore refused to take judicial notice of a Michigan statute and recognize its own statutory subject matter limitations. The trial court's Order precluding Home Owners from advising the jury of the Court's jurisdictional limit is attached as **Exhibit N**; (Tr. Trans. Vol II, pp. 48-73).

Home Owners twice renewed its Motion for Summary Disposition pursuant to MCR 2.116(C)(4) during trial after the sworn testimony established Mr. Moody's claimed damages well exceed the court's \$25,000.00 jurisdictional limitation. The court denied Home Owners' motion on each occasion. (Tr. Trans. Vol X, p. 116; Tr. Trans. Vol XII, p. 43)

Trial in this matter stretched over 15 days and resulted in a mixed verdict on January 8, 2010. The jury found that Mr. Moody was a resident of his father's home at 33379 Sandpiper

Drive at the time of his November 21, 2007 accident. The jury further held that the only allowable expenses due and owing were Mr. Moody's \$32,447.23 bill from Henry Ford Hospital and the medical bills presented by Mr. Cirino's clients, Appellants, Get Well Medical Transport, Progressive Rehab and Carol Reints, Inc. The jury went on to hold that Mr. Moody had not sustained any work loss, attendant care or replacement services arising out of his motor vehicle accident. The jury further held that none of Mr. Moody's allowable expenses were overdue. (Tr. Trans. Vol. XV, pp. 22-27).

Attorney Cirino on behalf of Appellants Get Well Medical Transport, Progressive Rehab and Carol Reints, Inc. was awarded an attorney fee of \$49,700.00 by the trial court.⁵ **Exhibit D.** Attorney Fortner, on behalf of Charles Moody, filed a Motion for Attorney Fees which claimed in excess of \$207,000.00 for the 15 day trial. **Exhibit E.** The trial court did not hear Mr. Fortner's motion prior to the circuit court's ruling on Home Owners' appeal. The judgments of the district court which gave rise to Home Owners' appeal to the circuit court were entered on May 27, 2010. **Exhibits C.**

The Honorable Robert Colombo of the Wayne County Circuit Court heard oral arguments on Home Owners' appeal on October 19, 2010. Judge Colombo reversed the jury verdict as to all Plaintiffs/Appellants, holding that the 36th District Court lacked subject matter jurisdiction over this case following Charles Moody's presentation of damage claims in excess of the district court's jurisdictional limit of \$25,000.00 as proscribed by MCL §600.8301. **Exhibit F & G.** Judge Colombo remanded then Appellee Moody's cause of action back to the 36th District Court for entry of an Order dismissing the case or entry of an Order transferring it to the Wayne County Circuit Court, due to the lack of subject matter jurisdiction. Judge Colombo's Order also remanded the causes of action filed by Get Well Medical Transport, Progressive Rehab Center and Carol Reints, Inc. back to the 36th District Court for a new trial.

⁵ The trial court's order was subsequently vacated by way of Judge Colombo's December 3, 2010 Order. **Exhibit G.**

Exhibit G. In his Opinion, Judge Colombo reasoned that then Appellee Moody's error in introducing evidence well beyond the trial court's jurisdictional limitations was so intertwined with Appellants Get Well Medical's matter that the error may have also tainted the jury's verdict relative to the medical provider suit. **Exhibit F** p 19.

Judge Colombo further held that comments made by Charles Moody's attorney during his opening statement deprived then Appellant Home Owners of a fair trial, necessitating a reversal of the verdict for all Plaintiffs and a new trial. Attorney Fortner, on behalf of Charles Moody, argued to the jury in his opening statement that Home Owners had a right of subrogation against the Michigan Assigned Claims Facility whereby they could recover any funds the jury was to award in damages to Mr. Moody and the other Plaintiffs in this case. This is obviously an erroneous statement. An error Mr. Moody's appellate counsel acknowledged in his Brief on Appeal to the Court of Appeals. See Appellant Moody's Brief on Appeal pp 4 and 33.

In its Opinion, the Court of Appeals correctly pointed out that at trial counsel for Home Owners objected to Mr. Fortner's statements referencing the Assigned Claims Facility on three separate occasions during trial. See Appellant Moody's Exhibit H p 3; Appellants Get Well Exhibit D p 3. Statements that Appellant Moody's counsel conceded during oral argument that were either 'wrong or irrelevant'. *Id.* at pp 15-16. The Court of Appeals further noted that counsel for Appellants Get Well Medical acquiesced to Mr. Fortner's incorrect statements by supporting the erroneous proposition in his opening statement by agreeing that an insurance company could seek reimbursement from the assigned claims facility. *Id.* Judge Colombo concluded these statements were "reversible error and tainted the entire case". **Exhibit F** p 27.

Judge Colombo went on to state "[t]his Court finds that the cumulative affect of Moody's counsel's comments that this Court found improper, particularly the reference to the Assigned Claims Facility and subrogation, deprived Appellant (Home Owners) of a fair trial.

For this additional reason, the verdict for all Appellees is reversed and a new trial is ordered”.

Exhibit F pp 29-30.

The Circuit Court’s ruling on appeal was simple, and two-fold:

1. The Circuit Court held that Charles Moody’s presentation of damage claims in excess of \$25,000 stripped the District Court of subject matter jurisdiction, thereby voiding any and all subsequent actions.
2. The Circuit Court held that statements made by Appellant Moody’s attorney regarding the Assigned Claims Facility “tainted the entire case” and necessitated a new trial as to all Appellees.⁶

On remand the Court of Appeals issued a seventeen page published Opinion affirming Judge Colombo’s ruling in total. In looking to the plain language found in MCL 600.8301(1), MCR 2.227(A)(1) and MCR 2.116(C)(4) the Court dismissed Appellants’ contention that the district court must limit questions of jurisdictional amounts to the allegations in a party’s pleadings. In looking at this Court’s decisions in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993) and *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935) as well as *Altman v Nelson*, 197 Mich App 467; 495 NW2d 826 (1992) the Court of Appeals correctly held that due to the trial court’s failure to either dismiss Appellants’ case or transfer it to the circuit court for want of subject-matter jurisdiction all subsequent orders by the district court were void. See Appellant Moody’s Exhibit H p 6; Appellants Get Well Medical’s Exhibit D p 6.

The Court appropriately struck down Appellants’ contention that subject-matter jurisdiction may be conferred by “artful pleading” and by limiting a post-verdict judgment to a court’s jurisdictional limit. In its Opinion the Court recognized that allowing for such tactics “violates the principle that the parties to a lawsuit cannot confer jurisdiction on the court that it does not have and says nothing to the offensive notion that one may merely ‘say the magic words’ to confer jurisdiction where it otherwise would not exist.” *Id.* citing *In re Hatcher*, 443

⁶ This Court should note that attorney Cirino, on behalf of the medical service providers, made nearly identical statements regarding the Michigan Assigned Claims Facility during his opening statement. **Exhibit Q**, pp. 69-70.

Mich at 433.

In addressing Appellants Get Well Medical's arguments, the Court of Appeals recognized that although providers have an independent cause of action under the No Fault law their claims are identical to and derivative of Mr. Moody's No Fault action. In recognizing that the providers' cause of action arises because of Mr. Moody's 'right to bring an action for personal protection insurance benefits...' the Court correctly held that Appellants consolidated claims "are the equivalent of a single plaintiff asserting multiple claims against a single defendant" and are therefore merged into a single case. Since the "amount in controversy" of the combined claims exceeded the jurisdictional limits and the district court's judgments failed to either dismiss the action or transfer it to circuit court the Court of Appeals correctly held that the trial court judgments pertaining to Appellants Get Well Medical et. al. were also void. See Appellant Moody's Exhibit H pp 13-14; Appellants Get Well Medical's Exhibit D pp 13-14.

On remand the Court of Appeals also affirmed Judge Colombo's finding that Home Owners was denied a fair trial following Appellant Moody's counsel improper remarks. The remarks of which independently warranted reversal and remand. The Court correctly acknowledged Home Owners' counsel's objection during trial and the trial court's subsequent ruling preserved the issues for appeal and did not offend notions of due process. The Court also found no clear error in Judge Colombo's finding that Mr. Moody's counsel 'purposely injected an irrelevant issue to prejudice' Home Owners or Judge Colombo's determination that because of counsel's conduct Home Owners was denied a fair trial warranting reversal. See Appellant Moody's Exhibit H pp 14-16; Appellants Get Well Medical's Exhibit D pp 14-16.

In its Application for Leave to this Court, Appellants seek reversal from the Court of Appeals decision. They request that this Court hold that a district court plaintiff can enter damage proofs in excess of \$412,607.23 without violating the plain language of MCL §600.8301 and depriving the district court of subject matter jurisdiction. Of course, this strategy begs the question as to why any litigant, who honestly believes his or her damages

exceed \$400,000.00 would file their cause of action in district court. However, this “strategy” is regularly used by Charles Moody’s trial counsel, Michael Fortner. Attorney Fortner, in cases of this type, submits an Offer of Judgment pursuant to MCR 2.405 for a figure just under \$25,000.00. Taking advantage of the fact that the 36th District Court no longer refers civil causes of action for case evaluation, he then goes to trial and enters excessive damages knowing full well that if any portion of his cause of action is believed by the jury, their verdict will exceed \$25,000.00, resulting in a Judgment of \$25,000.00 and sanctions in the form of attorney fees pursuant to MCR 2.405. Attached as **Exhibit M** are a number of examples provided by Mr. Fortner himself whereby he has been awarded attorney fees in excess of \$100,000.00 for district court causes of action. Home Owners submits to this Court that this “strategy” constitutes legal malpractice, a gross violation of the Rules of Professional Conduct and a clear violation of the statute governing the subject matter jurisdiction of a district court.

Appellants Get Well Medical also request that their consolidated cause of actions and post-verdict judgments be severed from Appellant Moody’s for purposes of determining jurisdictional amounts and entry of judgment. What Appellants Get Well Medical fail to recognize, and the Court of Appeals correctly pointed out, is that their cause of action is completely derivative of and identical to Mr. Moody’s No Fault action. This shared identity effectively merged the separate causes of actions into one resulting in an aggregation of claims for purposes of jurisdiction and judicial economy. Due to the matters being merged into one, Appellants Get Well’s cause of action was subject to the same want of jurisdiction as Appellant Moody’s action. Due to the trial court’s failure to either dismiss the action or transfer it to the circuit court, any judgments effecting with Appellant Moody or Appellants Get Well Medical were void.

ARGUMENT

I. **THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS CAUSE OF ACTION.**

A. Standard of Review

A trial court's decision regarding subject matter jurisdiction and a motion for summary disposition are reviewed *de novo*. *Klapp v United Insurance Group*, 468 Mich 459, 463 663 NW2d 447 (2003); *Polkton Township v Pellegrom*, 265 Mich 88, 98, 693 NW2d 170 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(4), the Court must "determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Cook v Applebee's of Michigan, Inc*, 239 Mich App 311, 315, 608 NW2d 62 (2000); *Steele v Dep't of Corrections*, 215 Mich App 710, 712, 546 NW2d 725 (1996).

A court is continually obliged to question *sua sponte* its own subject-matter jurisdiction. *Yee v Shiawassee Cty Bd of Com'rs*, 251 Mich App 379, 399, 651 NW2d 756 (2002). A lack of subject matter jurisdiction "...is so serious a defect in the proceedings that the trial court was duty-bound to dismiss plaintiff's suit even had defendants not so requested." *Id.* A court's lack of subject-matter jurisdiction or exercise thereof is always subject to appellate review. *Clohset ex rel v No Name Corp (On Remand)* 302 Mich App 550; 840 NW2d 375 (2013). By way of proper appeal, a lower court's lack and/or exercise of subject matter jurisdiction may render a judgment erroneous and subject the judgment to being set aside. *Id.* quoting *Jackson City Bank & Trust v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935); See also *Buczowski v Buczowski*, 351 Mich. 216, 222-23, 88 N.W.2d 416 (1958) (distinguishing between the appellate review of complete want of jurisdiction and improper exercise of jurisdiction).

B. Appellants Reliance on MCR 4.002

Appellants' assertion that MCR 4.002 provides only a plaintiff with a mechanism to remove a matter from district court to circuit court belies a fundamental misunderstanding as

to why this matter was reversed by the Wayne County Circuit Court. Both the Court of Appeals and the Circuit Court's Judge Colombo properly stated that a court must, at all times, question *sua sponte* its own jurisdiction. See Appellant Moody's Exhibit H p 6; Appellants Get Well Medical's Exhibit D pp 6; **Exhibit F** p 14; See also *Yee*, 251 Mich App at 399. Home Owners did not bring a motion before the district court to transfer Appellant Moody's cause of action to the Wayne County Circuit Court. Home Owners brought a Motion for Summary Disposition pursuant to MCR 2.116(C)(4), arguing that the District Court lacked subject matter jurisdiction over Appellant Moody's cause of action. Appellants' arguments regarding MCR 4.002 are irrelevant, non persuasive and should be dismissed by this Court as such.⁷

C. Analysis

Michigan Compiled Law Section 600.8301(1) is a clear, one sentence statute which identifies the jurisdictional limit of Michigan's District Courts:

The District Court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00.
MCL 600.8301.

A clear and unambiguous statute is not subject to judicial review. *McCormick v Carrier*, 487 Mich 180, 191-92; 795 NW2d 517 (2010) citing *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). All non-technical 'words and phrases shall be construed and understood according to the common and approved usage of the language'. *Id.* at 192 quoting MCL §8.3a. If a certain term is not defined in the statute, a court can consult a dictionary to aid in the determination of the common and approved use of the language used in the statute. *Id.* citing *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604, 575 NW2d 751 (1998). Black's Law Dictionary defines amount in controversy is as

⁷ Appellants also ignore MCR 2.227 which provides courts with a mechanism to transfer, rather than dismiss, an action which was not brought in the proper court. Such a transfer is permissive. However, the Rule prevents the matter from being subjected to complete dismissal for lack of subject-matter jurisdiction pursuant to MCR 2.116(C)(4). See 2 Longhofer, 2 Michigan Court Rules Practice (5th ed.) § 2.227.1.

“[t]he damages claimed or relief demanded by the injured party in a lawsuit.” Black's Law Dictionary (9th ed. 2009).

Circuit courts are Michigan's court of general jurisdiction and have “original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the Constitution or by statute to some other court.” MCL §600.605. As noted above, MCL §600.8301 specifically gives Michigan's district courts jurisdiction over matters only where the amount in controversy “does not exceed \$25,000.00.”

Appellants argue that subject matter jurisdiction is based only upon the allegations contained within the plaintiff's complaint. This assertion comes from a long line of Michigan cases which began with *Strong v Daniels*, 3 Mich 466 (1855) and *Fox v Martin*, 287 Mich 147, 283 NW9 (1938) (discussed *infra*). These cases generally stand for a proposition that a Court's subject matter jurisdiction is based on the Plaintiff's allegations, not on the actual facts of the case. Subject-matter jurisdiction is established by the pleadings, however, it is not a static. “Courts are bound to take notice of the limits of their authority, and a Court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, *at any stage of the proceeding*”. *In Re Fraser's Estate*, 288 Mich 392, 394; 285 NW1 (1939) (emphasis added). “When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void”. *Fox v Board of Regents of University of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965). If a court errs in the exercise of its jurisdiction, any action taken pursuant to that error is subject to reversal. *Grubb Creek Action Committee v Shiawassee County Drain Commissioner*, 218 Mich App 665, 670, 554 NW2d 612 (1996) discussed *infra*.

Further, MCR 2.116(G)(5) specifically states that in deciding a Motion for Summary Disposition brought pursuant to MCR 2.116(C)(4), the court is to look to “at the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in

the action or submitted by the parties”. The court rule then goes on to specifically state that only in motions for summary disposition brought pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(9) are “only the pleadings” to be considered.

The fact that a court examining its own subject matter jurisdiction can go beyond the mere allegations of the pleadings was confirmed by the Michigan Court of Appeals in *L & L Wine and Liquor Corporation v Liquor Control Commission*, 274 Mich App 354, 733 NW2d 107 (2007). In that case, the Court of Appeals specifically stated “we must determine whether the affidavits, together with the pleadings, depositions, admissions and documentary evidence, demonstrate a lack of subject matter jurisdiction”. *Id.* at 356; See also *Metro Car Co v Hemker*, unpublished *per curiam* Court of Appeals Opinion issued Dec. 29, 2005, Docket No. 254687, attached as **Exhibit O** (affirming the circuit court’s grant of summary disposition for lack of subject matter jurisdiction in favor of defendant where an affidavit of plaintiff company’s president failed to substantiate plaintiff’s amount in controversy allegations as stated in its complaint).

Among other irrelevant inapplicable cases, Appellant Moody asks this Court to rely upon *Estefia v Credit Technologies Inc*, 245 Mich App 466; 628 NW2d 577 (2001) to support the proposition that amount in controversy jurisdiction is static and solely limited to allegations in the complaint. See Plaintiff-Appellant Moody’s Application for Leave p 20. In its analysis Appellant Moody ignores that the Court in *Estefia* dealt with Administrative Order 1998-1⁸ and not, as is the case before this Court, a motion for summary disposition for lack of subject-matter jurisdiction. 215 Mich App at 473. Appellant also fails to discuss that the Court in *Estefia* specifically announced that in deciding issues involving amount in controversy, factors

⁸ Administrative Order 1998-1 dictates procedures for reassignment of a circuit court action to the district court. The Order prohibits a circuit court from transferring a case to the district court pursuant to MCR 2.227 based upon the amount in controversy unless the parties stipulate to such transfer or “[f]rom the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.”

outside of the complaint “may provide some guidance regarding a decision to transfer an action”.⁹

Appellants also asks this Court to rely upon language found in *Trost v Buckstop Lure Co*, 249 Mich App 580, 587, 644 NW 2d 54 (2002). See Appellant Moody’s Application for Leave p 18; Appellant Get Well Medical’s Application for Leave p 13. In *Trost*, the appellate court reviewed the lower court’s grant of summary disposition based upon MCR 2.116(C)(8) for failure of the plaintiff to state a valid claim upon which relief could be granted. 249 Mich App at 583. As discussed above the standard of review for a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is inherently different than that of a Motion for Summary Disposition under MCR 2.116(C)(4) in so much that the reviewing court cannot render a decision on anything but the complaint. See MCR 2.116(G)(5). *Trost* and its analysis simply do not relate to the standard of review and/or analysis in the matters properly before this Court.

Similarly, Appellants cite to *Fox v Martin*, 287 Mich 147; 283 NW 9 (1938) in support of their proposition that subject-matter jurisdiction is stationary and dependent only upon the allegations in the complaint. See Appellant Moody’s Application for Leave p 19; Appellants Get Well Medical’s Application for Leave p 10. In *Fox* the Supreme Court affirmed the lower court’s dismissal of plaintiff’s petition for a writ of assistance for possession of property in which there was no legal basis for plaintiff to allege a lien on the property, therefore no legal right to a claim of possession. 287 Mich at 153. There being no basis to bring a suit from the outset the reviewing Court agreed that the lower court had no jurisdiction to hear the matter. *Id.* Again, the matter before this court is inherently different than the issues presented in *Fox* in that Appellant Moody initially asserted an amount in controversy within the court’s jurisdictional limitations, however, actually claimed damages in both his discovery answers and

⁹ In *Estefia* the circuit court transferred plaintiff’s action from circuit court to district court pursuant to MCR 2.227 and Administrative Order No. 1998-1 based upon the complaint and the fact that the case mediated for an amount less than \$25,000.00. Upon review the Court noted that the mediation evaluation may assist in providing guidance regarding an action to transfer but that it was not dispositive. 245 Mich App at 474-75.

at trial well beyond the asserted amount.

Appellants do provide instructive case law with regards to a court's jurisdictional parameters, however, the analysis provided by Appellants falls woefully short. See Appellant Moody's Application for Leave p 22; Appellants Get Well Medical's Application for Leave pp 10, 13, 15. In *Grubb Creek Action Committee v Shiawassee County Drain Commissioner* the appellate court set aside the lower court's judgment after the lower court acted outside of its subject-matter jurisdiction and exceeded its authorized scope of review.¹⁰ 218 Mich App at 670. The Court in *Grubb Creek* determined that the lower court initially had subject-matter jurisdiction over the matter due to the allegations in the complaint falling within the court's subject-matter jurisdiction. *Id.* at 670. However, the Court also found that the lower court fatally erred in the exercise of its jurisdiction by deciding matters beyond its scope of authority and the judgment was thereby set aside. *Id.* at 669-671.

In this case, the claimed damages or relief demanded by Mr. Moody changed prior to and during the course of trial. Instead of presenting the case to the jury for damages which would "not exceed \$25,000.00" as indicated in his Complaint, Mr. Moody, through his attorney, presented a case to the jury which by his attorney's own words amounted to more than \$294,637.00. **Exhibit A;** (Tr. Trans. Vol. VI, pp. 66-71). Mr. Moody's Answers to Interrogatories, which were executed just 61 days prior to trial amount to the Plaintiff's assertion that the true amount in controversy in this case was at least \$412,607.23. **Exhibit L.** This is evidenced by Mr. Fortner's inability to provide the trial court with affirmation that

¹⁰ In *Grubb* plaintiffs filed a complaint in circuit court to set aside the county drain commissioner's drain board's decision which granted approval for the repair of a certain drain. In approving the action, the board also made a recommendation that the drain be spot-cleaned. The lower court did not set aside the board's decision but rather made specific findings relative to the board's recommendations concerning the cleaning of the drain. On appeal, the Court recognized the lower court had statutory authority to review a previously issued decision by a drain commissioner board but the review was legislatively limited to the board's determinations of the necessity of improvements and/or repairs to an existing drain not on maintenance matters. The lower court therefore acted outside of its authority and did not have jurisdiction to limit the board's determination relative to how the drain needed to be maintained/cleaned. 218 Mich App at 666-70.

his intent at trial was to limit his damage proofs to the court's jurisdictional limit. (Tr. Trans. Vol II, pp 56-57, 59, 61, 68) Not surprisingly, Appellant Moody's proofs during trial well exceeded the court's jurisdictional limits.

Mr. Fortner questioned Home Owners' claims representative at length regarding Mr. Moody's demand for wage loss benefits. The testimony elicited by Mr. Fortner revealed Mr. Moody had submitted claims to Home Owners which, when calculated out, would total \$29,298.28. (Tr. Trans. Vol V, pp. 55-59).¹¹ Mr. Fortner elicited testimony from Home Owners' claim representative regarding his client's initial hospital bill from Henry Ford which totaled \$32,447.23.¹² (Tr. Trans. Vol VI, p. 57). Mr. Fortner elicited testimony from Home Owners' claim representative regarding replacement services which by Mr. Fortner's math would total \$14,600.00. (Tr. Trans. Vol VI, p. 59).¹³

During his three day examination of Home Owners' claim representative, Mr. Fortner went over Mr. Moody's wage loss claim a second time, this time indicating that it was worth \$28,288.00. (Tr. Trans. Vol VI, p. 60).¹⁴ Mr. Fortner then engaged in an elaborate exercise with Home Owners' claim representative during which time he twice indicated that Mr. Moody's claim totaled \$294,637.00. (Tr. Trans. Vol. VI, pp. 66-71).¹⁵

¹¹ \$320.00 per week multiplied by .85 = \$272.00 per week. That figure is then multiplied by 107, the amount of weeks from Mr. Moody's motor vehicle accident through the date this testimony was elicited equaling \$29,298.29.

¹² The Court should note that the initial hospital bill was admitted into evidence by Mr. Moody's counsel as part of their trial Exhibit A and by Home Owners' counsel as trial Exhibit E.

¹³ \$20.00 per day multiplied by 365 days = \$7,300.00 multiplied by 2, as two years had passed since Mr. Moody's motor vehicle accident. (Tr. Trans. Vol VI, p. 59)

¹⁴ \$16,640.00 multiplied by .85, multiplied by 2. (Tr. Trans. Vol VI, pp. 60-61). Mr. Fortner then elicited testimony from Home Owners' claims representative indicating that his client's attendant care claim totaled \$96,360.00 per year. (Tr. Trans. Vol. VI, pp. 62-64).

¹⁵ By Home Owners' calculation, the actual numbers Mr. Fortner put before the jury should have either been a claim for \$268,055.23 or a claim for \$269,065.52, depending on which of Mr. Fortner's wage loss calculations was to be believed.

Mr. Fortner elicited the above referenced testimony from Home Owners' claim representative based upon materials contained within Home Owners' claim file. He then immediately moved for the admission of the claims file, which was entered into evidence as Plaintiff's Exhibit A. (Tr. Trans. Vol. VI, pp. 72-79).

This Court should note that Home Owners was specifically precluded from introducing Mr. Moody's Complaint into evidence by the trial court. (Tr. Trans. Vol. VII, pp 15-47). Counsel for Home Owners attempted to introduce Mr. Moody's Summons and Complaint for a very specific purpose. One day earlier in the trial, Mr. Moody's attorney had spent literally hours digging through Home Owners' claim file and arguing through his examination of Home Owners' claims representative that his client was entitled to more than \$290,000.00 in first party no-fault benefits arising out of his November 21, 2007 motor vehicle accident. Home Owners' counsel attempted to introduce the Summons and Complaint to demonstrate for the jury that Mr. Moody, upon filing his cause of action, very specifically indicated that his damages did not exceed \$25,000.00.¹⁶ The introduction of this exhibit would have called into question all of the testimony Mr. Fortner elicited from Home Owners' claims representative regarding damages and allowed counsel for Home Owners to argue during closing argument that Mr. Fortner's claims in this trial were so grandiose that not even he himself could believe them.

The trial court placed Home Owners in an impossible situation through her ruling on December 9, 2009, wherein she indicated that Mr. Fortner would be allowed to introduce proofs exceeding the Court's jurisdictional limit, but counsel for Home Owners would not be able to inform the jury of the Court's jurisdictional limit or even admit Mr. Moody's Complaint, which is a public record. **Exhibit N**. This ruling turned the entire trial into a farce,

¹⁶ Initially the trial court admitted Mr. Moody's Summon and Complaint without objection. However, when Home Owners attempted to utilize the already admitted exhibit demonstratively in order to highlight Mr. Moody's admission in his Complaint that claimed damages would not exceed \$25,000.00 the court reversed its earlier decision and would not allow the exhibit to be admitted as evidence. (Tr. Trans. Vol. VII, pp. 15-47); See MRE 801(d)(2).

where the jurors were deceived into believing that Mr. Moody had been deprived by Home Owners of hundreds of thousands of dollars in first party no-fault benefits which the Court, Mr. Fortner, Mr. Cirino and the attorneys for Home Owners all knew he could never receive in that jurisdiction.

Mr. Fortner continued to elicit testimony from various witnesses throughout the remainder of the trial which revealed that the amount in controversy far exceeded the Court's \$25,000.00 jurisdictional limit. He inquired with the Mr. Moody's nurse case manager as to whether \$12.00 per hour for attendant care is a reasonable rate. (Tr. Trans. Vol VIII, p. 71). He then went on to elicit testimony from her indicating that attendant care rates for family providers can vary from anywhere from \$10.00 per hour to \$16.00 per hour. (Tr. Trans. Vol. VIII, pp. 95-96). Mr. Cirino, on behalf of Appellants Get Well Medical, elicited testimony from Mr. Moody wherein he indicated he has not been able to work since his motor vehicle accident. (Tr. Trans. Vol. IX, pp. 28-30; 40-42). Mr. Cirino went on to elicit testimony from Mr. Moody wherein he indicated he is not allowed to cook meals at home because of his memory problems. (Tr. Trans. Vol IX, pp. 39-40). Mr. Fortner elicited testimony from his client which indicated that he had not worked a day since his motor vehicle accident. (Tr. Trans. Vol. IX, p. 60).

Plaintiffs called Mr. Moody's mother, Elaine Moody, and father, Charles Moody, to bolster their demands. Mr. Fortner specifically elicited testimony from Elaine Moody wherein she indicated that she has provided care for Charles after his motor vehicle accident and expects to be compensated for those services. (Tr. Trans. Vol X, p. 35). Mr. Fortner elicited testimony from Charlie Wheeler, wherein he indicated that he was responsible for the household chores at the Sandpiper address prior to his motor vehicle accident. (Tr. Trans. Vol X, pp. 55-56). Mr. Wheeler went on to testify that his son had been experiencing various physical pains since his motor vehicle accident, along with memory problems and headaches. He cited specific instances where his son had inexplicably wandered off and had wild mood

swings. (Tr. Trans. Vol X, pp. 59-60).

Mr. Fortner went on to elicit specific testimony wherein Mr. Wheeler indicated that attendant care services were being provided to his son because Charles Moody was depressed and suicidal. (Tr. Trans. Vol X, pp. 102-103). Mr. Moody then testified, under examination by Mr. Fortner, "We care for him, that I care for him and that his mother cares for him. And I try to make things as easy as possible for him; and that's why I try to keep people around him so that he can't, really, be alone. In case he needs somebody to talk to or want something to eat, somebody can make sure that he's fixing it without blowing up the house by leaving the gas on or anything". (Tr. Trans. Vol. X, pp. 107-108). Mr. Fortner then asked whether any individuals Mr. Wheeler had directed to care for his son had been paid by Home Owners. Mr. Wheeler answered "No". (Tr. Trans. Vol X, p. 108). Mr. Wheeler then stated specifically that he expected Home Owners to pay his son's medical bills. (Tr. Trans. Vol. X, p. 108).

After Charlie Wheeler revealed under cross-examination that his demand for the attendant care provided to his son totaled more than \$280,000.00, Home Owners' counsel's immediately moved for summary disposition pursuant to MCR 2.116(C)(4). (Tr. Trans. Vol. X, pp. 109-116). Counsel for Home Owners also again informed the Court that it was a violation of the rules of professional conduct for Mr. Fortner to continue to assert before the jury that his client was entitled to demands exceeding the trial court's jurisdictional limit. Counsel for Home Owners believes that Mr. Fortner is faced with an either/or proposition when presenting arguments such as this. Either he believes what he is saying and is intentionally committing legal malpractice in order to obtain a significant attorney fee for himself, or he does not believe his arguments and is perpetrating a fraud upon the Court. The trial court obviously denied Home Owners' Motion for Summary Disposition, necessitating Home Owners' Appeal to the Circuit Court. (Tr. Trans. Vol X, p. 116).

It is clear from the proofs submitted by both Mr. Fortner and Mr. Cirino on behalf of Charles Moody, that the amount in controversy in this case far exceeded the District Court's

jurisdictional limit of \$25,000.00. Home Owners researched this issue extensively and is unable to find a single case on point in the history of Michigan jurisprudence. Home Owners submits that this is because no well-reasoned zealous attorney-advocate would ever file a claim on behalf of a client in a court of limited jurisdiction when, as was seen in Appellant Moody's case, the actual evidence demonstrates claimed damages in an amount more than sixteen times the court's limited \$25,000.00 subject-matter jurisdiction.¹⁷

Appellant Moody argues that this inherently bizarre strategy is somehow supported in the holding found in *Krawczyk v Detroit Auto Inter-Ins Exch*, 418 Mich 231, 341 NW2d 110 (1983) rev'd in part on other grounds, 418 Mich App 231 (1983). See Appellant Moody's Application for Leave p. 21, footnote 7. However this case fails to shed any meaningful light on Mr. Fortner's "strategy" and the matters before this Court. In a claim for first party no-fault benefits the appellate court in *Krawczyk* held that the trial court erred in awarding plaintiff certain profit sharing and pension contributions as owed benefits. 418 Mich at 158-62. Following a bench trial, the final judgment exclusive of interest and attorney fees, exceeded the trial court's then-existing subject-matter jurisdictional limit of \$10,000.00 by approximately \$2,700.00. *Id.* at 162-63.

In *Krawczyk*, the basis of the appeal to the Court was two-fold, appellant first argued the trial court erred in awarding the plaintiff profit sharing and pension contributions as part of the overall no-fault award and secondly that the trial court erred in entering a judgment that exceeded jurisdictional limitation. *Id.* at 158. In finding that the profit sharing and pension contributions were not legally compensable no-fault benefits, the Court of Appeals subtracted those amounts (amounts which the trial court should have never heard and/or considered in rendering judgment) from the trial court's final judgment which thereby decreased the overall judgment to an amount within the trial court's \$10,000.00 jurisdictional limit. *Id.* at 162-64.

¹⁷ Following receipt of Plaintiff's Answers to Defendant's Interrogatories Plaintiff's claimed damages rose to \$412,607.23, $16 \times \$25,000.00 = \$400,000.00$. See Exhibit I; Exhibit L.

The Court affirmed the trial court's award in all other regards. *Id.* at 164.

Appellant Moody's attempt to extrapolate relevant meaning from the Court's holding in *Krawczyk* is not instructive. The holding in *Krawczyk* negated any need for the appellate court to explore whether or not the amount in controversy exceeded the trial court's subject-matter jurisdiction because the appellate court found the trial court erred in considering and awarding damages which were not relevant to plaintiff's cause of action. In making this error the appellate court subtracted the erred sum from the judgment which thereby reduced the overall award of damages below the court's jurisdictional amount. *Id.* at 162-63. Thus, the appellate court's corrective order negated the need for any consideration of the offered trial proofs relative to the court's subject matter jurisdictional limitations. In this case, it is impossible to know exactly how Appellant Moody's extravagant presentation of damages affected the jury, however, it is clear that Appellant Moody's claimed amount was far beyond the reach of the court's \$25,000.00 subject-matter jurisdiction.

Home Owners suspects that the lack of illustrative case law is due to the fact that Mr. Fortner, and by implication, Mr. Cirino, are exercising a strategy which is uniquely errant in nature. Mr. Fortner files a case in district court and submits an Offer of Judgment for just under the district court's jurisdictional limit. If a Defendant rejects Mr. Fortner's Offer he then proceeds to present demands which are so large that an award of even a small fraction of his demand will exceed the court's jurisdictional limit. Mr. Fortner's clients may only get \$25,000.00 out of these cases, but Mr. Fortner does much better for himself, earning hundreds of thousands of dollars in attorney fees. **Exhibit E; Exhibit M.**

The trial court's lack of subject matter jurisdiction was clearly established through Mr. Moody's Answers to Interrogatories which were filed on October 12, 2009 and presented a demand for at least \$412,607.23. **Exhibit L.** This "demand" falls within the realm of evidence a trial court is to consider when determining a motion for summary disposition pursuant to MCR 2.116(C)(4). See MCR 2.116(G)(5); *Cook*, 239 Mich App at 315; *Steele*, 215 Mich App

at 712. These admissions, when combined with the fantastic figures presented by Mr. Fortner at trial establish conclusively that Plaintiff's claimed "amount in controversy" damages were well beyond the district court's jurisdictional limit. See MCL 600.8301(1); *L & L Wine*, 274 Mich App at 356.

Judge Colombo of the Circuit Court provided an excellent summation of the jurisdictional issue when he stated:

The facts in this case are too compelling to do anything but set aside the jury verdict and the Judgment in this case. Counsel for Moody presented damage proofs of hundreds of thousands of dollars in excess of the District Court's jurisdictional amount. His proofs did not comply with his pleadings. He attempted to proceed in District Court, even though the District Court was without jurisdiction and improperly engaged in forum shopping.

Exhibit F p. 18.

In affirming Judge Colombo's decision, the Court of Appeals pointed out that Appellant Moody "... patently claimed damages far in excess of the \$25,000 amount-in-controversy limit of the district court's jurisdiction throughout litigation" requiring the district court to either dismiss the case or transfer it to a proper forum. Due to the trial court's failure to recognize its own jurisdictional limitations in light of the proofs submitted, the judgements as to all Appellants were void. See Appellant Moody's Exhibit H pp 7-11; Appellants Get Well Medical's Exhibit D pp 7-11. The Court of Appeals properly affirmed Judge Colombo's ruling by finding that the trial court acted without subject-matter jurisdiction or otherwise fatally exercised its jurisdiction warranting reversal of the trial court's judgments. *Fox v Board of Regents*, 375 Mich at 242; *Metro Car*, **Exhibit O**; *Grubb*, 218 Mich App at 670.

Contrary to Appellant Moody's and Appellants Get Well's contentions, the Court of Appeals decision does not limit a party's access to the judiciary by somehow limiting or even barring their ability to bring a cause of action. See Appellant Moody's Application for Leave p viii; Appellants Get Well Medical's Application for Leave pp 11-12. This nonsensical theory is untrue and misapplies the Court of Appeals' Opinion. Appellants' numerous examples

ignores the court's duty to follow the Court Rules, the statute governing subject matter jurisdiction and established Michigan jurisprudence requiring courts to take notice of its lack of subject-matter jurisdiction. See Appellant Moody's Application for Leave, p viii; Appellant's Get Well Medical's Application for Leave pp 11-12. As the Court of Appeals aptly pointed out, the trial court in the instant matter was divested of its jurisdiction and obligated to either dismiss or transfer the action to the circuit court the moment the amount in controversy exceeded the trial court's \$25,000.00 "amount in controversy" jurisdictional limitations. See Appellant Moody's Exhibit H pp 7-11; Appellants Get Well Medical's Exhibit D pp 7-11.

II. THE COURT OF APPEALS AND CIRCUIT COURT WERE CORRECT IN REVERSING THE JURY'S VERDICT AS TO THE MEDICAL PROVIDERS AND REMANDING THEIR CASES BACK TO THE 36TH DISTRICT COURT FOR A NEW TRIAL.

A. Standard of Review

A trial court's decision regarding subject matter jurisdiction and a motion for summary disposition are reviewed *de novo*. *Klapp*, 468 Mich at 463; *Polkton Township*, 265 Mich at 98.

B. Analysis

Michigan Court Rule 2.505(A) provides trial courts with an avenue to consolidate multiple cases that involve 'a substantial and controlling common question of law or fact ...' *Chen v Wayne State Univ*, 284 Mich App 172, 195, 771 NW2d 820 (2009) quoting MCR 2.505(A). Once consolidated proofs submitted in one matter stand as proofs in the other as to common questions of fact. *People ex rel MacMullan v Babcock*, 38 Mich App 336, 344, 196 NW2d 489 (1972) citing *Johnson v Manhattan Railway Co*, 289 U.S. 479, 53 SCt 72 (1933); *National Nut Co of California v Susu Nut Co*, 61 F Supp 86 (1945); *Armstrong v Commercial Carriers, Inc*, 341 Mich 45, 67 NW2d 194 (1954).

Appellants Get Well Medical did not object to Home Owner's Motion to Consolidate Mr. Moody's cause of action with theirs pursuant to MCR 2.505(A) due to the two actions

involving substantial and controlling common questions of fact and law nor did Appellants Get Well Medical appeal the lower court's decision to consolidate. Rather, Appellants Get Well Medical suggest that Home Owners somehow invited error by requesting consolidation and that therefore the verdict cannot be challenged on appeal. See Appellants Get Well Medical's Application for Leave p 5 citing *People v Jones*, 468 Mich 345, 352, 662 NW2d 376 (2003)¹⁸.

Although each suit remained separate, the extravagant submission of claimed damage proofs beyond the trial court's jurisdictional limitation submitted on behalf of Mr. Moody's action operated as proofs in Appellants Get Well Medical's action. See *People ex rel MacMullan*, 38 Mich App at 344 (citations omitted). Therefore, the district court was equally divested of subject-matter jurisdiction as to both Appellant Moody's cause of action and Appellants Get Well Medical such that the verdict against Appellants Get Well Medical also cannot stand. See *Grubb*, 218 Mich App at 670.

Appellants Get Well Medical do not cite to a single relevant case, court rule or statute in support of its contention that the fact that their cumulative damages do not exceed \$25,000.00 somehow insulates them from the rampant misconduct which took place in this trial and the fact that the Circuit Court concluded that the length of the trial, the various subjects addressed and the evidence admitted all leads to the conclusion that these matters are inextricably linked and should be tried together. Home Owner also notes for this Court that the two primary issues at the time of the underlying trial was Charles Moody's residence and the amount (if any) of no-fault benefits owed. These factual determinations and proofs, the Court of Appeals correctly held, applied equally to all four Plaintiffs. See *MacMullan*, 38 Mich App at 344.

The Circuit Court provided two reasons for reversing the jury verdict as to the medical

¹⁸ The facts and analysis in *Jones* are completely inapposite to the instant matter. The Court in *Jones* addressed the applicability of the invited response doctrine (not the invited error doctrine) in determining whether a prosecutor's improper questioning of a key witness at trial required reversal of the defendant's criminal conviction. 468 Mich at 352-53.

providers and remanding those matters back to the 36th District Court for a new trial. First, the Circuit Court found that the lack of subject matter jurisdiction over Charles Moody's cause of action, combined with the fact that all four causes of action arose out of the same motor vehicle accident and were consolidated, necessitated reversal. **Exhibit F, p 19; Exhibit G.**

The Court of Appeals agreed with the Circuit Court's reasoning and further acknowledged that the providers' claims "... are completely derivative of and dependent on" Mr. Moody establishing a valid cause of action against Home Owners. The Court correctly pointed to MCL 500.3112 in stating that personal injury protection benefits are payable to the "injured person". As such, the Court stated out that the providers cause of action actually belongs to Mr. Moody as the claimed "injured person" for whom personal injury protection benefits are being sought. Since the providers cause of action is derivative of and dependent upon Mr. Moody's successful cause of action, the Court of Appeals held the two consolidated matters were merged and equated to multiple claims against a single defendant by a single plaintiff. See Appellant Moody's Exhibit H pp 11-14; Appellants Get Well Medical Exhibit D pp 11-14.

Contrary to Appellants Get Well's argument the foregoing decision by the Court of Appeals does not place an onerous burden on those providers who seek to file their own cause of action independent of the underlying claimant. See Appellant Get Well Medical's Application for Leave pp 6-7. As the Court of Appeals discussed, No Fault provider suits arise only because of the underlying claimant's No Fault claim against an insured. Appellants Get Well Medical ask that this Court consider all providers claims in a vacuum, separate and distinct from one another and from the underling claimant's potential claim.

Essentially the providers ask this Court to recognize that their cause of action stems from simple contract principles rather than in the No Fault Act, MCL 500.3101 et. seq. This notion completely ignores the root of the providers cause of action within the No Fault Act and the providers overlapping burdens of proof in proving that the underlying claimant, alleged

“injured person”, is the individual actually entitled to benefits under the Act. The Court of Appeals correctly noted that the burden of proofs established in the No Fault Act exist regardless of whether the plaintiff is a claimant or a provider and notwithstanding the amount of claimed damages. See Appellant Moody’s Exhibit H pp 11-14; Appellants Get Well Medical’s Exhibit D pp 11-14.

In effect the Court of Appeals decision promotes public interest and judicial economy by halting the overly burdensome costs associated with litigating the same issues in multiple proceedings and reducing caseloads. Requiring identical, dependent and derivative provider actions to be consolidated into one action with multiple claims against a single defendant promotes judicial expedience by resolving the identical matters in one rather than multiple forums. Requiring identical, dependent and derivative provider actions to be consolidated into one action with multiple claims against a single defendant reduces the of unnecessary and costly litigation fees by insurers in the defense of multiple actions in multiple forums concerning the same claimant, same accident and same alleged accidental bodily injuries. Thus reducing the overall costs of insurance to consumers.

The Circuit Court offered a second reason for the order of a new trial as to the medical providers. The Court found that the trial counsel for Charles Moody had made comments in his opening statement which deprived Appellee Home Owners of a fair trial. These comments are addressed at length in Argument III. In short, Mr. Fortner suggested to the jury that Home Owners has a right of subrogation against an assigned claim servicing insurer. Allegations that simply do not exist in this case. The implication of the statements presented by Mr. Fortner was to suggest to the jury that they could award damages against Home Owners which Home Owners then could recover against an unknown third party. These were incorrect deliberate misstatements of Michigan law.

This Court should note that trial counsel for Appellants Get Well Medical also made statements during his opening which suggested that Home Owners had a right of subrogation

against the Assigned Claims Facility before stating "I may be wrong" and suggesting to the jury that he would "go home and look it up" and report back to the jury later. (Tr. Trans. Vol. III, pp. 69-70). These statements, when combined with the statements by counsel for Mr. Moody provide a reason for the ordering of a new trial as to the medical service providers which is entirely independent of the Circuit Court's ruling on subject matter jurisdiction.

As indicated, Appellants Get Well Medical do not cite to a single relevant case to support its contention that because their cumulative damages do not exceed \$25,000 they are somehow protected from the rampant misconduct which took place in this trial. Nor do Appellants Get Well Medical address the fact that the Circuit Court concluded that the length of the trial, the various subjects addressed and the evidence admitted all led to the correct conclusion that the two matters are so inextricably linked that neither verdict could stand. In addition, the Circuit Court correctly noted that the misstatements of Mr. Fortner as well as Mr. Cirino throughout the trial significantly prejudiced Home Owners and warranted reversal of the jury's verdict as to Appellant Moody as well as Appellants Get Well. For the reasons set forth above, Home Owners asks this Court to affirm Judge Colombo's Order remanding Appellants Get Well matter for trial.

III. THE COURT OF APPEALS AND CIRCUIT COURT DID NOT ERR WHEN IT PROVIDED A SEPARATE AND ADDITIONAL REASON FOR A NEW TRIAL BASED UPON APPELLANT MOODY'S IMPROPER COMMENTS.

A. Standard of Review

Claimed improper comments by a party's lawyer are reviewed for reversible error. *Hunt v Freeman*, 217 Mich App 92, 95, 550 NW2d 817 (1996). Generally an attorney's comments will not be "cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial". *Id.* citing *Wilson v General Motors Corp*, 183 Mich App 21, 26, 454 NW2d 405 (1990). Reversal is required where a lawyer's prejudicial statements "reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the

issues involved”. *Id.* citing *Hammack v Lutheran Social Services*, 211 Mich App 1, 9, 535 NW2d 215 (1995).

“Where improper conduct by one or both parties influences the outcome of a trial, an Appellate Court may reverse although the Appellant’s attorney did not seek to cure the error”. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102; 330 NW2d 638 (1982).

When reviewing an appeal asserting improper conduct of an attorney, the Appellate Court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the Court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error was so preserved, then there is a right to appellate review; if not, the Court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or play too large a part and may have denied a party a fair trial. If the Court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because of a lawyer or Judge or both failed to protect the interest of the prejudice party by timely action.

Id. at 103.

B. Analysis

The Circuit Court reversed the trial and remanded Appellant Moody’s cause of action back to the District Court for either an Order dismissing the case for want of subject matter jurisdiction or transferring the case to the Wayne County Circuit Court for a new trial. The Circuit Court remanded Appellants Get Well Medical matter for a new trial based upon the inextricably intertwined jurisdictional error found in Appellant Moody’s case. **Exhibit F** p 19; **Exhibit G**. The second independent reason the Circuit Court elected to order a new trial was due to the conduct of Mr. Moody’s attorney. **Exhibit F** pp 24-27, 29-30.

The Circuit Court exercised its appellate authority and found that attorney Fortner, on behalf of Mr. Moody “purposely injected an irrelevant issue to prejudice the Appellant and to erroneously suggest to the jury that the Appellant may not be liable for any of the claims he can recover from a third-party source”. **Exhibit F** p 26. Contrary to Appellant Moody’s claim, this finding of fact by the appellate circuit court was permissible. See Appellant Moody’s

Application for Leave pp 6-7; MCR 7.216(A)(6)¹⁹. The Circuit Court went on to state that Mr. Moody's attorney's conduct constituted "reversible error and tainted the entire case". **Exhibit F 27**. The Circuit Court held "The cumulative affect of Moody's counsel's statements that this Court found improper, particularly the reference to the Assigned Claims Facility and subrogation, deprived Appellant of a fair trial. For this additional reason, a verdict for all the Appellees is reversed and a new trial is ordered". **Exhibit F pp 29-30; Exhibit G**.

Charles Moody's cause of action was premised upon a policy of Michigan No-Fault insurance issued by Appellee Home Owners to his parents. Mr. Moody asserted that he was a resident relative of his parent's household at the time of his motor vehicle accident and therefore eligible for benefits under the policy. Any competent attorney practicing in this field would understand that the Assigned Claims Facility would only play a role in this type of a cause of action if there was some question as to whether Charles Moody was actually residing with his parents when the accident occurred and Mr. Moody had no policy of Michigan no-fault insurance himself. See MCL §§ 500.3114 & 3171. There was such an issue in this case. However, attorney Fortner, on behalf of Mr. Moody, never presented an application to the Michigan Assigned Claims Facility ("ACF"). See MCL § 500.3174. At the time of trial, the statute of limitations for any such application to the ACF had long since expired. Therefore, counsel for Mr. Moody knew that the ACF was not and could not be involved in the case presented before the jury but he chose to interject the issue during his opening statement anyway:

Like I told you about the Assigned Claims Facility as it apply to them, it's a situation where the insurance company determines or learns that they're the wrong insurance company. We paid some bills for this gentleman, but we weren't the right insurance company. It should have been another insurance company or it should have been the Assigned Claims Facility to pay it.

¹⁹ Appellant Moody's assertion that the Court of Appeals erroneous concluded that the appellate circuit court erred in making a finding of fact is untrue. Appellant Moody ignores the appellate court's authority to "draw inferences of fact" and "enter any judgment or order or grant further or different relief as necessary" in its appellate discretion and on terms deemed just. See MCR 7.216(6) & (7)

They got a thing out here called subrogation. Subrogation means that when an insurance company pays to the wrong company, they can turn around and get their money back. They got two years from the date they paid their last bill in order to get the money back, so they never lose a dime in the event that the wrong - - that they're the wrong insurance company. They got the absolute right to go back and get their money back and they do.

Tr. Trans. Vol. III, p. 57-58.

Counsel for Home Owners then appropriately objected stating "Judge, I don't even know what Mr. Fortner is talking about right now. I just have to object. There are so many things wrong with that statement. Is he insinuating that we are somehow going to recover money we would have paid to Charles Moody, from who?" Tr. Trans. Vol. III, p. 58. After a sidebar, counsel for Mr. Moody then inexplicably asserted after being asked who Home Owners would be subrogating against "I didn't say anything about you subrogating". Tr. Trans. Vol. III, p. 59. Moments later in front of the jury, Mr. Moody's counsel continued:

I don't mind the interruption because I want to make sure you understand the point when I talk about subrogation. Subrogation works in different ways. In this case, I'm talking about subrogation Assigned Claims Facility.

What I'm saying to you, and what I want you to understand which you will hear more about, is that when an insurance company finds out that there not the proper insurance company that should be paying the bill, this is a mechanism in place and we need to get more - - will deal with it with the Judge - - whereby they can get their money back from an assigned insurance company and the state covers the fund put aside for persons who injuries don't have insurance. So its never been about Mr. Moody. Its never been about Mr. Moody not being covered.

(Tr. Trans. Vol. III, pp. 62-63).

Counsel for Home Owners then asked for a sidebar, during which its objection was reiterated. Counsel for Mr. Moody then continued:

So back to the same point. Obviously they have a different position but we can deal with it. So they had an absolute right to get their money back if it turns out that they paid benefits that they shouldn't have.

They said Assigned Claims Facility is not relevant. Its relevant because I want you all to know if they had an avenue, if they had paid to get that money back, that's why subrogation became relevant.

(Tr. Trans. Vol. III, pp. 63-65).

Counsel for Home Owners again reiterated its objection to Mr. Fortner's interjection of the issue of subrogation and the ACF into the case. The suggestion by counsel for Appellant Moody was an obvious one. He argued to the jury in his opening statement that the jury could award Mr. Moody the damages he was seeking from Home Owners and Home Owners would then be able to recover those damages from some other insurance company, the asserted inference being one appointed by the ACF. In a case where a pedestrian is struck by an unidentified hit and run vehicle, these statements could not be further from the truth. Home Owners will not belabor this Court with a recitation of the statutes and case law governing when an individual is eligible for assigned claim benefits, but will note that on several occasions, Charles Moody's Appellate counsel admits to this Court that the statements presented by Charles Moody's trial counsel were "either wrong or irrelevant". See Appellant Moody's Brief on Appeal pp 4 & 33.

The statements presented by Mr. Moody's trial counsel were then compounded by statements presented by attorney Nicholas Cirino on behalf of Appellants Get Well Medical whose opening statement immediately followed Mr. Fortner's. With regard to the Assigned Claims Facility, Mr. Cirino added:

I know its been a lot of back and forth bantering and excusing the jury. Let me give you my take on something and I'm going to go home and look it up and I'll tell you why it doesn't make a difference to me standing before you on this issue of subrogation being paid back or not. Let me give you my thought, okay.

Its always been my understanding that if an insurance company is paying benefits voluntarily to an insured and its later recognized that it needs to go to the Assigned Claims Facility and it does within one year, I've always been under the impression that at that point they have a right within a two year period of time to seek subrogation or their money back because they shouldn't have been paying in the first place. I may be wrong.

(Tr. Trans. Vol. III, p. 69).

Counsel for Home Owners again objected stating "Judge, I have to object again. That's an absolute misstatement of the Michigan No-Fault Statute". Counsel for the service providers then responded "I may be wrong. I'm going to look it up". (Tr. Trans. Vol. III, p. 69-70).

The statements made by both Appellants' attorneys in this case relative to the ACF were incorrect assertions of Michigan law, but also sought to deceive the jury as to the fundamental purpose of the trial they were witnessing. See *Hunt v Freeman*, 217 Mich App at 95. Home Owners denied Appellant Moody's claim for no fault benefits because it did not believe Charles Moody was a resident relative of its insureds at the time of his motor vehicle accident. Mr. Moody contended that he was, and the focus of the trial was to obtain a determination from the jury as to his domicile on the date of the accident. Both attorneys Fortner and Cirino would focus their efforts over the next three weeks on arguing this point. The only way the ACF would play a role in this cause of action would have been for one or both of Appellants' attorneys to have submitted an application to them years prior to the commencement of trial which asserted that Mr. Moody was not a resident relative of his parent's home and therefore not eligible to claim under any policy of Michigan no-fault insurance. The suggestion that somehow Home Owners could recover against an assigned claims insurer following the conclusion of this trial flies in the face of the very arguments being presented by both Appellants' attorneys. This is why the Circuit Court, sitting on appeal concluded that these arguments were "reversible error and tainted the entire case". **Exhibit F** p 27; See also *Reetz*, 416 Mich at 103.

Counsel for Appellant Moody suggests that Home Owners somehow did not preserve this argument for appeal or is somehow not entitled to a new trial on this issue. Judge Colombo conducted a thorough analysis of this issue in his Opinion and based his reasoning in reliance upon this Court's decision in *Reetz*, 416 Mich 97. The Court in *Reetz* very clearly stated "incurable errors are not shielded from appellate review because an attorney fails to request what in that case would be futile instruction". *Id.* at 101.

In this case, the district court Judge did not seem to have an understanding as to the role of the Michigan Assigned Claims Facility in a first party cause of action. Consequently, she instructed counsel for Home Owners during a sidebar that he would have the opportunity to

correct Appellant Moody's attorney's misstatements of Michigan law in his opening statement. This led to the statement by counsel for Home Owners stating before the jury "I have to object, that's an incorrect statement of Michigan no-fault law. Its - - he stating the exact opposite of what the actual law is and I will gladly explain it to the jury when I have the opportunity to. (Tr. Trans. Vol. III, pp. 65-66). Home Owners had invested thousands of dollars in costs and legal fees in defending Mr. Moody's cause of action by the time the misstatements by his attorney and the attorney for the service providers were made. The Supreme Court in *Reetz* recognized this stating "[A] party may have such an investment in time and money in a trial at the point when incurable error arises that he would rather see the case go to the jury, hoping that the jurors would be able to ignore the improper argument. Such a decision is imminently reasonable, both for the individual litigant and the judicial system as a whole. A trial which has consumed valuable private and public resources need not be aborted because the jury may have been improperly influenced or distracted by closing argument". *Id.* at 102.

The Court of Appeals affirmed the Circuit Court's decision. The Court held the Circuit Court did not clearly err in its factual determination and did not commit legal error in determining that the improper statements by counsel for Mr. Moody, in which counsel for the providers joined and agreed with, denied Home Owners a fair trial warranting reversal and remand for a new trial. The Court further noted that Appellants Get Well Medical's acquiescence and agreement with Mr. Moody's counsel reimbursement proposition in their opening statements, in total, surmounted to a failure of the trial court to control the trial proceedings and instruct the jury regarding the law. The Court of Appeals agreed that the reversal was a separate and independent reason for reversal. See Appellant Moody's Exhibit H pp 14-16; Appellants Get Well Medical's Exhibit D pp 14-16.

IV. RELIEF REQUESTED

Home-Owners requests this Court DENY Appellant Moody's Application for Leave and DENY Appellants Get Well's Application for Leave from the Court of Appeals dated

February 24, 2014. *Moody v. Home Owners Insurance Co.*, __ Mich. App. __, __ N.W.2d __ (2014). See Appellant Moody's Exhibit H; Appellants Get Well Medical's Exhibit D. Reversing the Court of Appeals decision would be contrary to the plain language and application of the Court Rules involving subject-matter jurisdiction and the long-standing jurisprudence that supports the proposition that a court sitting without jurisdiction must divest itself from the proceedings by either dismissing the matter or transferring it to a court with proper jurisdiction. Further, Home Owners submits that a reversal of the Court of Appeals Opinion would re-open the flood gates for improper gamesmanship and forum-shopping.

The decision by the Court of Appeals also serves the interests of judicial economy. The Court aptly pointed out that No Fault provider suits belong to the underlying claimant and are thus identical to and derivative of the underlying claimant's cause of action against an insurer. The Court of Appeals decision effectively reduces ever rising caseloads by requiring identical derivative provider lawsuits be merged together under one claim where the rights and responsibilities of all parties involved can be determined in a single proceeding resulting in smaller caseloads and judicial expediency. Neither Appellant has provided this Court with any reason to usurp the Michigan Court Rules, well established Michigan jurisprudence or the Court of Appeals Opinion such that review by this Court is unnecessary and unwarranted.

Respectfully submitted,

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