

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSE A. RODRIGUEZ,

Plaintiff/Appellee,

v.

FEDEX FREIGHT EAST, INC., RODNEY
ADKINSON, LAURA BRODEUR, MATTHEW
DISBROW, WILLIAM D. SARGENT, and
HONIGMAN MILLER SCHWARTZ AND COHN
LLP, ~~jointly, severally and individually,~~

Defendants/Appellants.

OK

Supreme Court Case No. Open

Court of Appeals No.: 312187 3-25-14

LC Case No.: 09-028366-NO

Wayne
R. Ziolkowski

**APPLICATION FOR LEAVE TO
APPEAL**

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DEFENDANTS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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I. ORDER BEING APPEALED AND RELIEF SOUGHT

The order being appealed is a Michigan Court of Appeals opinion dated March 25, 2014, which affirmed in part, reversed in part, and remanded this case for further proceedings to the Wayne County Circuit Court (Exhibit R). The Wayne County Circuit Court had granted summary disposition to the defendants on plaintiff's fraud and abuse of process claims in an order dated July 20, 2012 (Exhibit O; *see also*, Ex. Q – Hearing Transcript). The Wayne County Circuit Court's order was based upon *res judicata* and collateral estoppel. The Michigan Court of Appeals' opinion being appealed essentially reinstates most of plaintiff's claims.

Appellants request that the Court grant this application for leave to appeal to: (1) affirm the trial court's summary disposition in favor of Appellants; (2) correct and reverse the Michigan Court of Appeals opinion; and (3) correctly apply the doctrines of *res judicata* and collateral estoppel to preserve judicial resources and henceforth avoid wasteful, repetitive litigation in this State's courts. Such relief will also correct the clearly erroneous opinion of the Michigan Court of Appeals and avoid a material injustice to the Appellants. Alternatively, Appellants request that this Court reverse and remand the case to the Michigan Court of Appeals to consider the independent bases for affirming the trial court, which the Court of Appeals ignored.

II. QUESTIONS PRESENTED FOR REVIEW

1. Should this Court correct a **significant flaw in the State's jurisprudence preventing the *res judicata* effect of a federal court's summary dismissal on the merits in Michigan state court proceedings?** Such flaw arises out of an outdated decision of this Court, in which only four Justices joined, one Justice concurred in the result only, one Justice took no part in the decision, and one Justice dissented. The dissenting Justice provided for the more logical rule, warning about abusive cases like the instant one. *See, Pierson Sand v Keeler Brass*, 460 Mich 372; 596 NW2d 153 (1999).
2. Even under existing law, did the trial court properly dismiss plaintiff's claims alleging fraud and abuse of process based upon ***res judicata*** where the identical issues and facts have previously been raised and decided against plaintiff numerous times in a combination of earlier cases in the U.S. Bankruptcy Court for the Eastern District of

Michigan, the U.S. District Court for the Eastern District of Michigan, and the U.S. Court of Appeals for the Sixth Circuit?

3. Did the trial court properly dismiss plaintiff's claims alleging fraud and abuse of process based upon **collateral estoppel** where the identical issues and facts have previously been raised and decided against plaintiff numerous times in a combination of earlier cases in the U.S. Bankruptcy Court for the Eastern District of Michigan, the U.S. District Court for the Eastern District of Michigan, and the U.S. Court of Appeals for the Sixth Circuit?
4. Neither the trial court nor the Court of Appeals reached the other independent bases raised and briefed to each of those courts for dismissing plaintiff's claims. Should the trial court's dismissal be affirmed on the **independent grounds that: (a) plaintiff lacks standing because the alleged claims belong to his bankruptcy estate and not to plaintiff individually; (b) plaintiff's complaint fails to state a claim for fraud or abuse of process; and (c) the alleged abuse of process claim is time-barred?**

III. OVERVIEW OF FACTS AND ISSUES

There are two independent grounds for granting this application. First, correcting Michigan law on the res judicata effect of a federal court decision on state court proceedings is of critical importance to the jurisprudence of this State, and will prevent multiple lawsuits based upon prior lawsuits (MCR 7.302(B)(3)). Second, under the existing law on res judicata and collateral estoppel, the Court of Appeals decision is clearly erroneous and results in a material injustice to defendants, who must defend claims and allegations that have no legal basis and that have been repeatedly decided in their favor by the federal courts. (MCR 7.302(B)(5)).

Plaintiff is a litigant whose bankruptcy estate lost an employment discrimination suit, and who individually lost a separate fraud suit (virtually identical to the complaint in this case), on the merits in numerous federal courts. Rather than accepting having lost, he has resurrected his claims yet again in state court by claiming fraud and abuse of process during the employment discrimination suit by the winning party, one of its witnesses, and its lawyers because plaintiff disagrees with the facts presented. The Court of Appeals decision allows plaintiff to continue down this path.

Under the Court of Appeals decision, a losing party in a federal court case now has the legal right to pursue state law claims for “fraud” against his adversary, the adversary’s witness and attorneys. He can do so even where, as here, multiple federal courts actually involved in the employment discrimination case have held that absolutely no fraud on any court occurred in that case, and where there can be no fraud on the losing party without there also being a fraud on the court. The Court of Appeals decision allows and encourages losing parties to re-litigate in state court what they have already litigated to conclusion and lost in federal court.

Plaintiff alleges two “frauds”. Both relate to the testimony of a single witness, defendant Adkinson, with whom plaintiff and his attorney do not agree. Both statements were the subject of cross examination before the jury, multiple post-trial motions, and several unsuccessful appeals. There is plenty in the record that defendants disagree with, including the allegations of discrimination (that the jury also rejected). Defendants’ disagreement with the evidence put forth by plaintiff’s bankruptcy estate and its counsel does not create a “fraud” claim any more than the offered testimony rejecting the discrimination claim. All of these issues (which are typical factual disputes decided by juries every day in both state and federal court) were thoroughly vetted and rejected in federal court by a jury at trial and then in several appeals. The “fraud” allegations have also been considered and rejected by the actual federal courts involved in the underlying case. There is nothing new that has been alleged in the instant action in state court. Plaintiff and his counsel do not get yet another bite of the same apple.

Cases will never end if a losing litigant like plaintiff can simply renew his claims alleging fraud and abuse of process by the opposing counsel and party in prior litigation. For instance, the underlying case here was filed **eleven years ago**. If left to stand, the Court of Appeals decision will set a horrendous precedent in this State. The Court of Appeals’ application of res

judicata under existing law, and collateral estoppel, was clearly erroneous and results in material injustice to defendants-appellants. The Court of Appeals decision should be reversed.

In addition, the Court of Appeals refused to apply res judicata here, in part relying on this Court's majority decision in *Pierson Sand, supra*. The result encourages the splitting of claims and repetitive litigation, which was specifically warned against by Justice Taylor in his dissent in *Pierson* at 388-95. The instant case is the quintessential case for this Court to correct the doctrine of res judicata set forth by the majority in *Pierson*, and to now adopt the dissent in *Pierson* as the rule of law in this State. It is time for the jurisprudence of this State to catch up to the tactics used by plaintiff here and about which Justice Taylor specifically warned would happen State-wide. This case presents this Court with the unique opportunity to jurisprudentially stop the abuse of our Court system.

IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Summary of the 2003 Employment Litigation

In 2003, plaintiff Rodriguez sued FedEx for discrimination (the "Employment Litigation"). (Ex. A ¶¶8, 10). Rodriguez later filed a Chapter 7 bankruptcy petition, and the Employment Litigation became property of the bankruptcy estate. (Ex. F, identifying litigation as asset of estate). Rodriguez himself was no longer a party to the Employment Litigation.

In the Employment Litigation, on October 18, 2004, FedEx moved for summary judgment. In support of its motion, FedEx attached as an exhibit an affidavit signed by one of its employees, Rodney Adkinson. (Ex. A ¶15). The affidavit was notarized on October 20, 2004, but the identical, unnotarized version was the one filed with the Court. (Exs. G, H). The summary judgment motion was referred to the bankruptcy court. (Ex. A ¶17). During the hearing, counsel for Rodriguez's estate orally objected to the unnotarized affidavit:

“So the motion for summary judgment is not properly supported. . . . Now I don’t know if the Court has a sworn affidavit, but the one I have right here is unsworn. This is an unsworn statement, Your Honor. Therefore, under the cases cited by Federal Express, it cannot be considered. And under the court rules, a motion for summary judgment must be supported by a sworn affidavit at the very least to create or to show that there’s no questions of fact.”

(Ex. I at 3). The court acknowledged counsel’s position, then asked him to identify any genuine issues of material fact preventing a grant of summary judgment. *Id.* at 4.

In response, FedEx’s counsel, Laura Brodeur-McGeorge (“Brodeur”), an attorney at Honigman Miller Schwartz and Cohn LLP, explained to the bankruptcy court that the affidavit had been notarized near the time of filing, but that the identical, notarized version was not filed. She offered to file the notarized version and send a copy to counsel for Rodriguez’s estate. (Ex. I at 5). The court declined a copy: “I’ll accept your representation, but I do think you should give Mr. Martin a copy.” *Id.* Brodeur followed the court’s instruction and mailed the notarized affidavit to opposing counsel the next business day. (Ex. H). Rodriguez admits this occurred. (Ex. A ¶27). Thereafter, the notarized version was attached to subsequent court filings. *See*, Ex. A ¶47.

The bankruptcy court granted summary judgment in favor of FedEx on all counts in December 2005. (Ex. A ¶29). Rodriguez’s bankruptcy estate appealed to the federal district court, which affirmed the grant of summary judgment. In its May 2006 order, the federal district court expressly acknowledged the objections to the “technical sufficiency” of Adkinson’s affidavit and assumed, for purposes of its ruling, that the alleged flaws would be able to be corrected upon resubmission. (Ex. D at 3 n 1). Thus, Rodriguez’s estate’s attorney would have known as late as May 2006 that a notarized affidavit had not yet been filed and that the court was still fully aware of the status. This also unassailably shows that neither the courts nor Rodriguez’s estate’s counsel were deceived by the unnotarized affidavit. In fact, it was

Rodriguez's estate's counsel who raised the issue as soon as it came up and then repeatedly thereafter. (Ex. I at 3; Ex. J; Ex. K at 47–50). Rodriguez's bankruptcy estate appealed to the Sixth Circuit, which affirmed the grant of summary judgment on all but one claim, which was remanded to the federal district court for trial. (Ex. A ¶¶27–30, 34, 39–40).

In June 2008, the federal district court presided over a five-day jury trial on the sole remaining count. Counsel for the Rodriguez estate cross-examined Adkinson about his affidavit. (Ex. J). Adkinson confirmed that he signed the unnotarized version shown to him at trial and that the statements (**identical in the unnotarized and notarized affidavits**) were true. *Id.* at 58–59.

The following exchange then occurred:

Q. Do you recall subsequently having this affidavit notarized?

A. I don't specifically remember whether I did or didn't have it notarized.

Q. It [sic] we have a document that was submitted, was notarized, you wouldn't dispute that, would you?

A. If it's got any signature, I would not dispute. I would like to see the document before I say that's specific.

Q. Any reason there was not –

MS. BRODEUR: I object. Relevancy.

MR. MARTIN: It is very relevant. It goes credibility.

MS. BRODEUR: There is no question before this witness to impeach him.

THE COURT: He acknowledged the signature on the document. Can we move along and wrap this up?

MR. MARTIN: Thank you, Judge.

Any reason this –

A. I don't know. I don't have any idea why it was not notarized.

BY MR. MARTIN:

Q. But what you said was true?

A. Yes, if I signed it, yes.

MS. BRODEUR: Your Honor, I object to reference of the document unless there is

another question. This isn't identified on the list. Unless –
THE COURT: It has not been received as a prior statement. If he seeks to impeach
the witness—
MR. MARTIN: That's exactly what I'm using it for. (Ex. J at 58-59).

Counsel for the Rodriguez estate never showed Adkinson the notarized version at trial. Contrary to Rodriguez's revisionary description of what happened at the trial, the actual record of the trial shows that Adkinson signed the unnotarized version of the affidavit and that he attested to its veracity in court. *Id.* The unnotarized and notarized versions are identical except for the notarization. (Exs. G, H). The jury issued a no-cause-of-action verdict in favor of FedEx, thus resolving any questions of fact, including issues about the truthfulness of the affidavit. The estate again appealed to the Sixth Circuit.

In that appeal, Rodriguez's estate raised the affidavit issue from the summary judgment motion five years earlier. **Rodriguez's estate expressly argued that the unnotarized and allegedly false affidavit was grounds for a new trial and that FedEx's attorney Brodeur committed misconduct.** (Ex. K at ix, Statement of the Issues "G" and "H"). In an Argument section titled "District Court's Refusal to Allow Rodriguez Properly to Explore the Filing of a False Affidavit by Decision Maker Adkinson, Constituted an Abuse of Discretion and Deprived Rodriguez of a Fair Trial," Rodriguez's estate argued:

Thus far, FedEx has successfully misled and misinformed the bankruptcy court, the district court and the 6th Circuit of Appeals. On remand for trial, FedEx's discrimination began to unravel[,] [b]y using an unsworn and untrue affidavit of Adkinson. By using this sharp practice, FedEx basically succeeded in emasculating most of Plaintiff's claim even before trial. The basis of that tactic has [sic] to assert that Rodriguez made no formal application for a supervisor's position and the completion of the LAC was a prerequisite for promotion. . . . When Adkinson was cross examined about his 'affidavit', the very essence of the case was to be explored. The question for the jury was whether Adkinson was telling the truth and had he been telling the truth. . . . A pattern of behavior emerges from FedEx's practices using an invalid and untrue affidavit to emasculate Rodriguez[']s case and then blocking Rodriguez's counsel's efforts to uncover the truth of the matter. . . . The pattern of behavior by FedEx constitutes a seamless whole. The error caused by the unsworn affidavit is compounded by the district court that accepted an unsworn affidavit.

(Emphasis in original).

(Ex K at 47-50; *see also* numerous references to the “unsworn and untrue affidavit” throughout Ex. K). In that section of the Rodriguez estate’s brief to the Sixth Circuit, it quoted the exact same exchange and objection at the trial by Brodeur quoted above and that Rodriguez complains about here. (*See*, Ex. K at 48-49; Ex. T at 3).

In an argument section titled “FedEx’s Attorney Committed Misconduct,” the Rodriguez estate also argued to the Sixth Circuit that FedEx’s counsel engaged in misconduct designed to prevent the Rodriguez estate’s counsel from exploring Adkinson’s “unnotarized affidavit which FedEx’s attorney used to have Rodriguez’s claims dismissed.” (Ex. K at 50). FedEx briefed the issue in its Appellee Brief, as well as the issue concerning the underlying substance of the affidavit. (*See*, Ex. L at 13-17, 23-24, 55-56). FedEx explained that the affidavit is true, and no evidence has been presented that the statements in the affidavit are untrue. *Id.* The Sixth Circuit affirmed the district court’s “thorough and meticulous” order finding that it correctly applied the law to the facts. (Ex. M at 2). The Sixth Circuit noted that Rodriguez’s estate had alleged errors based on evidentiary rulings and Brodeur’s “misconduct” during the proceedings. *Id.* at 1. The misconduct alleged by Rodriguez in his briefs was that related to the affidavit. (Ex. K at 47–50.) The U.S. Supreme Court denied the Rodriguez estate’s request for *certiorari*, and the Sixth Circuit opinion is final.

B. Summary of the 2009 Fraud on the Court Action

On December 2, 2009, Rodriguez (not his bankruptcy estate) commenced a federal action against FedEx, Adkinson, FedEx’s law firm in the Employment Litigation and three of its attorneys (all the same defendants in this action) (Ex. C). In that action, Rodriguez alleged a single count, which he entitled “fraud on the courts” (the 2009 “Fraud on the Court Action”) (Ex.

C). In it, he requested that the bankruptcy court's 2005 grant of summary judgment against the Rodriguez bankruptcy estate be vacated, based on the filing of the affidavit at issue here. (Ex. C ¶¶47-49). **That federal complaint is nearly identical to the amended complaint here.**

Compare Ex. A with Ex. C. On February 10, 2010, the federal district court held that Rodriguez had failed to state a claim upon which relief could be granted:

[T]he allegations do not plausibly suggest acts of extrinsic fraud necessary to support a finding of fraud on the courts. Affidavits proffered and filed with the Bankruptcy Court, this court, and the Sixth Circuit Court of Appeals, including Adkinson's affidavit, indicate on their face whether they were notarized or sworn. **The nature of Adkinson's affidavit, sworn or unsworn, notarized or "un-notarized," was within Rodriguez's Counsel's knowledge, as well as the courts', as a matter of record.**

(Ex. N at 5-6, emphasis added; internal citations omitted). The court dismissed the complaint with prejudice and closed the case. *Id.* at 7. Rodriguez appealed to the Sixth Circuit.

Rodriguez also argued that the notarized version of the affidavit had been forged: "[T]here is now evidence that a *notarized* affidavit filed by FedEx's attorneys. . . was *forged*." (Ex. E) (emphasis in original). The Sixth Circuit cancelled oral argument on Rodriguez's appeal. The Sixth Circuit affirmed the district court's order noting that Rodriguez had alleged no specific facts regarding the conduct of defendants Sargent and Disbrow, then focused its analysis on the allegations regarding Brodeur. (Ex. D at 8). The Sixth Circuit held that Rodriguez failed to allege facts to establish fraud – specifically that the courts were deceived:

The bankruptcy court and all subsequent courts that considered the motion for summary judgment were aware of the status of the Adkinson affidavit because the fact that the affidavit was not sworn and notarized was clear on the face of the submitted document and Rodriguez's counsel had raised the issue at the August 26, 2005 hearing. Rodriguez does not allege facts that establish that the bankruptcy court's decision on the motion for summary judgment turned on a mistaken belief that a notarized version of the affidavit had been submitted. Brodeur's statements did not prevent the court from observing or investigating the status of the affidavits before it. As noted by the district court, "[a]ffidavits proffered and filed with the Bankruptcy Court, this court, and the Sixth Circuit Court of Appeals, including Adkinson's affidavit, indicate on their face whether they were notarized or sworn." Therefore, because the court was not deceived about the

status of the document, the complaint does not sufficiently allege deception of the court. *Id.* at 9. The Sixth Circuit ruled that Rodriguez also failed to allege facts to suggest that defendants actually subverted the administration of justice or defiled the integrity of the courts, since Rodriguez's counsel had objected to the affidavit during the hearing and cross-examined Adkinson regarding the affidavit during the trial. *Id.* Similarly, the allegation that the affidavit contained false statements was insufficient to establish deception. *Id.* at 10.

Defendants moved in the Sixth Circuit for sanctions against Rodriguez and his counsel for the vexatious multiplication of the proceedings. The Sixth Circuit noted that whether to impose sanctions on Rodriguez and his counsel was a "close call," then ultimately declined to do so. *Id.* at 11. That Sixth Circuit opinion is final.

C. Summary of the 2009 Wayne County Circuit Court Action (This Case)

On November 17, 2009, Rodriguez commenced this action in Wayne County Circuit Court alleging fraud and abuse of process against the same defendants he sued in the 2009 Fraud on the Court Action. (Ex. A, bar code caption sticker). He later filed an amended complaint. (Ex. A). The factual basis for the complaint involves the affidavit that was submitted in 2004 in support of the summary judgment motion heard by the bankruptcy court in the Employment Litigation. (Ex. A ¶¶67-84). Rodriguez alleges that defendants submitted an affidavit that was false and unnotarized and that the identical, notarized version's signature was forged. *Id.* at ¶¶68, 75. Rodriguez also alleges that Attorney Brodeur misrepresented that Adkinson had signed a notarized version, that she intended to bring the notarized version to court, and that she would file the notarized version. *Id.* ¶23. Rodriguez alleges that the bankruptcy court relied upon the unnotarized version of the affidavit in granting summary judgment against Rodriguez's bankruptcy estate in 2005, and that the federal district court and the Sixth Circuit relied upon it

on appeal. *Id.* ¶¶69, 83. Based on these allegations, Rodriguez asserted abuse of process and fraud causes of action seeking money damages from defendants. *Id.* at ¶84.

If this Court compares the amended complaint in the instant case with the federal complaint in the 2009 Fraud on the Court Action, it will see that the parties are identical and the factual allegations are largely repeated verbatim. (Compare Exs. A and C).

The instant action was initially removed to federal court, although it was remanded to Wayne County Circuit Court on April 1, 2010. (Ex. B). By the time the federal court decided whether to remand the instant action to state court on April 1, 2010, the 2009 Fraud on the Court Action had already been dismissed. (Ex. N). The federal court acknowledged that, while the labels on the causes of action were different, the complaint in the instant action alleges “virtually the same factual claims against these same defendants” as the separate 2009 Fraud on the Court Action that had already been dismissed. (Ex. B at 8). The federal court invited the Wayne County Circuit Court to “appropriately decide if Rodriguez’s instant state law claims are barred by application of Michigan’s rules of res judicata or collateral estoppel” based on the prior dismissal of the federal complaint in the 2009 Fraud on the Court Action. (Ex. B at 8–9, underlined in original).¹

Defendants moved for summary disposition on the state court complaint on the basis of

¹ As already noted, Rodriguez has alleged in the instant action that Adkinson’s signature is forged on the notarized version of the affidavit. Rodriguez raised this forgery issue as well in the 2009 Fraud on the Court Action. (Ex. E). The entire set of allegations regarding the alleged forgery of the notarized affidavit is a red herring. Adkinson testified at trial that he signed the unnotarized affidavit, the contents of which are identical to the notarized version. (Ex. J at 57–59). Adkinson was not shown the notarized version at trial by counsel for Rodriguez’s estate. In any event, Rodriguez’s claim is that the courts relied on the unnotarized affidavit in granting summary judgment. (Ex. A ¶¶69, 83). The courts never relied on the notarized version, which Rodriguez alleges is forged. (Ex. A ¶56). In short, there is no “forged” affidavit. But even if there was, it could not possibly have damaged Rodriguez, because no court ever relied on the notarized “forged” version.

res judicata, collateral estoppel, and several other independent bases, all of which were fully briefed by the parties. The Wayne County Circuit Court dismissed the complaint on the grounds of res judicata and collateral estoppel, and did not reach the other grounds raised. (Exs. O, Q).

Rodriguez appealed. The Michigan Court of Appeals essentially reversed (although it affirmed part of the trial court's decision on collateral estoppel). The Michigan Court of Appeals decision to not apply res judicata, due to the 2009 Fraud on the Court Action, was based in part on this Court's majority decision in *Pierson Sand, supra.* The Michigan Court of Appeals based the other parts of its decision to not apply res judicata and collateral estoppel on principles and rationales that were clearly erroneous under existing law. (Ex. R at 5-7; *See*, § III.B. above). Defendants have timely filed this application for leave to appeal to this Court.

V. **INTRODUCTION AND SUMMARY OF THE REASONS THIS COURT SHOULD GRANT LEAVE TO APPEAL**

A. **This Case Involves Legal Principles Which Are Of Major Significance To The State's Jurisprudence (MCR 7.302(B)(3))**

1. **Continuous and Repeated Litigation By A Losing Party Against A Prevailing Party, Its Counsel and Trial Witnesses Cannot Be Permitted**

If plaintiff is permitted to continue this litigation on remand, it will encourage every losing litigant who disagrees with the facts proffered by their adversary, and the interpretation of those facts, to simply sue the adversary and adversary's lawyers for fraud in an entirely new round of litigating the same issues again. The overly zealous litigant will simply never cease his litigation. A losing litigant will usually never agree with their adversary's facts. If that litigant can simply file a new lawsuit for fraud or abuse of process the day after losing the prior one, under the guise that the adversary's facts are wrong or that the adversary's lawyers presented facts with which the litigant disagrees, cases will never conclude. This case is "Exhibit A."

Losing parties should not be permitted to bring these kinds of cases against the prevailing parties, trial witnesses and their counsel.

2. A Federal Court's Summary Dismissal on the Merits of the Same Underlying Case Should Result in Res Judicata in Michigan State Court

In Michigan, barring exceptional circumstances, there can never be res judicata in state court based upon a federal court's summary dismissal on the merits of virtually identical federal claims. This result emanates from this Court's majority decision in *Pierson Sand, supra*. The Court of Appeals here followed *Pierson*. It is time for a change in the law so that Michigan's res judicata jurisprudence is consistent with the practical realities in today's world of repetitive litigation, and with other jurisdictions. This is the perfect case to adopt the more logical and prudent rule of res judicata explained by the dissent in *Pierson*.

When this Court decided *Pierson* 15 years ago, four Justices joined the majority opinion of the Court (Justices Weaver, Brickley, Kelly, and Corrigan). Justice Cavanagh concurred in the result only. Justice Taylor dissented. Justice Young took no part in the decision. In *Pierson*, the plaintiff brought federal claims in federal court that were dismissed on summary judgment for defendants and affirmed by the Sixth Circuit Court of Appeals. The plaintiff then filed an action in Michigan state court on claims and theories that arose out of the same alleged transactions and occurrences that led to the federal litigation. A majority of this Court held that the state law claims were not barred by res judicata.

This Court noted that generally res judicata will apply to bar a subsequent relitigation based upon the same transaction or events, regardless of whether a subsequent litigation is pursued in a federal or state forum. *Id.* at 380-81. Unless it is clear that a federal court would have declined to exercise jurisdiction over the state claims, the state action is barred. *Id.* at 381-82.

In *Pierson* (and here), the “plaintiffs’ state claims, which could have been brought with the federal claims by supplemental jurisdiction, clearly would have been barred by res judicata if the federal court had entered a judgment on the federal claim. However, if plaintiffs had brought the state claims in the federal court, and the federal court had refused to retain jurisdiction over them when it dismissed the federal counts, then the plaintiffs would not be barred by res judicata from bringing their state claims in state court.” *Id.* at 382.

Pierson went beyond that general rule by fashioning a holding that the Court of Appeals applied here: “We hold that, when the federal claims are dismissed before trial, the federal court clearly would have dismissed the state claims if there are no exceptional circumstances that would give the federal courts cause to retain supplemental jurisdiction.” *Pierson* at 384; Ex. R at 5. This led to the ultimate holding in *Pierson* (and the Michigan Court of Appeals here) that “where the district court dismissed all plaintiff’s federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims. Accordingly, . . . res judicata will not act to bar plaintiffs’ [state law] claim.” *Pierson* at 387; Ex. R at 5.

In practical terms, that holding means that a plaintiff can, and will be encouraged in every instance (barring exceptional circumstances), to split his federal and state claims into two different courts (state and federal). A plaintiff will choose to do so every time (like plaintiff did here) because if his federal claims are dismissed on a summary motion (as was the case here), he can always continue to pursue the state court litigation, although the facts and circumstances are identical in both cases. **The rationale for such an outcome is that, unless there was an exceptional circumstance, the federal court would always decline to exercise supplemental**

jurisdiction over any state law claims, so there will never be res judicata in state court from a federal court's summary dismissal decision. This is the exact opposite of what the doctrine of res judicata is designed to accomplish in this State. It is supposed to be a broadly applied doctrine to ensure finality, prevent repetitive litigation, conserve judicial resources, and to apply even to claims that a plaintiff could have raised but did not.

In his dissent in *Pierson*, Justice Taylor warned of the exact scenario that plaintiff is taking advantage of here. Justice Taylor first stated what the logical rule should be in Michigan: "If a plaintiff wants to preserve state law claims, the plaintiff should be obligated to plead them, or at least attempt to plead them, in the federal court. If the federal court does in fact later decline to exercise supplemental jurisdiction over state law claims, then and only then, would filing such state claims in a state court not be barred by res judicata. The reason for this rule is evident. The rule of res judicata is designed to forestall a plaintiff from getting 'two bites at the apple.'" *Pierson* at 391. This removes the guesswork from trying to determine whether a federal court would decline to exercise supplemental jurisdiction over state law claims. *Id.* at 391-92. Essentially, a plaintiff must give the federal court the opportunity to exercise supplemental jurisdiction over state law claims. If the plaintiff deprives the federal court of that opportunity, then he risks losing those claims in state court by res judicata.

Justice Taylor rightly warned that *Pierson* subverts the strong policy grounds underlying res judicata: "Indeed, today's ruling may have profoundly negative ramifications for future cases where there are parallel federal and Michigan remedies that arise from the same transaction or occurrence. Under the majority's holding, plaintiffs will have an incentive to split their causes of action and assert only federal claims in federal court. Given the overburdened trial court dockets, this Court ought not give aid and comfort to those who would, as legal strategy (whether

formulated before or after dismissal of a federal lawsuit), split their cause of action. The majority's holding unfairly deprives the instant defendants, **and undoubtedly will be cited to deprive future defendants**, of the certainty and closure promoted by res judicata. Our courts can ill afford the narrowing of our res judicata doctrine that this case represents." *Id.* at 394-95 (emphasis added). Justice Taylor's predictive warning describes the instant case to a "T". This case presents this Court with the rare opportunity to fix this fundamental unfairness and flaw in Michigan's jurisprudence. The Court will be hard pressed to find another case that so perfectly provides the reason for correcting an error of law having major significance in Michigan.

B. The Michigan Court Of Appeals Decision Is Clearly Erroneous And Results In A Material Injustice (MCR 7.302(B)(5))

The Michigan Court of Appeals based its decision on principles and rationales that are clearly erroneous under the existing law of res judicata and collateral estoppel. (Ex. R at 5-7).

1. The filing date does not matter for res judicata purposes

The Court of Appeals held that this state action was not a "second, subsequent action" for purposes of res judicata because it was filed one month before the federal Fraud on the Court Action, even though that federal action was decided and dismissed on the merits before this state action was decided. (Ex. R at 5). This is clearly erroneous. **It makes no difference which action was filed first in applying res judicata or collateral estoppel.** *Schwendener v Midwest Bank & Trust Co*, 2011 Mich App LEXIS 1950 at *14 (Nov 8, 2011) citing *Brownridge v Mich Mut Ins Co*, 115 Mich App 745; 750-51; 321 NW2d 798 (1982) ("The res judicata effect of the federal judgment is not altered because plaintiff commenced the state action before the federal judgment was entered Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, *the effect of that judgment is to be determined by the*

application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.”) (emphasis in original).

2. Privity exists among the defendants

The Court of Appeals held that the federal Employment Litigation could not be a basis for res judicata because that action had only one defendant (FedEx), and this state action has more defendants (FedEx, a FedEx employee, and FedEx’s lawyers from the earlier Employment Litigation) (Ex. R at 5-6). Consequently, the Michigan Court of Appeals reasoned that the two actions did not involve the same parties or their privies to apply res judicata. This is clearly erroneous. Under Michigan law, privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). The only reason that FedEx’s employee and its lawyers are named in this state action is because they were a witness or the lawyers for FedEx in the prior federal Employment Litigation. They were effectively acting together for FedEx. **Privity among the defendants in these two litigations absolutely exists. The defendants have an exact identity of interest and were, by definition, as lawyers and an employee, presenting and protecting the same interests.**

3. The matters arise out of the same transaction

The Court of Appeals held that the federal Employment Litigation and this state action did not involve the same transaction. Specifically, it stated that the federal Employment Litigation involved alleged discrimination by FedEx against plaintiff in his employment. This state action involves alleged conduct by FedEx, its witness and lawyers during the litigation of the plaintiff’s employment discrimination claim (Ex. R at 6). So the court concluded that the

claims raised in this state action were not and could not have been resolved in the federal Employment Litigation. This is clearly erroneous. Res judicata applies to any “*matter* contested in the second action [that] was or could have been resolved in the first.” *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). (emphasis added). Res judicata does not arise only from accrued “causes of action”. In this state action, the matters at issue concern the alleged conduct of FedEx, its witness and lawyers in the prior Employment Litigation (an unnotarized and allegedly false and forged affidavit and the corresponding representations). **But these matters were already actually raised and decided repeatedly in the federal Employment Litigation in both the district court and Sixth Circuit.** See, e.g. Ex. J at 58-59; Ex. K at 47-50; Ex. L at 13-17, 23-24, 55-56; Ex. M at 1-2; Ex. T at 3. Plaintiff objected, cross-examined the affiant, and briefed and appealed the “conduct” issues extensively in the Employment Litigation. Plaintiff not only could have raised these matters in the Employment Litigation, but he actually did – a lot. The transaction test is more than met.

4. **The issues are the same and collateral estoppel applies**

The Court of Appeals held that there was no collateral estoppel in this state action because the issue in the Employment Litigation was whether FedEx discriminated against plaintiff, and the issues here concerning conduct during the litigation are different (Ex. R at 6). This is clearly erroneous because, as just noted, the issues concerning the alleged conduct of FedEx, its witness and lawyers in the prior Employment Litigation **were already actually raised and decided repeatedly in the Employment Litigation.**

5. **The complaints in two of the actions are factually identical, and were ruled upon by the federal court**

The Court of Appeals held that the dismissal on the merits of the 2009 Fraud on the Court Action did not entirely preclude this state action under collateral estoppel. It reasoned that the

issue in the Fraud on the Court Action was whether there was fraud on the court, and the issue in this state action is whether plaintiff and his counsel were deceived (by the exact same underlying facts) (Ex. R at 6-7). This is clearly erroneous. **The complaints in these two actions allege the exact same conduct and are factually identical. Every single fact of any significance in this state action was argued and briefed extensively in the district court and the Sixth Circuit Court of Appeals in the Fraud on the Court Action that was dismissed on the merits.** The complaint in the Fraud on the Court Action specifically alleged numerous times that plaintiff and his counsel were deceived (*see, e.g.*, Ex. C ¶¶ 9, 24, 41). The court in the Fraud on the Court Action held that the “nature of [the] affidavit, sworn or unsworn, notarized or “un-notarized,” was within [plaintiff’s] Counsel’s knowledge, as well as the courts’, as a matter of record. (Ex. N at 5-6). Plaintiff argued in the Fraud on the Court Action that “there is now evidence that a *notarized* affidavit filed by FedEx’s attorneys...was *forged*.” (Ex. E) (emphasis in original). The Sixth Circuit ruled that Rodriguez also failed to allege facts to suggest that defendants actually subverted the administration of justice or defiled the integrity of the courts, since Rodriguez’s counsel had objected to the affidavit during the hearing and cross-examined the affiant regarding the affidavit during the trial. (Ex. D at 9). Similarly, the allegation that the affidavit contained false statements was insufficient to establish deception. *Id.* at 10.

6. **The actual prior court record trumps plaintiff’s allegations about the prior record**

The Court of Appeals based its collateral estoppel holding on the allegations in plaintiff’s state action complaint that described what happened in the underlying federal Employment Litigation proceedings (Ex. R at 7). This was clearly erroneous. **The actual court transcripts and pleadings from the Employment Litigation were all in the record and prove that the plaintiff’s description in his complaint of those prior proceedings, upon which the Court of**

Appeals relied, is inaccurate. For a summary disposition motion based on a prior judgment under MCR 2.116(C)(7), a court must consider documents submitted in support of defendants' motion, which may contradict the pleading allegations. *See, Whitmore v Charlevoix County Rd Comm'n*, 490 Mich 964; 806 NW2d 307 (2011).

7. **Independent bases for affirmance were ignored**

The Court of Appeals ignored completely a number of fully briefed independent bases upon which to affirm the trial court (which were also fully briefed in, but not reached by, the trial court). For example: there are no substantive allegations whatsoever against two of the defendants Sargent and Disbrow; plaintiff absolutely lacks the most fundamental requirement to bring his claims – standing - since it was his bankruptcy estate that was the plaintiff in the underlying Employment Litigation, not plaintiff individually; the fraud and abuse of process allegations do not even state a claim; and the abuse of process claim is time-barred. The court of appeals should have considered these independent bases and affirmed the dismissal on these grounds to put an end to this case. *See, Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (an appellate court may uphold a lower tribunal's decision that reached the correct result even if based on different reasons).

The Court of Appeals opinion results in material injustice to defendants. Plaintiff has already had his “day in court” numerous times on the exact same issues that he raises here, and has not alleged causes of action sufficient to even state a claim to be in court. Plaintiff has pursued a decade-long crusade through the federal bankruptcy, district and appellate courts numerous times, and now the Michigan circuit and appellate courts. He just narrowly escaped sanctions by the Sixth Circuit for his last appeal there. Defendants are entitled to the justice provided by MCR 2.116(C)(5), (7) and (8), and request that this Court reverse the Court of

Appeals decision, and affirm the trial court's grant of summary disposition to defendants.

VI. LEGAL ARGUMENT

This Court reviews a trial court's summary disposition de novo. *Reed v Breton*, 475 Mich 531, 534; 718 NW2d 770 (2006). The application of res judicata or collateral estoppel is a question of law, subject to de novo review. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007).

A. **Principles of Res Judicata and Collateral Estoppel**

Res judicata (claim preclusion) "serves a two-fold purpose: to ensure the finality of judgments and to prevent repetitive litigation". *Bergeron v Busch*, 228 Mich App 618, 621; 579 NW2d 124 (1998). "The law abhors multiplicity of suits. Attempts to split a claim into separate causes of action have often met with disfavor." *Id.* at 621 n 1, quoting *Krolik & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920), and citing numerous Michigan cases. "The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v Tibaldi*, 272 Mich App 522, 530–31; 726 NW2d 770 (2006). The doctrine of res judicata bars a subsequent action when:

(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. The doctrine bars all matters that with due diligence should have been raised in the earlier action.

Estes, 481 Mich at 585. This Court applies "a broad approach to the doctrine of res judicata, holding that it bars 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." *Washington*, 478 Mich at 418. Even if different theories or causes of action are pursued, res judicata applies if a single group of operative facts gives rise to the requested relief. *Id.* at 420. A party's choice of labels is not determinative. *Johnston v City of Livonia*, 177 Mich App 200,

208; 441 NW2d 41 (1989).

The separate doctrine of collateral estoppel (issue preclusion) bars relitigation of issues that were already decided in a prior action. It precludes relitigation even where different causes of action are alleged. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). It traditionally applies when “(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel,” *Estes*, 481 Mich at 585, but mutuality of estoppel is not always required. *Alterman v Provizer*, 195 Mich App 422, 424; 491 NW2d 868 (1992). A federal court decision may have collateral estoppel effect and bar a party from relitigating issues in a state court action. *Healing Place Ltd v State Farm*, 2011 Mich App LEXIS 2372 at **9-10 (Dec 27, 2011) citing *VanVorous v Burmeister*, 262 Mich App 467, 482; 687 NW2d 132 (2004).

B. Res Judicata and Collateral Estoppel Arising From the 2009 Fraud on the Court Action Bar the Complaint Here

To try to distinguish the issues in this case from the 2009 Fraud on the Court Action adjudicated against him, Rodriguez argues the issue in this case is whether Rodriguez and Rodriguez’s counsel were deceived by the affidavit; but in his 2009 Fraud on the Court Action the issue was whether the courts were deceived by the affidavit. (Ex. T at vi, 4, 12-14). This argument ignores the complaints that Rodriguez filed in the two cases showing that his argument is wrong. In the 2009 Fraud on the Court Action, Rodriguez alleged (among many examples):

“That, based upon information and belief, Defendants deliberately planned and carefully executed a scheme that was designed to, and did, mislead and defraud **Plaintiff**, the Bankruptcy Court, the District Court, and the 6th Circuit Court of Appeals to dismissing claims asserted in Case No. 04-70021 (original district court case number) a/k/a/ District Court No. 05-cv-74737 and 2006 WL 1522584.” (Ex. C, ¶9) (emphasis added).

“That, in furtherance of Defendants’ carefully planned scheme to defraud the Court into

relying upon an “unsworn” and fraudulently submitted Affidavit, Defendant Brodeur mailed to Plaintiff’s counsel on August 29, 2005 a ‘notarized’ Affidavit that she purported to have been signed by Adkinson. This was deliberately done to, and did, defraud and mislead **Plaintiff’s counsel** into believing that a notarized Affidavit by Adkinson had been filed with the Court, as Defendant Brodeur promised, and as mandated by Rule 56(e)(1).” (Ex. C, ¶24) (emphasis added).

“That, Adkinson’s unsworn and fraudulent Affidavit defiled the judicial machinery of the **Courts**, and prevented **Plaintiff** from fully and fairly adjudicating all of his claims. This is the type of fraud that affects the integrity of the judicial system itself.” (Ex. C, ¶41) (emphasis added).

Similarly, in support of the abuse of process count in the instant action, Rodriguez alleges that the affidavits were filed for the purpose of “(a) deceiving Plaintiff, [and] Plaintiff’s counsel, (b) deceiving the court into granting summary judgment, [and] (c) defrauding the 6th Circuit into affirming the dismissal of Plaintiff’s claims” (Ex. A ¶69). In support of the fraud count here, Rodriguez alleges that Defendants’ fraudulent statements in court and the affidavit resulted in “(1) Plaintiff being deceived, (2) the courts being deceived into granting summary judgment in favor of FedEx, and (3) the 6th Circuit being deceived” (Ex. A ¶83). *See also, e.g.*, Ex. A ¶¶28, 29, 35, 41, 62, 63, 64. Rodriguez also raised the forgery issue in the 2009 Fraud on the Court Action (Ex. E). The Sixth Circuit rejected Rodriguez’s arguments, holding that the affidavit did not cause the adverse rulings of which Rodriguez complains. (Ex. D at 9).

1. Res Judicata

a. The Elements for Applying Res Judicata Are Met

Rodriguez is barred by res judicata from alleging his fraud and abuse of process claims. The Sixth Circuit opinion is a final decision on the merits and the parties are identical, satisfying the first and third res judicata elements. (See, Section III.B. above). As for the second element, res judicata bars “every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Washington*, 478 Mich at 418. “Whether a

factual grouping constitutes a ‘transaction’ for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation . . .” *Id.* at 420 (applying res judicata where complaint was identical to that which was filed in the first action). Even if based on different kinds or theories of relief, the transactional test is satisfied if a single group of operative facts gives rise to the claimed relief. *Id.* A court is not bound by a party’s choice of labels for an action because this would elevate form over substance. *Johnston*, 177 Mich App at 208. Rodriguez could have alleged in the 2009 Fraud on the Court Action that he was defrauded and entitled to recovery for abuse of process and fraud. Here, the complaints are nearly identical, and the factual allegations in this case — the affidavit and corresponding statements — were also the basis raised by Rodriguez for his 2009 Fraud on the Court Action. The factual grouping and transactions are identical. (Exs. A, C). This matter was actually resolved by the Sixth Circuit, more than satisfying the second element.

b. The Court of Appeals Refused to Apply Res Judicata Based on the Fraud on the Court Action Relying on This Court’s Decision in *Pierson*, But the Law in Michigan Should Adopt the Dissenting Opinion in *Pierson*, As Is Evident From the Abuse Being Perpetrated in The Instant Case

The Court of Appeals held that there could be no res judicata in this state action based upon the 2009 Fraud on the Court Action, even if plaintiff had included his state claims in that federal action. (Ex. R at 5). Citing the majority decision in *Pierson*, its rationale was that “when the federal court summarily dismissed the single federal claim, it ‘clearly would have dismissed the state claims’ because no exceptional circumstances existed that would have given the federal court ‘cause to retain supplemental jurisdiction’ *Pierson*, at 384. Therefore, res judicata was not applicable to plaintiff’s state law action.” (Ex. R at 5).

The practical effect of the Court of Appeals decision here and its reliance on *Pierson* is

that, barring exceptional circumstances, whenever a federal court dismisses a federal claim on the merits by granting summary judgment or a motion to dismiss, that federal court action will never have a res judicata effect on a state court action arising from the exact same transaction. This is exactly contrary to the purpose of res judicata, and especially in Michigan where that doctrine is to be broadly applied.

The more logical and fair policy analysis and law in Michigan should be taken from Justice Taylor's dissenting opinion in *Pierson*, which also tracks the dissenting opinion of Court of Appeals Judge Hoekstra in the preceding case of *Bergeron, supra*. These dissenting opinions, which defendants here advocate should be the rule of law in Michigan, and which this case presents the unique opportunity to accomplish, provide for the following analysis in determining whether res judicata applies in state court from a federal court summary dismissal on the merits (assuming that all other requirements for applying the doctrine of res judicata are met):

- **Did the federal court have the opportunity to exercise pendent jurisdiction over state law claims?**
 - If the plaintiff prevented the federal court from having that opportunity, and the federal court dismissed the federal claims, then res judicata applies to state law claims. (This is Rodriguez's situation).
 - If the federal court did have that opportunity, and the federal court declined to exercise pendent jurisdiction over state law claims, then res judicata does not apply to the state law claims. (This is not Rodriguez's situation).

The touchstone should be whether the federal court had the opportunity to exercise pendent jurisdiction and declined to do so. Rather than guessing what a federal court would do, the plaintiff should be required to bring all of his claims, federal and state, in one action or risk res judicata effect upon the state law claims. That way, the parties will **know** what the federal court decided regarding pendent jurisdiction.

The current analysis under *Pierson* is that federal law governs the res judicata effect of

federal judgments in subsequent suits. *Pierson* at 378, n 8, 380-81. *Pierson* states that “If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.” *Pierson*, 460 Mich at 380-81 citing 18 Moore, Federal Practice, §131.21[3][d], p. 131-50.²

In analyzing federal law on the point, *Pierson* adopted and relied upon 1 Restatement Judgments, 2d, § 25, comment e, illustration 10, pp 213-14, which provides:

A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealings as had been alleged in the federal action. Even if diversity of citizenship between the parties did not exist, the federal court would have had “pendent” jurisdiction to entertain the state theory. Therefore unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred. *Pierson* at 379-80.

Pierson then stated that “if the federal court would clearly have dismissed the state claims when it dismissed the federal claims, then the doctrine of res judicata should not apply.” *Pierson* at 383. *Pierson* proceeded to cite a number of federal cases and the Restatement for the proposition that “we can confidently surmise that, as a general rule, where, as in the instant case, all federal claims are resolved before trial, federal courts will decline to exercise supplemental jurisdiction over remaining state law claims, preferring to dismiss them without prejudice for resolution in

² The elements for res judicata under both Michigan and federal law are very similar. *See, Estes*, 481 Mich at 585; *Sanders Confectionery Products v Heller Financial, Inc*, 973 F2d 474, 480 (CA 6, 1992). The only difference is that under federal law, there must also be an identity of the causes of action. *Sanders* at 480. Identity of causes of action means an “identity of the facts creating the right of action and of the evidence necessary to sustain each action.” *Sanders* at 484. Rodriguez’s state law claims are based on the same facts that Rodriguez alleged in the 2009 Fraud on the Court Action. (Compare Exs. A, C). The identity of facts and evidence are the same, satisfying this additional federal law element.

the state courts. . . . We hold that, where the district court dismissed all plaintiff's federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims." *Pierson* at 384, 387.³ In support of this proposition, *Pierson* quotes language from a Supreme Court opinion regarding pendent jurisdiction to the effect that if the "federal claims are dismissed *before trial*, . . . the state claims *should be dismissed as well*." *Pierson* at 383-84 quoting *United Mine Workers of America v Gibbs*, 383 US 715, 725-27; 86 S Ct 1130; 16 L Ed 2d 218 (1966). However, the Supreme Court has since clarified the statement in *Gibbs* upon which *Pierson* relied, and held that it "does not establish a mandatory rule to be applied inflexibly in all cases." *Pierson, dissent*, at 393, n 10 quoting *Carnegie-Mellon Univ v Cohill*, 484 US 343, 350, n 7; 108 S Ct 614; 98 L Ed 2d 720 (1988).

The rule and rationale of the majority in *Pierson* were met with immediate criticism when they were raised and pronounced in Michigan, and have been heavily criticized in other jurisdictions, most notably by Justice Taylor in his strong dissent in *Pierson*, and by Court of Appeals Judge Hoekstra in his similar dissent in the prior case of *Bergeron, supra*. Justice Taylor first noted that the Restatement rule adopted by the majority in *Pierson*, is not consistent

³ Some examples of exceptional circumstances provided in *Pierson* are when the supplemental claim significantly invokes questions of federal policy, when the court and litigants have spent considerable time on the supplemental claims before the federal claim was dismissed, where there have been substantial resources invested in the lawsuit towards the resolution of the dispute, and the parties are ready for trial. *Pierson* at 386. Had Rodriguez filed all of his claims in the federal Fraud on the Court Action, it is very likely that the federal court would have exercised supplemental jurisdiction and dismissed the state claims on the merits at the same time it dismissed the federal claim on the merits as an exceptional circumstance or otherwise. Rodriguez has been pursuing his claims against FedEx for more than 10 years, and the federal courts actually involved in that process have held that there was no fraud or deception of the courts, subversion of justice, or defiling of the integrity of the courts.

with Michigan's "broad" approach to res judicata, and it depends on a "suspect proposition, i.e., one can surmise whether a federal court 'clearly' would have done something when it had discretion to do it or not to do it as the court saw fit." *Pierson, dissent*, at 390 citing *Street v Corrections Corp of America*, 102 F3d 810, 818 (CA 6, 1996) ("district courts enjoy 'wide discretion' in deciding whether to retain supplemental jurisdiction over a state claim after all federal claims have been dismissed").

Justice Taylor pointed out that the caveat in comment e of the Restatement, adopted by the majority in *Pierson*, has been persuasively criticized, and found to be "unworkable because: (1) it requires a court to engage in 'speculative gymnastics,' (2) calls for 'pure speculation,' and (3) requires an exercise in 'prognosticative futility.'" *Pierson, dissent*, at 390 [citations omitted]. As if having the instant Rodriguez case in mind, Justice Taylor then stated that this "exception in the Restatement inappropriately allows a plaintiff's voluntary choice not to include state law claims in a federal complaint to subvert the strong policy grounds underlying the doctrine of res judicata. There is no question that adopting this exception from the Restatement does not conserve judicial resources and that it subjects defendants to the vexation and costs associated with multiple lawsuits." *Pierson, dissent*, at 391 [citation omitted].

Justice Taylor continued that "[w]e should not countenance, by adopting the exception from the Restatement, a plaintiff's action in failing to plead a state law theory in a federal court (perhaps with the hope of later litigating the theory in a state court) because it was possible, or even probable, that the federal court would have declined to exercise its supplemental jurisdiction. Rather, such a plaintiff should plead state claims in the federal court, and, if that court fails to hear the claims, the plaintiff would then be allowed to pursue state law claims in a state court. If a plaintiff does plead or attempt to plead state law claims in federal court and the

court later dismissed all federal jurisdiction granting claims, then the federal court will decide whether to decline jurisdiction over the state law claims. Only then will a state court know for certain whether the federal court declined to exercise its supplemental jurisdiction over the state law claims.” *Pierson, dissent*, at 391-92.

There is some significant overlap in the dissent of Justice Taylor in *Pierson* and the dissent of Judge Hoekstra in *Bergeron*. However, Judge Hoekstra makes a number of additional key points. First, he highlights an important characteristic of res judicata. “The doctrine does not apply when a court itself splits a cause of action, either by dismissing a claim without prejudice attributed to the litigant [citation omitted], or by declining jurisdiction on a pendent state claim [citation omitted]. Rather, the doctrine applies when the litigant [like Rodriguez] splits the cause of action. [citation omitted]” *Bergeron, dissent*, at 636.

Second, he highlights a line of cases holding that “in order to show that the court in the first action would ‘clearly have declined’ to exercise jurisdiction over the whole action, a plaintiff must file the state claim in federal court, invoke the court’s pendent jurisdiction, and thus build a record reflecting the court’s exercise of discretion over pendent jurisdiction.” *Bergeron, dissent*, at 633, 634 citing *Nwosun v General Mills Restaurants, Inc*, 124 F3d 1255, 1258 (CA 10, 1997) (“We are persuaded that uncertainty over whether a federal court would have exercised pendent jurisdiction does not justify a conclusion that a plaintiff was denied a full and fair opportunity to litigate a claim.”); *Gilles v Ware*, 615 A2d 533, 541 (DC App, 1992) (“a federal court is not obliged automatically to dismiss a pendent state claim if it grants summary judgment on a federal claim.” Also pointing out the inherently contradictory concept of “predicting that a court will ‘clearly’ decline to do something that is a matter of ‘discretion’”); *Reeder v Succession of Palmer*, 623 So2d 1268, 1274 (La, 1993) (“The rules do not countenance

a plaintiff's action in failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow"); *Anderson v Phoenix Investment Counsel, Inc*, 387 Mass 444, 451; 440 NE2d 1164 (1982) (holding that it is not enough that federal court possibly or probably would have dismissed the pendent state law claims); *Blazer Corp v New Jersey Sports & Exposition Authority*, 199 NJ Super 107, 112; 488 A2d 1025 (1985) (holding that a plaintiff who does not raise state claims in a federal court action will be barred from thereafter asserting them in state court); *Rennie v Freeway Transport*, 294 Ore 319, 327; 659 P2d 919 (1982) ("We are convinced that the better rule, the one more consonant with the policies behind res judicata, is that a plaintiff must attempt to have all claims against a defendant arising out of one transaction adjudicated in one court in one proceeding, at least insofar as possible, despite the fact that the various claims may be based on different sources of law."); *Mohamed v Exxon Corp*, 796 SW2d 751, 756-57 (Tex App, 1990) (holding that when no effort was made to present state claims to federal court, state court must presume that federal judgment is res judicata). Each of these cases cites more cases, authorities, treatises, and analyses supporting and establishing this rule of res judicata law in many jurisdictions around the country.

This line of cases and interpretation "is aptly expressed within the reporter's notes to § 25 [Restatement], which state that 'in cases of doubt, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit.'" *Bergeron, dissent*, at 635 quoting Restatement Judgments, 2d, § 25, p 228.

Moreover, federal courts can and do exercise supplemental jurisdiction over state claims even after dismissing federal claims on summary judgment. *See, e.g., Stevens v St Elizabeth Medical Center, Inc*, 533 Fed Appx 624 (CA 6, 2013) (on balance, interests of judicial economy

supported decision of district court, which was familiar with the facts, to resolve similar state-law claims instead of dismissing them without prejudice after having dismissed federal claims); *nSight, Inc v PeopleSoft, Inc*, 296 Fed Appx 555 (CA 9, 2008) (federal court exercised supplemental jurisdiction over state claims after dismissing and entering summary judgment on federal claims, where federal court was familiar with the facts and issues underlying state law claims, and this advanced judicial economy and convenience to the parties.); *Orria-Medina v Metropolitan Bus Authority*, 565 F Supp 2d 285 (D PR, 2007) (in appropriate situation, federal court may retain pendent jurisdiction over state-law claims notwithstanding early demise of all foundational federal claims).

It is also very likely here that the same federal court (which had been dealing with Rodriguez's cases for so many years and was actually involved in every aspect of the underlying cases) would have dismissed all of the state claims on their merits with prejudice when it dismissed the virtually identical fraud on the court federal claim with prejudice. Had Rodriguez filed them together in one action, as he should have, there is little doubt that they would have met the same fate in federal court as their federal brethren. **This Court should grant leave to appeal in this action, and then adopt the rule of law for res judicata as stated in the dissents of Pierson and Bergeron. It is the perfect case to do so.**

Rodriguez has argued that the federal court "*declined* to exercise pendent jurisdiction over the remaining state-law claims," (Ex. T at 10). But that argument is wrong legally and factually. The Court of Appeals glossed over this when it simply stated that "the federal court held that it lacked jurisdiction over plaintiff's state law claims and remanded the case to the Wayne Circuit Court for adjudication." (Ex. R at 5). To be clear, there was no opportunity for the federal court to exercise **pendent** jurisdiction over Rodriguez's state law claims, and **the**

federal court did not decline to exercise pendent jurisdiction.

The federal court dismissed the 2009 Fraud on the Court Action on the merits on February 10, 2010. (Ex. N). Separately, this state action had been removed to federal court. Rodriguez moved to remand it to state court. The federal court remanded it to state court on April 1, 2010. (Ex. B). By the time the federal court decided whether to remand the instant action to the state court, the 2009 Fraud on the Court Action had already been dismissed. There was no existing federal case to which to “append” the state law claims upon which pendent jurisdiction could be based. For there to be pendent jurisdiction or the opportunity for a federal court to exercise pendent jurisdiction over state law claims, there must be a civil action over which the district court has original jurisdiction. 28 USC 1367(a). *Brownridge*, 115 Mich App at 748, citing *United Mine Workers*, 383 US at 725. The federal court then has discretion as to whether it will exercise pendent jurisdiction over the state law claims. 28 USC 1367(c). Here, the federal court did not have an opportunity to exercise, and then decline to exercise, pendent jurisdiction over Rodriguez’s state law claims. Importantly, the federal court’s remand opinion here does not address at all pendent jurisdiction concerning Rodriguez’s state law claims, or the federal court’s declining to exercise pendent jurisdiction. Rather, the federal court determined that it did not have original jurisdiction over the state-law claims. (Ex. B at 5-10). In short, the federal court never declined to exercise pendent jurisdiction over Rodriguez’s state law claims.

2. Collateral Estoppel

The decisions of the district court and Sixth Circuit in the 2009 Fraud on the Court Action give rise to collateral estoppel here. The first element is that a question of fact essential to the judgment was actually litigated and determined by the first final judgment. (*See*, Section III.B. above). Rodriguez alleged in both the 2009 Fraud on the Court Action and this action that

he, his counsel, and the courts were deceived. (*See*, § III. C. above). In addition, the district court *did* rule that Martin (Rodriguez’s attorney) had knowledge of the unnotarized nature of the affidavit (Ex. N at 5-6), which the Sixth Circuit affirmed. So whether Rodriguez’s attorney (and therefore Rodriguez) was deceived has already been decided. As for the “forgery” allegation, even accepting it as true, it is barred by collateral estoppel, because Rodriguez expressly litigated the forgery allegation in the Sixth Circuit. (Ex. E). The issues in the two cases are identical. These were questions of fact essential to the judgment that were actually litigated. (Ex. D at 8–9). The first element for collateral estoppel is clearly satisfied.

All the parties here are the same exact parties in the 2009 Fraud on the Court Action. (Exs. A, C). They had a full and fair opportunity to litigate the issues in the federal courts, satisfying the second element for collateral estoppel. (*See*, § III. B. above).

There was also mutuality of estoppel. Defendants, who are taking advantage of the decision, were parties to and bound by the decision in the 2009 Fraud on the Court Action, satisfying the third element for collateral estoppel. (*See*, Section III.B. above). Rodriguez is barred by collateral estoppel from asserting the very basis of his complaint here — that he, his counsel and the courts were deceived or defrauded by the affidavit or Brodeur’s statements.

C. Res Judicata and Collateral Estoppel Arising From the 2003 Employment Litigation Bar the Complaint Here

1. Res Judicata

The Employment Litigation independently gives rise to res judicata effect here. The Employment Litigation was decided on the merits, after an express objection to the affidavit, after cross-examination about the affidavit, and through a jury trial and a Sixth Circuit appeal. The Sixth Circuit confirmed that Brodeur’s alleged “misconduct” was one ground of the appeal. The first element of a decision on the merits is established. (Ex. M at 1).

The second element requires that the matter contested in the second action was or could have been resolved in the first and bars all matters that with due diligence should have been raised in the earlier action. As already explained, the issues concerning the affidavit were raised and litigated in the Employment Litigation. (See § IVA above). But even if they had not been raised, they could have been raised in the Employment Litigation. The second element for res judicata is met.

The third element is also met as the Employment Litigation and this action both involve the same parties or their privies. Under Michigan law, privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline*, 266 Mich at 214. Under federal law, privity means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented. *Sanders*, 973 F2d at 481. Privity “simply represents a conclusion that a person is so closely connected to a party that with respect to the issues in litigation the person’s interests are essentially the same as those litigated interests of the party. . . . Privity and fairness exist if a party represented the interests of the non-party, such as a guardian or fiduciary might represent a ward or beneficiary. The case law clearly supports this principle.” *United States v Truckee-Carson*, 649 F2d 1286, 1303 (CA 9, 1981) (citations omitted), *rev’d in part on other grounds*, 463 US 110 (1983). FedEx, its employee and lawyers are all in privity.

If Rodriguez is found to have standing to pursue this action, there is also privity between Rodriguez here and his bankruptcy estate in the Employment Litigation. The bankruptcy estate pursued the same arguments and alleged bases for relief being asserted here. (Exs. I, J, K at 47-50). Moreover, the bankruptcy court order closing the bankruptcy case expressly ordered that the bankruptcy estate will continue the Employment Litigation “to protect the interest of the

estate's creditors and Debtor, Jose Antonio Rodriguez." (Ex. S) (emphasis added). That order goes on to state that "if and when there comes a time when the Debtor is entitled to a distribution from the [Employment Litigation], the case shall be reopened, . . . and the Trustee shall be allowed to fully administer such interest and distribute the proceeds according to law." (Ex. S). This unequivocally meets the privity requirement as one whose interests were adequately represented. *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 193 F3d 415, 423 (CA 6, 1999) (for privity, adequate representation includes an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues). Privity is satisfied, establishing the third element. (Ex. A ¶¶11-14).

As for the additional federal law element for res judicata, it is met as there is an identity of the facts creating the right of action and of the evidence necessary to sustain each action. Rodriguez's claims here are based on the behavior in the Employment Litigation, which behavior has been exhaustively considered and argued in the Employment Litigation case itself.

2. Collateral Estoppel

In the Employment Litigation, the affidavit was objected to, and was the subject of cross-examination of Adkinson. Adkinson testified that he signed the unnotarized version and that the statements in the affidavit – which are identical in both the notarized and unnotarized versions – are true. (Ex. J at 57-59; See § IVA above). The jury decided all questions of fact and issued a verdict for FedEx as to the truth of the testimony. Rodriguez concedes that the question of whether the notarized version of the affidavit was also forged was raised in the Employment Litigation. (Ex. T at 3). A valid and final judgment resulting from a jury verdict is necessarily a determination on the merits. *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

In addition, in the appeal of the Employment Litigation, the Sixth Circuit expressly

considered and rejected the alleged attorney misconduct concerning the affidavit (which Rodriguez raises here), and affirmed the decision against the Rodriguez estate. The proof that the issues, facts and evidence are identical is that these very issues were briefed by the parties before the Sixth Circuit. (Exs. K at ix, 47-50; L at 13-17, 23-24, 55-56). The first element of collateral estoppel is met. (*See*, Section III.B. above).

As for the second element, collateral estoppel requires that the same parties, or their privies, “had a full and fair opportunity to litigate the issue” in the previous suit. *Monat v State Farm*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). As already explained in § V.D.1. above, privity exists and this element is met. The third element is met here because Michigan courts allow defensive use of collateral estoppel in the absence of mutuality. *See, e.g., Alterman*, 195 Mich App at 424; *Kircher v Steinberg*, 2001 Mich App LEXIS 1862 at *11 (Nov 20, 2001).

D. Several Independent Grounds Exist for Affirming the Trial Court’s Dismissal of the Complaint

1. Rodriguez Lacks Standing to Bring This Action

Rodriguez lacks standing to assert the claims he alleges. Whether a party has standing is a question of law that the appellate court reviews de novo. *Manuel v Gill*, 481 Mich 637, 642-43; 753 NW2d 48 (2008). A party must have standing and be the real party in interest to commence an action, otherwise the complaint should be dismissed. MCR 2.116(C)(5); MCR 2.201(B). Here, it is undisputed that the Employment Litigation became property of the bankruptcy estate under the control of the Trustee, when Rodriguez filed a petition for Chapter 7 bankruptcy protection in March 2004. 11 USC 541(c)(1); Ex. F; *Young v Independent Bank*, 294 Mich App 141, 143-45; 818 NW2d 406 (2011) (“It is well established that the interests of the debtor in property include causes of action. [citations omitted]. Moreover, ‘the right to pursue causes of action formerly belonging to the debtor . . . vests in the trustee for the benefit of the estate. The

debtor has no standing to pursue such causes of action.’ [citations omitted]. The debtor can only bring suit on a vested asset if the trustee abandons it or the court gives permission.” [citations omitted]).

Because Rodriguez himself was not a party to the Employment Litigation, any allegedly wrongful acts taken by FedEx, its employee, or its counsel during that action did not impact Rodriguez personally. Therefore, he cannot establish any causation between defendants’ acts in the Employment Litigation and his own damage as required for standing. *See, Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007) (affirming dismissal of complaint where Trustee was the only proper party). Standing is a prerequisite that the trial court and Court of Appeals have been willing to overlook thus far, but this Court should not.

2. The Fraud Count Fails to State a Claim Upon Which Relief Can Be Granted

A fraud claim must be pled with particularity. MCR 2.112(B)(1). With respect to defendants Sargent and Disbrow, there are no specific allegations whatsoever and the amended complaint fails to state a fraud claim against them. As for the remaining defendants, Rodriguez fails to state and has not alleged or shown facts supporting at least two of the elements of his fraud claim: that the representation was made with the intention that Rodriguez would rely upon it, and that Rodriguez acted in reliance upon it. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Here, the representations alleged to have caused Rodriguez’s damage (court decisions) were made to and relied upon by the courts, not by Rodriguez. (Ex. A ¶¶23, 26, 29, 35, 40, 61, 67–69, 75, 83). Thus, they fail to support a fraud claim by Rodriguez himself. Moreover, by objecting to the affidavit at every turn, Rodriguez’s estate did the opposite of relying on the affidavit. In short, Rodriguez has not even alleged a fraud claim as a matter of law. The trial court and Court of Appeals have been willing to overlook this, but this Court

should not.

3. The Abuse of Process Count Fails to State a Claim and is Time-Barred

An abuse of process claim requires a plaintiff to plead and prove (1) an ulterior purpose and (2) an act that is improper in the regular prosecution of the case. *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). “[T]he tort of abuse of process is disfavored, and must be narrowly or strictly construed” 1 Am Jur 2d, Abuse of Process § 1, 457. This tort is generally used when a plaintiff files a lawsuit to gain an advantage outside of court, using the process as a “form of extortion.” *Three Lakes Ass’n v Whiting*, 75 Mich App 564, 573; 255 NW2d 686 (1977). Rodriguez has failed to allege facts supporting either an “ulterior purpose” or “improper act”. Moreover, damages are an essential element of a prima facie abuse of process claim. *Id.* at 575. Here, any alleged damage was caused by decisions of the courts, but the courts were not deceived. Rodriguez’s allegations are not a basis for an abuse of process claim. *See also, Friedman*, 412 Mich at 30-31 (affirming dismissal of abuse of process claim against opposing counsel from earlier action). In addition, the limitations period for an abuse of process claim is at most three years. MCL 600.5805(10); *Moore v Michigan Nat’l Bank*, 368 Mich 71, 76; 117 NW2d 105 (1962). Here, the limitations period expired no later than August 29, 2008. *See, Ex. A, ¶¶ 27, 55.* The abuse of process claim, filed on November 17, 2009, is time-barred. Rodriguez has not even alleged an abuse of process claim and it is time-barred in any event as a matter of law. The trial court and Court of Appeals have been willing to overlook this, but this Court should not.

VII. CONCLUSION AND RELIEF REQUESTED

Defendants/Appellants request that this Court grant this application for leave to appeal. This is the quintessential case for addressing an outdated quirk in Michigan's jurisprudence on the res judicata effect of a federal court's summary dismissal on the merits in state court proceedings. If the Michigan Court of Appeals decision is permitted to stand, it will encourage endless, repetitive litigation, that wastes judicial resources, and that promotes conduct that is the exact opposite of what the doctrines of res judicata and collateral estoppel are intended to accomplish in this State. In addition, under existing res judicata and collateral estoppel law, the Michigan Court of Appeals decision is clearly erroneous and results in material injustice to defendants.

Ultimately, whether by a summary order, or after leave is granted to appeal, this Court should reverse the decision of the Court of Appeals and affirm the dismissal of Rodriguez's complaint by the Wayne County Circuit Court on one or more of the several independent grounds for dismissal established under MCR 2.116(C)(5), (7), and (8). Alternatively, defendants request an order reversing and directing the Court of Appeals to consider and rule upon the independent grounds for affirming the trial court's dismissal which the Court of Appeals ignored even though they had been briefed – plaintiff's lack of standing, failure to state a claim for fraud or abuse of process, and time-bar.

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