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STATE OF MICHIGAN

COURT OF APPEALS

PHYSIATRY AND REHAB ASSOCIATES, d/b/a COLUMBIA CLINIC PAIN AND SPINE INSTITUTE, and CAPITAL HEALTHCARE PC,

Plaintiffs-Appellants,

v

MED CARE WELLNESS, INC,

Intervening Plaintiff,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 22, 2020

No. 351056
Oakland Circuit Court
LC No. 2018-169282-NF

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiffs, Physiatry and Rehab Associates and Capital Healthcare PC, appeal as of right the order of the trial court dismissing their complaint as a sanction because defendant's insured failed to appear for a court-ordered deposition. We vacate the challenged order and remand for further proceedings.

I. FACTS

This appeal arises from a claim for no-fault insurance benefits. On June 11, 2008, Matthew Smock allegedly was injured in an automobile crash. At that time, defendant State Farm had issued a policy of no-fault insurance to Smock. After the crash, defendant paid personal protection insurance (PIP) benefits to Smock under the policy. Defendant asserts that it closed its file in the matter in 2012. In 2018, Smock again treated with several medical providers, including plaintiffs, for injuries purportedly related to the 2008 accident. Defendant declined to pay plaintiffs, and

plaintiffs initiated this action seeking reimbursement pursuant to an assignment from Smock of his rights under the policy.

As part of discovery in this litigation, defendant attempted to depose Smock. Defendant asserts that it contacted Smock by telephone regarding the deposition and that Smock told defendant to contact him only through his attorney. Defendant thereafter scheduled Smock's deposition, and reportedly provided notice and a subpoena to both Smock and his attorney. Defendant's counsel then attempted to confirm the deposition date with Smock's counsel, but after several conversations the attorneys were unable to confirm a date, and the deposition did not occur.

Defendant moved to compel Smock's appearance, and the trial court granted the motion ordering Smock to appear for his deposition. Defendant asserts that it thereafter delivered a new notice and subpoena regarding the deposition to Smock's counsel, and the attorneys agreed on a date for the deposition. Defendant was unable to confirm the deposition time with Smock's attorney, however, and the deposition did not occur.

Defendant moved to dismiss the complaint as a sanction under MCR 2.313(D)(1) because Smock failed to appear for the court-ordered deposition. The trial court granted defendant's motion, dismissing plaintiffs' complaint. The order dismissing the complaint further states the trial court's finding that "Matthew Smock did not sustain accidental bodily injury arising out of the ownership, operation, or use of a motor vehicle on June 11, 2008." Plaintiffs now appeal.

II. DISCUSSION

A. DUE PROCESS

Plaintiffs contend that the trial court's dismissal of their complaint as a discovery sanction violated Smock's right to due process because he was not provided with proper notice of the deposition. We review a trial court's decision to impose discovery sanctions for an abuse of discretion. *Elahham v Al-Jabban*, 319 Mich App 112, 135; 899 NW2d 768 (2017). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 676-677; 806 NW2d 353 (2011). We review de novo the trial court's interpretation and application of court rules, and also review de novo whether a party has been denied due process of law. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014).

Both the United States and Michigan Constitutions prohibit the government from depriving a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. The "deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard." *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). However, a person generally may not assert the denial of constitutional rights on behalf of another person. *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 271; 327 NW2d 910 (1982); see also *Lake v Putnam*, 316 Mich App 247, 256; 894 NW2d 62 (2016) (rejecting the plaintiff's assertion of the violation of the equal protection rights of another person); *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009) (rejecting the respondents' assertion of another person's right to effective assistance of counsel). Constitutional rights are personal, and therefore

a person lacks standing to assert those rights on behalf of another. *In re Morton*, 258 Mich App 507, 509; 671 NW2d 570 (2003).

In this case, plaintiffs brought this action to enforce the assigned contractual rights of Smock under his no-fault policy issued by defendant. Although such contractual rights may be assigned, see *Jawad A. Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 200; 920 NW2d 148 (2018) (an accrued cause of action under a no-fault policy may be freely assigned), the assignment of contractual rights does not grant plaintiffs standing to assert Smock's constitutional right to due process. We therefore reject plaintiffs' assertion of Smock's due process rights.

B. DISCOVERY SANCTIONS

Nonetheless, plaintiffs correctly suggest that the trial court improperly penalized them for the failure of Smock, a non-party, to appear for his deposition. Trial courts are empowered to order a witness to appear. MCR 2.506(A)(1) provides that a court in which a matter is pending "may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and/or to produce documents, or other portable tangible things." Failure to comply with a subpoena served in accordance with MCR 2.506 may be considered a contempt of court. MCR 2.506(E)(1). When a party, or an officer, director, or managing agent of a party fails to produce documents pursuant to a subpoena, the trial court may sanction the party by, among other things, striking pleadings, refusing to permit the party to support claims or defenses, dismissal, or default. MCR 2.506(F).

In addition, trial courts possess inherent authority to sanction litigants and their attorneys; this power to sanction includes the power to dismiss an action. *Swain v Morse*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346850); slip op at 4, citing *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). MCR 2.313(B)(2)(c) authorizes the trial court to impose sanctions, including dismissal, if a party fails to obey an order to provide or permit discovery. MCR 2.313(B)(1) provides that a deponent who fails to be deposed or to answer questions during a deposition may be held in contempt of court. That court rule provides, in relevant part:

> (B) **Failure to Comply With Order**
>
> (1) *Sanctions by Court Where Deposition is Taken*. If a deponent fails to be sworn or to answer a question after being directed to do so by a court in the county or district in which the deposition is being taken, the failure may be considered a contempt of that court.
>
> (2) *Sanctions by Court in Which Action is Pending*. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following.

* * *

> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party; . . . [MCR 2.313(B)].

This Court has held that when a nonparty witness fails to obey a subpoena or order, the appropriate sanction is a penalty against that witness for contempt of court. *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 288; 404 NW2d 242 (1987). In this case, Smock was not a party to the lawsuit, having assigned his contractual rights under the no-fault policy to plaintiffs. Apart from the assignment, Smock is not affiliated with plaintiffs.[1] Because the failure to comply with the trial court's order appears to be Smock's failure alone and not that of plaintiffs, the appropriate sanction would be for the trial court to hold Smock in contempt. Indeed, as a practical matter it is unrealistic to expect plaintiffs to be able to produce an obviously reluctant nonparty witness that even the trial court's order failed to produce.

In addition, dismissal is an extreme sanction that is reserved for intentional misconduct by a party. Although the trial court is in the best position to judge the severity of discovery abuses and to determine the appropriate sanction for improper conduct, *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 88; 618 NW2d 66 (2000), the trial court is authorized to impose the severe sanction of dismissal only when a party intentionally refuses to comply with discovery, not when the failure to do so is accidental or involuntary. *Hardick v Auto Club Ins Ass'n*, 294 Mich App 651, 661; 819 NW2d 28 (2011). Any discovery sanction imposed by the trial court must be "proportionate and just." *Hardick*, 294 Mich App at 662, quoting *Kalamazoo Oil Co*, 242 Mich App at 87. Dismissal of an action is considered a drastic step, *Swain*, ___ Mich App at ___; slip op at 3, and is appropriate as a discovery sanction only in the most egregious circumstances. *Kalamazoo Oil Co*, 242 Mich App at 87. Because there is no indication that plaintiffs in this case refused to comply with discovery, the trial court abused its discretion by imposing the harsh sanction of dismissal even if that sanction were available in this case.

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[1] We note the distinction between this case and *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517; 895 NW2d 188 (2016). In *Dawoud*, the plaintiffs allegedly were injured in a motor vehicle accident, and filed a claim for no-fault benefits against State Farm as their assigned insurer. The service providers who had provided therapy and transportation to the plaintiffs intervened in the action, seeking reimbursement for the provided services. The plaintiffs then failed to attend their own depositions and to comply with other discovery orders, and the trial court dismissed their complaint with prejudice as a sanction. The trial court then granted State Farm's motion for summary disposition of the intervening plaintiffs' claims. This Court affirmed, reasoning that the trial court's dismissal of the plaintiffs' claims operated as an adjudication on the merits of those claims, and thus necessarily barred the providers' derivative claims. *Id*. at 524. Because the insureds in *Dawoud* who failed to attend their own depositions were also the plaintiffs, dismissal was a sanction available to the trial court in that case.

Defendant argues that plaintiffs should be subject to sanctions as a result of Smock's conduct because plaintiffs are Smock's assignees and therefore stand in the shoes of Smock. In its brief on appeal, defendant argues that

> Plaintiffs' rights in this action, therefore, are bound up in Smock's rights – Plaintiffs are in no better position than Smock himself. . . .
>
> Plaintiffs, as Smock's assignees, are properly held responsible for his discovery violations[2] under MCR 2.313. Plaintiffs have no independent cause of action to seek PIP reimbursement from State Farm – they must stand in Smock's shoes. Therefore, the fate of Plaintiffs' claim stands and falls with Smock because it is his rights – not their own – that Plaintiffs seek to enforce.

An assignee stands in the shoes of the assignor, acquiring the same rights and being subject to the same defenses. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2012). In the no-fault context, this means that a healthcare provider who obtains an assignment from an insured possesses whatever rights the insured would have had to collect past due or presently due benefits from the insurer. See *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). However, an assignee is in privity with the assignor only up to the time of the assignment, and as a result, the assignee obtains only the rights possessed by the assignor *at the time of the assignment*. See *Mihajlovski v Elfakir*, 135 Mich App 528, 533-534; 355 NW2d 264 (1984), citing *Saginaw Fin Corp v Detroit Lubricator Co*, 256 Mich 441, 443-444; 240 NW 44 (1932). Because an assignee and an assignor are no longer in privity after the assignment, an assignee is not bound by the subsequent actions of the assignor. See *id*.

In this case, Smock assigned his rights under the no-fault policy to plaintiffs. Smock then failed to obey the trial court's order to appear for his deposition in the subsequent litigation between plaintiffs and defendant, potentially warranting the trial court holding Smock in contempt. Smock's misdeeds during this litigation, occurring after the assignment, do not affect plaintiffs' rights under the assignment. Nor do plaintiffs continue to be in privity with Smock in some sort of partnership after the assignment. True, if it is adjudicated[3] that Smock had no rights at the time

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[2] Smock is not a party to the litigation, however, and therefore does not have "discovery violations."

[3] In its order of dismissal, the trial court also found that "Matthew Smock did not sustain accidental bodily injury arising out of the ownership, operation, or use of a motor vehicle on June 11, 2008," suggesting that Smock's failure to be deposed operates as a default and serves as an adjudication on the merits. In *Dawoud*, after the plaintiffs failed to attend their own depositions the trial court dismissed their complaint with prejudice as a sanction, then granted State Farm's motion for summary disposition of the intervening plaintiffs' claims. This Court affirmed, reasoning that the trial court's dismissal of the plaintiffs' claims operated as an adjudication on the merits of those claims, barring the providers' derivative claims. *Dawoud*, 317 Mich App at 524. But in *Dawoud*, unlike this case, the insureds who failed to attend their own depositions were also the plaintiffs in

of the assignment, then plaintiffs would share in that fate. However, defendant's argument conflates plaintiffs' enforcement of Smock's assigned contractual rights with whether plaintiffs can be penalized with discovery sanctions for the misdeeds of a nonparty witness, who in this case happens to be the assignor. The nature of assignment is that plaintiffs were assigned whatever rights Smock had at the time of the assignment, and these rights are unaffected by Smock's subsequent conduct. Plaintiffs did not become somehow responsible for Smock's conduct during the litigation merely because they are enforcing rights they obtained by virtue of an assignment.

Plaintiffs also contend that the trial court abused its discretion by dismissing their complaint as a discovery sanction in light of the factors set forth in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990). Because we conclude that dismissal of plaintiffs' complaint was not an appropriate sanction for the failure of Smock to attend his deposition, we decline to reach this additional argument.

Defendant also argues that it was plaintiffs' obligation to ensure that Smock appeared for his deposition because without Smock's testimony plaintiffs will be unable to demonstrate that Smock's medical treatment was for injuries sustained in the 2008 accident. Defendant argues that plaintiffs therefore should be subject to dismissal of their claims as a sanction. Defendant does not support this argument with authority, however, and points to no case that holds that a plaintiff who fails to state a claim should be sanctioned. It may be that plaintiffs will be unable to set forth a prima facie case without Smock's testimony. In that event, a motion for summary disposition may prove to be the correct avenue to dismissal of plaintiffs' complaint.

Defendant further suggests that even if the trial court's dismissal of plaintiffs' complaint as a discovery sanction were improper, this Court may nonetheless affirm the trial court's decision because summary disposition under MCR 2.116(C)(10) is appropriate. Defendant correctly observes that this Court has at times affirmed a trial court's decision when the trial court has reached the correct result for the wrong reason. For example, this Court has affirmed when a trial court granted summary disposition on an erroneous basis, but summary disposition was proper on another basis. See, e.g., *Forest Hill Cooperative v City of Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014). We decline to do so here, however.

In this case, the trial court dismissed plaintiffs' complaint as a discovery sanction. Defendant argues that if dismissal as a discovery sanction is inappropriate, this Court should *sua sponte* grant defendant summary disposition under MCR 2.116(C)(10) because without Smock's testimony plaintiffs cannot demonstrate that the services they provided were necessitated by Smock's 2008 auto accident. Unlike a case where summary disposition was granted on an improper basis but was valid on another basis, in this case the trial court has not yet had the opportunity to rule on such a motion. This Court's usual practice is to decline to decide issues for the first time on appeal, and instead to leave such issues to be analyzed and ruled upon by the trial court in the first instance. See *Shah*, 324 Mich App at 194. We therefore decline to grant defendant summary disposition absent such a motion being raised before and decided by the trial court.

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the case, and thus dismissal, and construing the dismissal as an adjudication on the merits, was a sanction available to the trial court in that case.

The trial court's order is vacated. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien