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6.08.07

SUPREME COURT DECIDES NO-FAULT INSURER IS ENTITLED TO STATUTORY MEDICAL EXAMINATION WHICH MAY BE SUBJECT TO CONDITIONS UNDER LIMITED CIRCUMSTANCES

By Nathan J. Edmonds

The Michigan Supreme Court, on June 6, 2007, reversed the Michigan Court of Appeals decision in *Muci v State Farm,* 267 Mich App 431 (2005). The Court of Appeals decision affirmed the trial court's imposition of certain conditions on an independent medical examination relying upon the Michigan Court Rules, which give wide latitude to the trial court to impose the conditions of a Defense Medical Examination (DME).

In Muci, the plaintiff was injured in an automobile accident on May 15, 2002. State Farm was the plaintiff's no-fault carrier and had refused to pay certain benefits. Suit was filed on February 11, 2003. During discovery, State Farm requested the plaintiff submit to an unconditional Defense Medical Examination (DME- ***Practice point***- The Majority of the Michigan Supreme Court referred to the examination as a DEFENSE MEDICAL EXAMINATION OR DME, not as an Independent Medical Examination), pursuant to MCLA 500.3151. The plaintiff's attorney refused and indicated the No-Fault Act and the policy were not controlling and that examination was governed by Michigan Court Rule 2.311(A), the rule governing medical examinations in any litigation. State Farm asserted that the Court Rule conflicted with the No-Fault act and the policy of insurance.

State Farm filed a motion to compel plaintiff to appear for the medical examination without any conditions pursuant to the No-Fault Act. Plaintiff responded by citing MCR 2.311, which allows a trial court to "specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination".

Judge Robert Ziolkowski of the Wayne County Circuit Court allowed the medical examination to proceed, but imposed nineteen (19) conditions on the medical examination, including but not limited to:

- a requirement to produce the defense medical examiner's 1099s indicating the income derived from performing independent medical evaluations;
- allowing the Plaintiff attorney to be present during the examination;
- allowing the examination to be recorded by audio and visual means;
- allowing the Plaintiff attorney to intercept communications between the Plaintiff and the defense medical examiner during the examination;
- precluding the Plaintiff from giving any oral history of the accident; and
- precluding the Plaintiff from having to fill out any paperwork at the examination.

State Farm consequently filed an interlocutory appeal.

The divided panel of the Michigan Court of Appeals, in *Muci v State Farm*, 267 Mich App 431 (2006), in a 2-1 decision, determined that while MCL 500.3151 gives the insurer the right to include reasonable provisions in an insurance policy with reference to physical or mental examinations, that right is not intended to allow an insurer to contractually dictate

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The case is significant for First Party No-Fault (PIP) claims in litigation. IMEs may have conditions placed on the exam only if an insured can demonstrate, with evidence, that the IME will cause annoyance, embarrassment or oppression. Otherwise the IME will be unconditional.

Furthermore, trial courts must follow the insurance policy and the No-Fault Act, which sets forth the conditions of a DME. Additionally, review all policies to ensure that proper language allowing a DME are contained in the policy and that the conditions do not conflict with the No-Fault Act. Trial courts may also refer to exams as a DME (Defense Medical Examination) as the Supreme Court has referred to this exam in the *Muci* case.

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how discovery shall proceed in a civil action. Relying on the discovery rule in MCR 2.311, the panel found that by virtue of the fact that the case was in litigation, and that State Farm was seeking to have Plaintiff submit to a physical or mental examination, the trial court properly treated Defendant's motion to compel as a discovery device subject to the Michigan Court Rules. State Farm then appealed to the Supreme Court claiming it had an unconditional right to a DME.

In reversing the Court of Appeals, the Supreme Court held that the Michigan No-Fault Act and the parties' contract of insurance established the parameters of a mental or physical examination and "that the Court's role is confined to adjudicating disputes that arise under them." *Muci v State Farm*, ___ Mich ___(2007).

The Supreme Court further held that in a no-fault automobile insurance case, the No-Fault Act and the provisions of the parties' insurance policy control whether any conditions may be placed on a DME. A trial court's ability to adjudicate disputes arising under the statute and the policy regarding examinations is limited to the authority granted by the No-Fault Act itself—primarily the provisions of §§ 3142, 3148, 3151, 3153, and 3159, and other applicable sections.

Furthermore, the Court stated that the trial court may impose conditions on an examination under §3159. *Conditions may be imposed if an insured can demonstrate good cause that submitting to a particular examination will cause annoyance, embarrassment, or oppression.*

The Court specified that good cause under §3159 "may only be established by 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements'" , citing *Hertenstein v Kimberly Home Healthcare Inc, 1*89 FRD 620, 624 (D Kan, 1999). Accordingly, only where the Plaintiff submits demonstrable evidence that the medical examination will cause the Plaintiff annoyance, embarrassment, or oppression is a situation created where the court may impose conditions.

In *Muci,* the Plaintiff did demonstrate good cause regarding the medical examiner asking the plaintiff questions about conversations the plaintiff had with her attorney (violation of attorney-client privilege), including questions about potential settlement of the pending litigation. No explanation was offered by the defendant as to why these questions were asked. The Supreme Court then ruled that, *[m]any of those conditions [the 19 proposed] bore no apparent relationship to the 'annoyance' the plaintiff established regarding the improper questioning by the medical examiner concerning the status of the litigation and attorney advice to the insured. On remand, in the event that the defendant insists on using the medical examiner who asked the improper questions, the trial court shall reconsider plaintiff's proposed examination conditions, and determine which conditions, if any, ought to be imposed in light of the evidence proffered by plaintiff.*

The decision of the Supreme Court in Muci, then, provides that a no fault insurer is entitled to have a claimant undergo a medical examination and when involved in litigation, conditions with regard to that examination may only be imposed where the Claimant has proffered evidence of an annoyance, embarrassment, or oppression, as provided by MCL 500.3159.

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