

Show Me the *Money!* Unemployment Records: If Plaintiff Waives Privilege, UIA Must Produce

By Zachary J. Plechaty

November 3, 2023

In *Finch v Gewin*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2023 (Docket No. 360189), the Unemployment Insurance Agency (UIA) lost its fight to withhold Plaintiff's unemployment records from production during discovery. The Court of Appeals ruled the UIA must produce the Plaintiff's unemployment records because Plaintiff voluntarily waived any statutory protections. The facts indicating waiver were twofold. First, Plaintiff testified during deposition concerning his representations to the UIA to obtain benefits. Second, Plaintiff expressly waived privilege by signing an authorization/release form.

The dustup began below in the trial court. During discovery, Plaintiff appeared for deposition and testified he applied for and received unemployment benefits in 2020 and 2021. This testimony led to Defendant, Lloyd's of London, submitting a subpoena to the UIA. The subpoena sought production of documents it had with respect to Plaintiff's application for, and receipt of, unemployment benefits. Additionally, Lloyd's of London obtained a signed release from Plaintiff, who agreed

he was waiving any protections he had under statute to the confidentiality of the documents. Despite the signed release, the UIA declined to provide the documentation, citing MCL 421.11(b)(1)(iii), which did not permit it to provide discovery in a case in which the UIA was not a party. In response, Lloyd's of London moved the trial court to compel the UIA to produce the requested documents, primarily relying on MCL 421.11a, which codified an exception to MCL 421.11(b)(1)(iii), when a claimant testifies voluntarily in separate litigation about representations they made to the UIA. The trial court ultimately agreed with Lloyd's of London. The trial court entered an order compelling the UIA to produce the requested documents. The UIA appealed that decision.

On appeal, the parties disputed whether MCL 421.11a applied, and thus whether Plaintiff waived any protections he might have had under MCL 421.11(b)(1)(iii). Lloyd's of London primarily argued that Plaintiff's deposition testimony concerning his representations to the UIA qualified as testimony "voluntarily" offered before another

SECRET WARDLE NOTES

The *Finch* decision shows how to sidestep the statutory excuse claimed by the UIA when refusing to produce Plaintiff's unemployment records during discovery. This case argued an exception to the statutory provision which UIA relied on. The trial court ordered UIA to produce the records. The UIA appealed and lost.

The key is showing claimant voluntarily waived privilege. For example, if claimant testifies about what he or she represented to the UIA at any stage (application, investigation, renewal, etc.), or if claimant executes a release waiving privilege, that opens the door to obtaining Plaintiff's records from the UIA.

body because Plaintiff is the party who initiated this action, not a defendant who was obliged to participate and testify against his will. Alternatively, Lloyd’s of London argued that Plaintiff explicitly waived any privilege concerning the subpoenaed records by executing the release form that Lloyd’s of London had submitted to the UIA with the subpoena. Conversely, the UIA contended that the Legislature intended for MCL 421.11a to operate only in “subsequent proceedings between an employee and employer” –i.e., the parties to the original UIA proceedings.

The Court of Appeals disagreed with the UIA. “Given the text of MCL 421.11a, we see no basis to consult legislative history, and even if we were so inclined . . . we remain skeptical that the UIA’s view of the statute is correct.” Further, “We agree with Lloyd’s of London’s alternative argument that Plaintiff explicitly waived any privilege concerning the subpoenaed records by executing the release form that Lloyd’s of London had submitted to the UIA with the subpoena.” Additionally, regardless of whether MCL 421.11a applied, it was entirely undisputed that Plaintiff voluntarily chose to waive any protections he had under MCL 421.11(b)(1)(iii) by signing an authorization for the UIA to produce documents requested by Lloyd’s of London. The release indicated Plaintiff was aware the documents would be going to Lloyd’s of London’s attorney. The release also cited the purpose for the release as “discovery in a civil lawsuit.” Plaintiff indicated the UIA should release “all information on file from Q4 2019 to Q3 2021.” Further, when the UIA and Lloyd’s of London were litigating this case, Plaintiff did not make any attempt during deposition or otherwise to assert his privilege under MCL 421.11(b)(1)(iii).

Although the MESA contains a specific provision regarding an implied waiver by a claimant, i.e., MCL 421.11a, the parties did not identify a similar statutory subsection regarding an express waiver. Nevertheless, the Court reasoned that the Legislature’s acknowledgment in MCL 421.11a that a claimant can impliedly waive any and all of their privileges under MCL 421.11 necessarily means a claimant can expressly waive those same rights. In this case, Plaintiff waived those rights by signing the release, and by testifying during deposition concerning his representations to the UIA to obtain benefits.

**Please click below to sign up for Secret Wardle newsletters
pertinent to other areas of the law**

SIGN UP

We welcome your questions – please contact:

Motor Vehicle Litigation Practice Group Chairs

[Anthony A. Randazzo](mailto:arandazzo@secretwardle.com) | arandazzo@secretwardle.com or 248-539-2812
[Renee T. Townsend](mailto:rtownsend@secretwardle.com) | rtownsend@secretwardle.com or 248-539-2859

For questions pertaining to this article

[Zachary J. Plechaty](mailto:zplechaty@secretwardle.com) | zplechaty@secretwardle.com or 248-539-2863



Website



LinkedIn



Twitter



YouTube



Email

S E C R E S T
SW
W A R D L E

Troy | 248-851-9500
Grand Rapids | 616-285-0143
www.secretwardle.com

Contributors
Motor Vehicle Litigation Practice Group

Chairs

Anthony A. Randazzo
Renee T. Townsend

Editors

Sandie Vertel
Sue Willcock
Brenna Scyzoryk

This newsletter is for the purpose of providing information and does not constitute legal advice and should not be construed as such. This newsletter or any portion of the newsletter is not to be distributed or copied without the express written consent of Secret Wardle.

Copyright © 2023 Secret Wardle. All rights reserved.

8614135_1.docx