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A Swing and a Miss: Michigan Court of Appeals Reverses Grant of Plaintiff's "Mulligan" Motion

By Joseph J. Giacalone **May 1, 2024**

> **SECREST WARDLE NOTES**
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> This case stresses the importance of proffering direct, substantively admissible evidence that shows no question of material fact for summary disposition brought under MCR 2.116(C)(10). Further, production of expert opinion reports should be done prior to the close of discovery.

The Michigan Court of Appeals recently released its decision in *Christensen v Amazon Logistics, LLC,* unpublished opinion of the Court of Appeals, issued April 11, 2024 (Docket No. 364919). The Plaintiffs were involved in a motor vehicle accident on October 31, 2020, in which they were rear-ended by a semi-truck that they alleged was operated by Defendant Hussein-Afrah, and owned by Defendants Sarajevo, LLC, Sarajevo, Inc., ENB Enterprises, and/or AFAM Logistics, LLC. The Plaintiffs further alleged that the semi-truck's trailer had signage for Amazon, and that Defendants Sarajevo, ENB Enterprises, and AFAM Logistics were delivery service partners for Amazon. Defendant Hanover insured the Plaintiffs for underinsured motorist and uninsured motorist claims. The appeal, however, only concerned the Plaintiffs' claims for automobile negligence damages against Defendant Amazon.

The trial court entered an initial scheduling order on May 18, 2021, and later amended scheduling order deadlines, which ordered all witness and expert witness lists to be filed by February 28, 2022, discovery cutoff on May 23, 2022, and all dispositive motions to be filed no more than 30 days after facilitation that occurred on May 23, 2022. Amazon timely filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Plaintiffs filed their response on September 1, 2022, which argued that the Plaintiffs had sustained threshold injuries and serious impairments of important bodily functions. Attached to their response, the Plaintiffs attached 300 pages of medical records without an appendix or notations. Amazon, in turn, filed its reply brief on September 7, 2022, arguing the Plaintiffs had conceded summary disposition on Plaintiff Rosemarie Christensen's claim, that Plaintiff Joseph Christensen had not demonstrated an objectively manifested impairment that prevented him from living his normal life, and that none of the Plaintiffs could demonstrate entitlement to their excess wage loss claims. Oral argument was heard on October 6, 2022, and the trial court granted Amazon's motion.

On October 25, 2022, the Plaintiffs filed a motion to set aside or clarify the order granting summary disposition in favor of Amazon, relief from judgment pursuant to MCR 2.612(C), and/or for reconsideration under MCR

2.119(F). The Plaintiffs argued in their motion that Amazon only claimed that the physical injuries allegedly sustained by Plaintiff Joseph Christiansen and minor Plaintiff KLC did not satisfy the threshold of MCL 500.3135(5), and that the Court should not have dismissed Plaintiff Joseph Christiansen and Plaintiff KLC's alleged traumatic brain injuries as insufficient to establish threshold injury status under MCL 500.3135(2)(a)(ii). For the first time in the litigation, the Plaintiffs attached as an exhibit to their motion the expert report and affidavit of Dr. Gerald Shiener, a board-certified forensic psychiatrist, and a preliminary report of Dr. Bradley Sewick, a board-certified neuropsychologist.

Amazon filed a response to this motion, arguing that the Plaintiffs (1) never claimed MCL 500.3135(2)(a)(ii) applied to their case, (2) never argued in their response to Amazon's Motion for Summary Disposition that either Plaintiff Joseph Christiansen or KLC satisfied MCL 500.3135(2)(a)(ii), and (3) the Plaintiffs never produced any substantively admissible supportive documents to defeat Amazon's summary disposition motion. As to the last argument, Amazon argued that the Plaintiffs were improperly submitting affidavits and expert opinion reports to the Court that had been produced months after the close of discovery. The Plaintiffs failed to identify the opinions of any experts retained for litigation, failed to supplement discovery responses regarding expert witnesses, and did not produce Dr. Shiener's expert report and affidavit or Dr. Sewick's preliminary report in response to Amazon's Motion for Summary Disposition. Instead, these documents were only produced after judgment was rendered.

As to the Plaintiffs' arguments for relief from judgment for mistake, Amazon argued that MCR 2.612(C)(1)(a) did not provide grounds for relief from the order granting Amazon's Motion for Summary Disposition. The Court did not make a "mistake" because the Plaintiffs did not present evidence of severe neurological injuries in response to Amazon's Motion for Summary Disposition. The Plaintiffs' motion for relief under MCR 2.612(C)(1)(b) presented evidence that was not "newly discovered," and the medical records attached to the Plaintiffs' motion did not constitute testimony under oath. Further, there were no grounds for relief under MCR 2.119(F)(3) because the Plaintiffs could not demonstrate palpable error in which the Court had been misled.

Oral argument was held on November 3, 2022, and Amazon argued that the Plaintiffs sought a "mulligan" from the Court, and that the Court had made no error in granting Amazon's Motion for Summary Disposition. On December 2, 2022, the Court issued its opinion, holding that it was dispensing of the Plaintiffs' argument under MCR 2.119(F), and was only proceeding with an order under MCR 2.612(C). After reviewing the documents that were submitted in the Plaintiffs' response to Amazon's Motion for Summary Disposition, as well as the newly produced evidence in the expert report and affidavit of Dr. Gerald Shiener and the preliminary report of Dr. Bradley Sewick, the Court issued an order granting the Plaintiffs' motion on the grounds of MCR 2.612(C)(1)(f). Amazon then filed a Motion for Reconsideration, which was denied after oral argument on January 13, 2023.

On January 17, 2023, the Court granted Amazon's Motion for Stay of Proceedings, and Amazon filed its Application for Leave to Appeal to the Michigan Court of Appeals the same day. In its Application, Amazon argued that the trial court erred in granting relief from judgment under MCR 2.612(C)(1)(f) when the Plaintiffs never specifically sought relief under MCR 2.612(C)(1)(f), reinstated claims that the Plaintiffs had conceded were abandoned, and that no extraordinary circumstances existed to warrant relief under MCR 2.612(C)(1)(f). Leave was then granted.[1]

[1] *KLC v Mahad Hussein-Afrah*, unpublished order of the Court of Appeals, entered June 27, 2023 (Docket No. 364919).

The Court of Appeals looked to MCR 2.612(C)(1)(f), which the trial court considered on its own. For this "catch-all" provision to apply, three requirements must be met:

> (1) the reason for setting aside the judgment must not fall under subsections a through e [of MCR 2.612(C)(1)], (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice.

Heugel v Heugel, 237 Mich App 471 (1999). Generally, relief is granted under MCR 2.612(C)(1)(f) only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. *Id*. at 479.

The Court of Appeals held that the trial court abused its discretion twice: first when it granted the Plaintiffs' Motion for Relief from Judgment, vacating the order granting Amazon's Motion for Summary Disposition, and reinstating the claims of all three Plaintiffs, and second when it denied Amazon's Motion for Reconsideration of this decision. Further, the trial court also should not have granted relief under MCR 2.612(C)(1)(f) because even where the Court concluded that extraordinary circumstances existed that mandated setting aside the judgment to achieve justice, Amazon's substantial rights would be detrimentally affected by setting aside a judgment already rendered in Amazon's favor. The Court of Appeals cited to *Heugel*, stating that "setting aside the judgment rewards plaintiffs for their lack of due diligence and improper conduct, and burdens Amazon with having to continue to litigate a costly lawsuit in which it properly defended and legitimately prevailed." *Heugel*, 237 Mich App at 479. Further, there was no evidence that Amazon obtained the judgment by improper conduct. *Id*.

In discussing Amazon's Motion for Summary Disposition pursuant to MCR2.116(C)(10), the Court of Appeals held that Amazon identified that the matters that had no disputed factual issues. *Quinto v Cross & Peters Co*, 451 Mich 358 (1996). It was then incumbent on the Plaintiffs to establish by evidentiary materials that a question of material fact existed that would preclude the trial court from granting Amazon's Motion for Summary Disposition pursuant to MCR 2.116(C)(10). The trial court had to consider the substantively admissible evidence the Plaintiffs proffered in opposition to the motion, and not the Plaintiffs' arguments. *Maiden v Rozwood*, 461 Mich 109 (1999). The Plaintiffs bore the obligation to direct the Court to the evidence that established a question of fact. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362 (2009) (internal citation omitted). To the extent that the Plaintiffs sustained a threshold injury under the No-Fault Act because they had closed-head injuries, the Plaintiffs failed to rebut Amazon's Motion for Summary Disposition by only attaching medical records, which did not constitute testimony under oath as required by MCL 500.3135(2)(a)(*ii*); further, the records were only for Plaintiff Joseph Christiansen, and not Plaintiff KLC, so the records could not support any claim for KLC.

The Court of Appeals took further exception to the trial court allowing new evidence – the medical records and affidavits not previously used in the Plaintiffs' response to Amazon's Motion for Summary Disposition - being introduced after the close of discovery. As the trial court failed to cite any court rule or precedent to grant the extraordinary relief it provided to the Plaintiffs, the use of undisclosed expert reports and records not produced during discovery and produced only a month before trial on a case that had been pending 18 months was not "new evidence," and could not allow for the relief the trial court provided to the Plaintiffs under MCR 2.612(C)(1)(f).

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