MI Decisions That Cite This Case

Decided June 7, 1965. Rehearing denied July 13, 1965.

Brooks v Fields
375 Mich 667, 135 NW2d 346
Michigan Supreme Court Opinion

Opinion by Souris, J. T. M. Kavanagh, C. J., and Smith and Adams, JJ., concurred with Souris, J.Dissenting opinion by Kelly, J. Dethmers and O'Hara, JJ., concurred with Kelly, J.Black, J., did not sit.

Calendar No. 2, 3.
Docket No(s) 50,552, 50,553
Disposition: Reversed and remanded.

Souris, J. | **Kelly, J. (dissenting).**

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Souris, J.

Defendants asked the trial court to grant summary judgment in their favor, alleging as the sole basis for such grant the provisions of section 1 of part 2 and section 15 of part 3 of the workmen's compensation act, CLS 1961, §§ 412.1, 413.15 (Stat Ann 1960 Rev §§ 17.151, 17.189). Section 1 pertinently provides:

"Every employee going to or from his work while on the premises where his work is to be performed, and within a reasonable time before and after his working hours, shall be presumed to be in the course of his employment."

Section 15 pertinently provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies".

The trial judge in his decision granting summary judgment stated that since plaintiff Dolores Brooks had alleged in her complaint all of the facts necessary to bring into play the presumption of section 1 she could not on trial be permitted to rebut that presumption, and if the presumption were unre- [Page 670] butted her suit could not succeed. We need not consider this reasoning process in its entirety simply because the trial judge's basic premise was wrong.

The fact is that the complaint of Dolores Brooks did not allege all facts necessary to give rise to section 1's presumption. For example, nothing appears in the complaint, or in any of the nonconclusionary pleadings before the trial court, to indicate when or whether Mrs. Brooks' working hours had begun or ended. Without such information, it is impossible to say that the presumption has arisen, since it arises only within a "reasonable time" before or after working hours. Thus the judgment of the trial judge, based as it was upon a major misconception of the record, cannot be permitted to stand.

Furthermore, even if Mrs. Brooks were in the course of her employment by virtue of section 1's presumption, she would not be barred from suit by section 15 unless the defendants also were in the course of their employment by the same employer. Aside from pleading such conclusion as an affirmative defense, denied by plaintiffs, there was nothing before the trial court, not even an affidavit, from which such a finding could be made even if it were then appropriately the function of the judge to make such findings. Under such circumstances, summary judgment as provided for by GCR 1963, 117, should not have been entered. See *Durant v. Stahlin (Appeal in re Van Dusen, Elliott, Romney)*, 375 Mich 628, 640, also decided this day.

Reversed and remanded. Costs to plaintiffs.

T. M. Kavanagh, C. J., and Smith and Adams, JJ., concurred with Souris, J.

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Kelly, J. (*dissenting*).

Plaintiffs appeal from the trial court's order granting defendants' motion for summary judgment as set forth in their "state- [Page 671] ment of facts," under the subheading "the accident facts," as follows:

"These are the cases of Dolores and Ernest Brooks which are consolidated for appeal. Plaintiff Dolores Brooks was injured in an automobile collision which occurred on January 13, 1961, *at about 3:10 p.m., in a private parking lot maintained by the Ternstedt Division, General Motors Corporation,* when an automobile owned and operated by defendant John McDill collided with an automobile owned and operated by defendant Oscar Fields, while Dolores Brooks was in said John McDill's vehicle as a passenger. Plaintiff Ernest Brooks brings his action for medical expenses and loss of his wife, Dolores Brooks' services and consortium. *Dolores Brooks, John McDill and Oscar Fields were all employed by the Ternstedt Division, General Motors Corporation, and were all employed in the same plant.* Ernest Brooks was not employed by the Ternstedt Division. *The collision between the two vehicles happened at the conclusion of the working day."* (Emphasis ours.)

Both defendants filed affirmative defenses alleging that plaintiff Dolores Brooks and both defendants, together with their mutual employer, were at the time of the accident subject to the provisions of the workmen's compensation act and that the exclusive remedy for recovery on account of injuries and damages sustained "is that provided by said workmen's compensation act."

Plaintiffs answered defendants' affirmative defenses denying the allegations and stating "that as a matter of fact your Dolores Brooks was not acting within the scope of her employment."

Defendants moved the court to enter summary judgment for the reason that: "Plaintiff's action is barred by the provisions of CLS 1961, §§ 412.1, 413.15 (Stat Ann 1960 Rev §§ 17.151, 17.189)."

[Page 672] The pertinent part of CLS 1961, § 412.1 (Stat Ann 1960 Rev § 17.151) is the amendment by PA 1954, No 175, that:

"Every employee going to or from his work while on the premises where his work is to be performed, and within a reasonable time before and after his working hours, shall be presumed to be in the course of his employment."

CLS 1961, § 413.15 (Stat Ann 1960 Rev § 17.189), provides in part as follows:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section."

In granting defendants' motion, the trial court, after holding that the language of the act as amended[1] applies not only to one "'while at the place where his work is to be performed or while actually performing it, but to one "going to or from his work while on the premises,"'" asks "where," as in the instant case, "plaintiff alleges by way of complaint all facts necessary to sustain the validity of the presumption, can it now be claimed that the same plaintiff will rebut said presumption on trial to show that the facts are otherwise?"

The court properly relied upon *Freiborg v. Chrysler Corporation*, 350 Mich 104, 107, and correctly construed CLS 1961, § 412.1 that the workmen's compensation act applies not only to injuries received [Page 673] "'while at the place where his work is to be performed or while actually performing it, but to one "going to or from his work while on the premises,"'" as is disclosed by the syllabus in that case:

"Injury to plaintiff employee on parking lot provided by employer for the employees, inflicted upon plaintiff by a fellow employee while plaintiff was en route from his car to place where work was to be performed a short while before working hours, *held,* to have arisen out of and in the course of his employment and compensable."

Appellant Dolores Brooks majors the point that she has never applied for or received compensation, and states that the question now presented to this Court has never been ruled upon in Michigan.

There is no election of remedies under the workmen's compensation act. See CLS 1961, § 413.15 (Stat Ann 1960 Rev § 17.189).

In *Sargeant v. Kennedy*, 352 Mich 494, we held that the statute (CLS 1961, § 413.15 [Stat Ann 1960 Rev § 17.189]) bars all actions against a fellow employee when plaintiff's injuries arise out of and in the course of his employment, without regard as to whether or not there has been a prior action for compensation.

The importance of this immunity provision for fellow employees is commented upon in 2 Larson's Workmen's Compensation Law, § 72.20, pp 173, 174, as follows:

"It is perfectly possible, within the bounds of compensation theory, to make out a case justifying this legislative extension of immunity to the co-employee. The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts. This reasoning can be extended to the tortfeasor coemployee; he too is involved in this [Page 674] compromise of rights. Perhaps one of the things he is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault. The sense of moral indignation expressed by some courts at the thought of relieving the coemployee of the normal consequences of his wrongdoing will bear some closer examination. It must never be forgotten that the coemployee, by engaging in industrial work over a period of years, is subjected to a greatly increased risk not only of being himself injured, but also of himself negligently causing injury. In other words, by becoming employed in industry, particularly in hazardous industry, the worker enormously multiplies the probability of not only injury to himself but liability on himself. And, if whenever his own negligence caused injury he might be liable to pay thousands of dollars in damages, the beneficent effects of workmen's compensation might be offset by the potential liabilities which confront the worker, particularly in activities where the risk of injury is great.

"It must be observed, however, that the immunity attaches to the coemploye only when the coemployee is acting in the course of his employment. This is consistent with the justification for the immunity just described, since the coemployee's employment status does not increase the risk of his causing nonindustrial injuries to his fellow-workers. The same rule applies under the broader statutes exempting from suit all persons subject to or bound by the compensation acts. An employee under the act who injures some other employee also under the act is liable to common-law suit if at the time of causing injury he was deviating from the course of his employment."

The court did not err in finding that plaintiff Dolores Brooks' exclusive remedy for recovery was that provided by the workmen's compensation act.

Ernest Brooks is barred from bringing a common-law action against his wife's coemployees. See *Moran v. Nafi Corporation*, 370 Mich 536.

[Page 675] The judgment should be affirmed. Costs to appellees.

Dethmers and O'Hara, JJ., concurred with Kelly, J.

Black, J., did not sit.

FOOTNOTES

1 CLS 1961, § 412.1 (Stat Ann 1960 Rev § 17.151).

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MI Decisions That Cite This Case

Decided June 14, 1966. Leave to appeal granted by Supreme Court October 8, 1966. See 378 Mich 733.

Tracer v Bushre
3 Mich App 494, 142 NW2d 915
Published Michigan Court of Appeals Opinion

Opinion by Quinn, J. Lesinski, C. J., and T. G. Kavanagh, J., concurred.

Docket No(s) 316
Disposition: Affirmed.

Quinn, J.

Quinn, J.

Plaintiff filed suit in Genesee county circuit court to recover money allegedly due him under a building contract with defendants. By supplemental affirmative defense, defendants pleaded that plaintiff was not licensed as required by PA 1953, No 208 (CLS 1961, § 338.971 *et seq.* [Stat Ann 1957 Rev and Stat Ann 1961 Cum Supp § 18.86(1) *et seq.*]),[1] and was barred from recovery by the statute. On the basis of this affirmative defense, the trial court granted defendants' motion for summary judgment.[2] Plaintiff appeals and contends the statute is unconstitutional because it is discriminatory and class legislation, it unreasonably and illegally delegates legislative powers to the county boards of [Page 497] supervisors, and it is ambiguous, uncertain and unreasonable.

Plaintiff, a building contractor with several years' experience but unlicensed under the above statute, lives in Shiawassee county and does work there and in Genesee county. On or about January 3, 1964, he entered into an oral contract with defendants to complete their home in Genesee county. Plaintiff pleaded that when the work was nearly completed, defendants stopped him from further work for the reason they did not have enough money to pay him and that plaintiff had then incurred obligations totaling $12,702.54 for materials and labor. Defendants contest these facts in their answer, but in the posture the case comes to us, we accept plaintiff's allegations as true. *Greenbriar Homes v. Cook* (1965), 1 Mich App 326.

The statute under attack is commonly referred to as "residential builders act." Section 1 thereof reads as follows:

"In order to safeguard and protect homeowners and persons undertaking to become homeowners, it shall be unlawful on and after the effective date of this act for any person to engage in the business of or to act in the capacity of a residential builder or a residential maintenance and alteration contractor in any county within this State subject to the provisions of this act on December 31, 1960, in any county brought under the operation of this act by its board of supervisors as provided in section 18[3] hereof without having a license therefor, unless such person is particularly exempted as provided in this act."

In *Alexander v. Neal* (1961), 364 Mich 485, with reference to this statute, the Supreme Court stated (p 487):

[Page 498] "The police power is thus employed to protect the public from incompetent, inexperienced, and fly-by-night contractors."

By appropriate action[4] of the Genesee county board of supervisors on March 24, 1959, the statute was made effective in that county. Section 16 of the act, being CLS 1961, § 338.986 (Stat Ann 1957 Rev § 18.86[16]), bars court action by an unlicensed residential builder to collect compensation for performance of an act or contract for which license is required by the act. It is clear on the record before us that plaintiff's action is barred if the statute is constitutional. In resolving plaintiff's challenges to its constitutionality, we are bound by the basic rule stated in *Attorney General v. Detroit United Railway* (1920), 210 Mich 227, 253, appeal dismissed 257 US 609 (42 S Ct 46, 66 L ed 395):

"In approaching the consideration of a legislative enactment with the purpose of passing upon its constitutionality, courts usually do and always should strive to sustain its validity, if that may be done without doing actual violence to the language used in the act. Every intendment favorable to a conclusion sustaining the law must be indulged in."

Plaintiff first contends that the restricted application of this statute to residential builders and residential maintenance and alteration contractors is discriminatory as class legislation and thus violates his constitutional rights. The rule to be applied in solving this classification question is well stated in *Gauthier v. Campbell, Wyant & Cannon Foundry Co.* (1960), 360 Mich 510, 514:

[Page 499] "The standards of classification are:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'" Citing cases.

We do not find this classification arbitrary and we do find it has some reasonable basis; for the reason that the demand for builders and contractors of this type in heavily populated areas is so great, many enter the field without sufficient qualifications. The fact of large population makes it difficult to ascertain the qualifications of those holding themselves out as such builders and contractors.

Relying on *Arlan's Department Stores, Inc., v. Attorney General* (1964), 374 Mich 70, plaintiff next contends that because the boards of supervisors of counties not specifically covered by the act may make the act effective in their counties by the required vote of the boards, the act contains an unconstitutional delegation of legislative authority. The act involved in *Arlan* permitted a county board of supervisors to vary State policy declared by the act. Here the act permits adoption of declared State policy in any county not specifically covered by the act. We do [Page 500] not find any unconstitutional delegation of legislative authority in the statute in question.

Plaintiff points out some inconsistencies and questionable phrases in the act but makes no showing of how they affect his constitutional rights; thus if we are to hold the statute unconstitutional because of inconsistency and questionable phrases, we must hold the act fatal on its face. In view of the rule announced in *Attorney General* v. *Detroit United Railway, supra,* and *Webster v. Rotary Electric Steel Co.* (1948), 321 Mich 526, and *General Motors Corp. v. Unemployment Compensation Commission* (1948), 321 Mich 604, this we decline to do.

Plaintiff also urges inconsistent application of criminal provisions of the act as a reason for its unconstitutionality but we do not have the criminal provision before us, and the act contains a severing clause. CLS 1961, § 338.988 (Stat Ann 1957 Rev § 18.86[18]).

Affirmed, without costs because of public question.

Lesinski, C. J., and T. G. Kavanagh, J., concurred.

FOOTNOTES

1 Repealed and superseded by PA 1965, No 383 (CL 1948, § 338.1501 *et seq.* [Stat Ann 1965 Cum Supp § 18.86(101) *et seq.*]).

2 GCR 1963, 117.2(1).

3 The reference to section 18 was an obvious error, as section 17 was clearly intended. See CLS 1961, § 338.987 (Stat Ann 1957 Rev § 18.86[17]).

4 Resolution electing to come under the act passed by more than three-fifths vote. Required by CLS 1956, § 338.987 (Stat Ann 1957 Rev § 18.86[17]).

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MI Decisions That Cite This Case

Decided March 26, 1968.

Gulash v Jerry Davidson Buick, Inc.
10 Mich App 238, 159 NW2d 168
Published Michigan Court of Appeals Opinion

Opinion by Levin, J. McGregor, P. J., and Quinn, J., concurred.

Docket No(s) 2,900
Disposition: Reversed.

Levin, J.

[Page 239]

Levin, J.

The question presented is whether an endorsement, extending an automobile dealer's bodily injury and property damage liability insurance to include an automobile owned by the dealer while in use by a customer whose own automobile is being serviced by the dealer, protects only the dealer (as claimed by defendants) or both the dealer and the customer (as claimed by plaintiffs and as found by the trial court).

Plaintiffs Hannah Gulash and her automobile liability insurer, United Security Insurance Company, commenced this action against defendants Jerry Davidson Buick, Inc., and its liability insurer, Universal Underwriters Insurance Company, and Serina Sirna and Anthony R. Sirna and Aetna Casualty & Surety Company, subrogee of Anthony Sirna, seeking a declaration of rights concerning the obligations of United and Universal.

On June 25, 1962, Mrs. Gulash left her automobile with Davidson Buick for service and repair. Davidson Buick provided Mrs. Gulash with a 1959 Buick automobile for her use while her car was being serviced. While operating the 1959 Buick Mrs. Gulash collided with a car being driven by Serina Sirna, wife of Anthony Sirna, following which the Sirnas commenced an action against Mrs. Gulash and others. In that action Aetna joined as one of the plaintiffs to assert its rights as subrogee of Anthony Sirna with respect to the damage done to Sirna's automobile.

The question before us turns on the construction of the language of the insurance policies issued by United and Universal. United's policy insuring Mrs. Gulash in regard to her own automobile also covers her while she is driving an automobile owned by another, subject to the following proviso:

[Page 240] "provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance."

United claims that the insurance provided by Universal to Davidson Buick is insurance protecting Mrs. Gulash, with the result that United's policy would become applicable only to the extent that the amount of any judgment obtained against Mrs. Gulash exceeds the limits established in the Universal insurance issued to Davidson Buick.

Universal responds that the policy issued to Davidson Buick does not protect Mrs. Gulash. When issued, the policy contained a Garage Liability Special Provision Form which contained a number of separate endorsements, only 2 of which concern this litigation: (1) the endorsement amending the definition of insured (hereafter the "insured endorsement") and (2) the endorsement extending customer rental coverage (hereafter sometimes the "customer rental endorsement").

The insured endorsement changed the definition of "insured" as set forth in the main body of the Universal policy so that those insured are limited to the named insured and any partner, employee, director or stockholder and other designated, similarly related, persons.[1]

The customer rental endorsement modifies an exclusion in the main body of the policy excluding from the coverage "any automobile while rented to [Page 241] others by the named insured", with exceptions not pertinent here.

The presented controversy revolves about the customer rental endorsement, which reads:

"Endorsement Extending Customer Rental Coverage. Such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies with respect to any automobile owned by the named insured and rented to a customer of the named insured but only while such customer's automobile is temporarily left in the custody of the named insured for service or repair."

United asserts that the customer rental endorsement extends the coverage of the insurance provided by the Universal policy (which in all other respects protects only the named insured and the designated, related persons) to protect the customer while using the dealer's automobile, with the result that the insurance provided by the Universal policy is valid insurance collectible by Mrs. Gulash as well as Davidson Buick, and with the consequence that United's insurance provides only excess coverage over and above the limits provided in the Universal policy.

The trial judge concluded that the customer rental endorsement provided insurance coverage for Mrs. Gulash while operating an automobile owned by Davidson Buick while her automobile was temporarily left with Davidson Buick for service and that there was sufficient consideration flowing from Mrs. Gulash to Davidson Buick to constitute a "rental" of the automobile.

On appeal Universal asserts that Mrs. Gulash was not an insured under the policy and that the customer rental endorsement did not broaden the coverage of the Universal policy to provide liability coverage for Mrs. Gulash.

[Page 242] In our opinion the customer rental endorsement does not enlarge the definition of "insured" as modified by the insured endorsement. As we read the policy, the purpose of the customer rental endorsement is to protect the named insured under the policy from its statutory liability as the owner of the "loaned" automobile.[2] If providing a "loaner" automobile to a customer whose car is being serviced is regarded as a rental—a not implausible construction and one which the trial judge in this case placed upon the transaction —then by reason of the exclusion in the main body of the policy of "any automobile while rented to others by the named insured", and but for the customer rental endorsement, Davidson Buick, as the named insured, would not be protected from its statutory liability in a common situation arising in the ordinary course of an automobile dealer and service business.

We add that the language of the policy, as modified by the insured endorsement and the customer rental endorsement, does not literally purport to insure persons other than the named insured and persons occupying the relatively close relationship designated in the definition of "insured" as so amended.

Although the result for which we write seems clear enough for the reasons already stated, we also note that the customer rental endorsement begins with the words: *"Such* insurance as is afforded by the policy." In this context, "such" is a word of limitation and means whatever insurance is afforded by the Universal policy. The only insurance afforded by the Universal policy after its amendment by the insured endorsement is protection of the named insured, Davidson Buick, and the persons [Page 243] occupying the designated relationship to the named insured.

The exclusion in the main body of the Universal policy as to "any automobile while rented to others by the named insured" eliminates the insurer's exposure in regard to car leasing generally. Reading the policy as a whole, the customer rental endorsement serves a dual purpose. It retains the basic limitation on the insurer's exposure, so that the insurer is not covering the dealer as to car leasing operations generally—car leasing being a business separate and apart from and not necessarily conducted by one operating an automobile dealer and service business—and extends the coverage to include a phase of the ordinary and customary business of an automobile dealer.

There is no apparent purpose to provide protection for the customer and, the policy not literally providing such protection, there is no reason to read such protection into the policy.

Reversed and remanded for the entry of judgment declaring that the insurance provided by Universal to Davidson Buick is not insurance collectible by Mrs. Gulash or her liability insurer. Costs to appellant.

McGregor, P. J., and Quinn, J., concurred.

FOOTNOTES

1 Contrast the definition of "insured" set forth in the main body of the policy as it read prior to its modification by the insured endorsement: prior to modification by the insured endorsement, the main body of the policy defined "insured" as the named insured and any partner, employee, director, or stockholder thereof (subject to certain limitations) *and* any person while using an automobile covered by the policy with the permission of the named insured (subject to certain limitations).

2 CLS 1961, § 257.401 (Stat Ann 1960 Rev § 9.2101).

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MI Decisions That Cite This Case

Decided January 19, 1971. Leave to appeal denied June 3, 1971. 385 Mich 753.

Stockman v Kinney
29 Mich App 432, 185 NW2d 568
Published Michigan Court of Appeals Opinion

Opinion by Danhof, J. Before: Quinn, P. J., and Danhof and Carroll,[1] JJ.

Docket No(s) 7218
Disposition: Reversed and remanded for new trial.

Danhof, J.

1 Circuit judge, sitting on the Court of Appeals by assignment.

Danhof, J.

On the night of September 17, 1966, plaintiff's decedent, Theodore Claire Hackett, and his wife were driving west on Vienna Road, a two-lane blacktop highway, en route to a wedding reception. Having reached the intersection of Lewis Road and feeling that he might have gone too far, the decedent turned his car around and pulled off the road onto the shoulder on the south side of Vienna Road a short distance east of Lewis Road. Leaving the car facing east with its low beam lights on, the decedent took a flashlight and walked back toward the intersection to read the street sign which was on the northwest corner. Mrs. Hackett remained [Page 434] in the car facing straight ahead in an easterly direction. Meanwhile, Clarence Young, his wife and son, driving south on Lewis Road, stopped at the intersection. As it was very dark out, the Youngs saw only the flashlight beam pointed in a northwesterly direction by the decedent who stood to the east of Lewis Road. An automobile driven by defendant Babcock, with the express permission of defendant Kinney, approached the intersection travelling west on Vienna Road and struck the decedent from behind with the right front fender, killing him. Mr. Babcock said he did not see the decedent either before or immediately after he struck him, but when he felt the impact he stopped the car and backed up to see what he had hit.

Immediately thereafter, Ithurmer Lowell, travelling west on Vienna Road, saw Babcock backing the car up, noticed a shoe in the road, pulled over on the shoulder and saw feet sticking out of the ditch, thus discovering the decedent's body.

Plaintiff, as administratrix of the decedent's estate, commenced a wrongful death action. Upon trial before a jury, verdict and judgment were entered of no cause of action. The plaintiff thereupon filed a motion for judgment *non obstante veredicto* as to liability and a new trial as to damages only, or alternatively, a motion for a new trial. Both were denied March 29, 1969, and plaintiff appeals as of right.

The first question raised is whether the trial court committed reversible error in refusing to direct the jury that the defendant driver was negligent as a matter of law. Conflicting testimony was given regarding whether or not the defendant driver's head-lamps were lighted, and generally unclear testimony was given with respect to exactly where the decedent was standing when struck. Thus on at least these [Page 435] two points factual issues were raised which were properly submitted to the jury.

The next issue is whether the trial court committed reversible error in refusing to give the jury instruction requested by plaintiff relative to the duty of an automobile driver to maintain a lookout for persons or objects in his way. Those portions of the requested instruction which were applicable were substantially covered by the actual instructions given by the court and we find no error.

The third and most significant issue raised on appeal is whether the trial court committed reversible error in refusing to instruct the jury that there was a presumption that the decedent was acting with due care for his own safety, where there were eyewitnesses but no one could testify to exactly where the decedent was standing when he was struck. The trial court in refusing to give the instruction relied on *Young v. Groenendal* (1968), 10 Mich App 112, affd (1969), 382 Mich 456, in which this Court wrote at p 118:

"In an action by the administratrix of a person killed in a highway accident, the presumption

of decedent's freedom from contributory negligence is not available where there is at least one living eyewitness to the accident, even if the witness is the defendant". (Citing *Kalbfleisch v. Perkins* (1937), 282 Mich 27.)

The court then held that he had to consider the Youngs to be living eyewitnesses even though they could not state whether the deceased was standing on the highway or off of it when he was struck.

Counsel has cited two cases from our Court for the proposition that when there is an eyewitness the presumption that the decedent exercised due care disappears. Those cases are *Young* v. *Groenendal, supra,* and *Ruotsala v. Holzhauer* (1970), 24 Mich App 571 [Page 436] . Both cases rely on Michigan Supreme Court cases decided before June 1, 1958. They are *Kalbfleisch v. Perkins* (1937), 282 Mich 27, and *Schillinger v. Wyman* (1951), 331 Mich 160. In *Schllinger* Justice Dethmers discussed the "apparently irreconcilable conflict in the holdings of this Court" pertaining to eyewitnesses removing the presumption of the decedent's due care. However, the actual holding was that the decedent was guilty of contributory negligence as a matter of law and a directed verdict for the defendant was affirmed. See *Steger v. Blanchard* (On Rehearing, 1958), 353 Mich 140, where the *Schillinger* case was criticized. In *Young* v. *Groenendal,* which was affirmed by an equally divided court, the opinion for affirmance by Justice Dethmers also held that the decedent was guilty of contributory negligence as a matter of law and that the trial court was correct in directing a verdict in favor of the defendants.

To understand the legal issue presented in the case before us, it must be remembered that before June 1, 1958 a plaintiff had the burden of proving himself free of contributory negligence which was a proximate cause of the injury. In wrongful death cases the plaintiff would always lose unless there was evidence to show that plaintiff's decedent was not contributorily negligent. Therefore, a presumption that the plaintiff's decedent was acting with due care for his own safety was recognized so as to prevent such a plaintiff from being directed out of his lawsuit. However, the presumption disappeared when direct, positive and credible evidence was introduced to rebut it. As was said in *Gillett v. Michigan United Traction Co.* (1919), 205 Mich 410, 415, 416:

"When direct, positive and credible rebutting evidence is introduced, the presumption ceases to [Page 437] operate; but when circumstantial evidence of doubtful value is the only rebutting evidence offered, the question should be submitted to the jury, and if they decide that the circumstantial evidence should be disregarded, the presumption is still sufficient to establish plaintiff's case as to the exercise of proper care by the deceased. Moreover, it is only in cases where direct testimony of credible eyewitnesses as to the negligence of deceased is *uncontradicted,* that the court is warranted in directing a verdict for the defendant on the ground of decedent's contributory negligence."

Court Rule No 23, § 3a (1945)[2] shifted the burden of proof as to contributory negligence from the plaintiff to the defendant. Thereafter, a minority of the Michigan Supreme Court was of the opinion that with plaintiff no longer bearing the burden of proving decedent's freedom from contributory negligence, the difficulty formerly confronting such plaintiff when eyewitness proofs were unavailable was absent and the need for an instruction as to the presumption had vanished. *Mack v. Precast Industries, Inc.* (1963), 369 Mich 439, 447.

However, in *Hill v. Harbor Steel & Supply Corporation* (1965), 374 Mich 194, 208-210, Justice Souris, writing for four Justices, said:

"Plaintiffs also contend that, inasmuch as defendants claimed that Hill was contributorily negligent, the trial court erred in refusing to instruct that in the absence of any contrary evidence there was a presumption that Hill was exercising due care at the time of the accident. Recently, we had occasion to consider such a claim in *Mack v. Precast Industries, Inc.*, 369 Mich 439. Mr. Justice Black, at p 454, speaking for a majority of the participating Justices, wrote the following:

[Page 438] "'I agree with Justice Dethmers that no reversible error resulted from denial of plaintiff's request to charge that her decedent was presumptively free from contributory negligence. *The* request was not phrased in accordance with what apprehendedly is the instructionally correct rule for cases like this, set forth in durable *Gillett v. Michigan United Traction Co.*, 205 Mich 410, 421. Aside from that, I must register disagreement with the conclusion that former Court Rule No 23, § 3a (1945), now GCR 1963, 111.7, has eliminated need for instruction, when such instruction is otherwise appropriate, upon the subject of presumed due care. Conceivably, many cases will come to this Court where, even though the defendant now bears the burden of proving contributory negligence, the plaintiff on properly couched request in a jury case, or on judicial consideration of a nonjury case, will be entitled to aid of the presumption. Surely that will be true when, as here, the defendant's proof of such negligence presents a doubtful, or uncertainly circumstantial, question of fact for the jury, and certainly it will be true when the defendant presents no proof of contributory negligence.' The record in this case discloses that Hill and another workman were trying to open the cabinet of the welding unit when the explosion occurred. It may be that as a result of the activities of one of them the gases were ignited. There was not direct evidence that Hill's actions caused the explosion. At best, the evidence was 'uncertainly circumstantial'. In either event, plaintiffs were entitled to the requested instruction.

"Harbor Steel argues that a presumption of due care may be injected into a case by jury

instruction only when there are no eyewitnesses to the accident. In *Mack,* however, there was an eyewitness whose testimony was favorable to plaintiff's cause, yet this Court still held that plaintiff would have been entitled to such an instruction concerning the presumption had he requested it properly."

[Page 439] Both the *Hill* and *Mack* cases were cited in *Koehler v. Detroit Edison Company* (1970), 383 Mich 224, 233, 234, for the rule that when the defendant's proof of contributory negligence presents a question of fact for the jury, plaintiff is entitled to a presumption of due care.

In the present case the testimony of the eyewitnesses was inconclusive as to whether the decedent was standing on or off Vienna Road. The defendant's proof of the decedent's contributory negligence presented a doubtful, or uncertainly circumstantial, question of fact for the jury and thus, as stated by Justice Black, the plaintiff upon a properly couched request was entitled to the aid of the presumption. Therefore, it is our opinion based on the *Mack, Hill,* and *Koehler* cases that it was reversible error for the trial court to refuse the plaintiff's request for a jury instruction that there was a presumption that the decedent was acting with due care for his own safety.

The final question raised does not require discussion since we are reversing for a new trial.

Reversed and remanded for a new trial; costs to plaintiff.

All concurred.

FOOTNOTES

2 As added, effective June 1, 1958. See 352 Mich xiv. See currently, GCR 1963, 111.7.

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MI Decisions That Cite This Case

Decided January 21, 1981.

McLaren v Zeilinger
103 Mich App 22, 302 NW2d 583
Published Michigan Court of Appeals Opinion

Opinion by Beasley, J. Before: V.J. Brennan, P.J., and Allen and Beasley, JJ.

Docket No(s) 45623
Disposition: Affirmed.

Beasley, J.

Beasley, J.

At a time when plaintiff and defendant were engaged to be married, plaintiff suffered severe personal injuries while a passenger in a car operated by defendant that collided with a guardrail. In her complaint, she sought exemplary damages for alleged gross negligence as well as compensatory damages. Plaintiff sent defendant a total of 111 interrogatories, of which defendant refused to answer numbers 86 through 105 on the basis that they involved "matters not discoverable", since they dealt with his financial status. When defendant moved for an order sustaining his objection to plaintiff's interrogatories, the trial court issued an opinion and entered an order denying defendant's motion. Defendant appeals by leave granted.

The case presents one issue. Is it error in an automobile accident case to compel a defendant to answer plaintiff's written interrogatories regarding defendant's financial condition?

[Page 25] In *Wronski v Sun Oil Co,*[1] we said that exemplary damages are compensatory in nature and not punitive, since they are properly an element of actual damages. In *Riggs v Fremont Mutual Ins Co,*[2] we said that exemplary damages may be recoverable for humiliation and indignity resulting from an injury which has been maliciously or wantonly inflicted, but that exemplary damages generally are not recoverable for even intentional breaches of commercial contracts. Thus, in *Riggs,* we held that a fire insurance contract was an ordinary commercial contract and the mere fact that the insurer denied liability and claimed arson, although failing to prove it, did not establish a malicious or reckless denial of payment.

Peisner v Detroit Free Press, Inc,[3] which is a libel case, is authority for the proposition that, since exemplary damages are not intended to punish a defendant for their actions, evidence of a defendant's financial situation is immaterial to the issue.

While there are no Michigan cases specifically deciding the issue, and while recognizing there is some authority to the contrary in other jurisdictions,[4] we hold that exemplary damages should not be allowed in automobile accident cases in Michigan even where allegations of gross negligence are made.

However, even if we were to assume the contrary, that is, that exemplary damages are permissible in gross negligence automobile accident cases, the result would not be changed. Since exemplary [Page 26] damages are designed to compensate a plaintiff and not to punish a defendant, there is no trial relevance in requiring a defendant to divulge information relating to his financial status through the use of interrogatories.

Certainly, it cannot be argued that such evidence is admissible on the issue of defendant's liability as the driver of an automobile, since defendant's financial worth is obviously irrelevant in determining whether he operated the vehicle in a grossly negligent manner. While such evidence might be relevant in punishing a defendant, it is clear under Michigan law that punitive damages are not allowable.[5]

Consequently, we hold that, in the absence of special circumstances, interrogatories directed to a defendant's financial condition are not relevant evidence at trial.

We proceed, then, to the question of whether there is another basis to compel defendant to answer these interrogatories. Plaintiff claims that her damages exceed the policy limits on defendant's insurance policy. She asserts that a mediation panel recommended damages close to the policy limits and that she needs to know the extent of defendant's collectability in order to make an intelligent decision as to whether to settle her claim. Defendant responds that

plaintiff should not be entitled to invade his privacy and to harass him in pretrial discovery when his liability has not even been established.

GCR 1963, 309.4, which concerns the scope and use of interrogatories, provides that "interrogatories may relate to any matters which can be inquired into under sub-rule 302.2 and the answers may be used to the same extent as provided in sub- [Page 27] rule 302.4 for the use of a deposition of a party". GCR 1963, 302.2 deals with the scope of examination of discovery depositions and provides in part as follows:

"(1) Persons taking depositions, unless for good cause otherwise shown, as provided by sub-rules 306.2 and 306.4, shall be permitted to examine the deponent regarding any matter not privileged which is admissible under the Rules of Evidence governing trials and relevant to the subject matter involved in the pending action."

In the 1980 pocket parts, with respect to 302.2, Honigman and Hawkins state:

"The admissibility requirement and the question of privilege as applied to the discovery of statements and writings has been affected by recent amendments to sub-rule 306.2 and Rule 310."[6]

GCR 1963, 306.2 is entitled "Orders For the Protection of Parties and Deponents" and provides:

"Upon motion seasonably made by either party or by the person to be examined and upon reasonable notice and for good cause shown, the court * * * may make an order that the deposition shall not be taken * * * or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers and counsel."

GCR 1963, 306.4 establishes a procedure for terminating or limiting depositions.

[Page 28] Consequently, neither Rule 306.2 nor Rule 306.4 afford a basis for plaintiff to compel defendant to answer the disputed interrogatories. On the contrary, Rule 306.2 and Rule 306.4 are possible avenues of protection for defendant.

The amendment to Rule 310 referred to by Honigman and Hawkins was apparently that of June 7, 1965, which eliminated the requirement for production of documents that they be admissible in evidence.[7] In the 1980 Cumulative Supplement, with respect to Rule 310, Honigman and Hawkins state:

"Prior to these amendments to Rule 310, the discovery of liability insurance was probably precluded in most cases by the admissibility requirement of sub-rule 302.2 and by sub-rule 301.1(6) expressly prohibiting disclosure at pretrial conference. While the latter provision still remains in the rules, it should probably be treated as nullified, in effect, by sub-rule 310.1(4), since there is no apparent reason for permitting disclosure of liability insurance by pretrial discovery but prohibiting its disclosure at the pretrial conference."[8]

GCR 1963, 310.1(4) is an amendment adopted in 1971 providing:

"(4) Notwithstanding the provisions of sub-rule 306.2, a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes [Page 29] of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. (Added by amendment effective Nov. 12, 1971.)"

In *Wilson v WA Foote Memorial Hospital,*[9] plaintiff sought discovery of internal hospital documents purportedly outlining the definition of an emergency and the duties of the hospital personnel under such circumstances. The trial judge held that the internal regulations of the hospital did not establish the applicable standard of care and, thus, presumably the information sought to be discovered would not be admissible evidence. We held that permissible discovery under Rule 310 may be had whether or not the evidence is admissible at trial. Rather, to be entitled to discovery, one must only show "good cause" for such discovery.

Under GCR 1963, 310, good cause is established when the moving party establishes that the information sought is or might lead to admissible evidence, is material to the moving party's trial preparation, or is for some other reason necessary to promote the ends of justice.[10] In *WA Foote Memorial Hospital, supra,* we held that the motion did not establish the requisite good cause for production and that, therefore, there was not any abuse of discretion in denial of the motion.

In *Daniels v Allen Industries, Inc,*[11] plaintiffs succeeded in forcing defendant to produce the results of emission control studies conducted by defendant's experts. The Supreme Court held that admissibility into evidence was no longer a prerequisite to discovery under Rule 310, but that good cause must be shown, saying:

[Page 30] "[T]his Court has clarified the import of Rule 310 noting the necessity for a showing of 'good cause' by the moving party before such party is entitled to put the issue of document

production to the trial court for exercise of its discretion. *Covington Mutual Insurance Co v Copeland*, 382 Mich 109, 111-112; 168 NW2d 220 (1969); *JA Utley Co v Saginaw Circuit Judge*, 372 Mich 367, 375; 126 NW2d 696 (1964)." (Footnote omitted.) *Daniels, supra,* 405.

Consequently, the question is do the amendments to the court rules or the case law contained in these cited cases afford to plaintiff a basis to require defendant to answer the contested interrogatories.

As indicated, former GCR 1963, 309, which by its terms relates to GCR 1963, 302.2, contained two conditions precedent which had to be met in order to require answering of interrogatories. First, the matter sought to be discovered had to be admissible into evidence at trial. In *Daniels v Allen Industries, Inc, supra,* the Supreme Court held that with respect to production of documents under GCR 1963, 310, no longer was it necessary that the document be admissible into evidence at trial. But, the Supreme Court held that there must be good cause to require production of the document. In that case, the Supreme Court also stated in strong terms a commitment to "far-reaching, open and effective discovery practice".

In *W A Foote Memorial Hospital, supra,* we held similarly, but in applying the good-cause rule, found good cause lacking.

Second, the matter sought to be discovered must be relevant to the subject matter of the pending case. We hold that these two conditions precedent no longer prevail; the scope of interrogatories is not now limited to matters "admissible under the [Page 31] rules of evidence governing trials and relevant to the subject matter involved in the pending action".

We believe that the test now utilized by the Supreme Court is whether plaintiff has "good cause" to have discovery of the extent and value of defendant's assets, and that the trial judge is vested with discretion to make that determination on a case by case basis. To hold otherwise would lead to incongruous results that we do not believe the Supreme Court intended.

E.g., in this case, if, rather than submitting interrogatories to defendant, plaintiff had chosen to proceed under GCR 1963, 310, to require defendant to produce copies of his income tax returns, it would appear that if plaintiff satisfied the trial court there was good cause, defendant could have been required to produce such income tax returns, even though they were *not* admissible in evidence at trial nor relevant to the subject matter at trial.[12]

We believe the Supreme Court intended the same test, namely, "good cause" to apply to the scope of interrogatories as to the scope of production of documents.

The question then is whether there is good cause to require defendant to answer these interrogatories. As indicated, we hold this decision was for the discretion of the trial judge, and we find that, under the circumstances of this case, "good cause" encompasses the interrogatories regarding defendant's assets that are in dispute.

The circumstances to which we refer are that the recommendation of a mediation panel has placed a substantial value on plaintiff's damages, that there is a real possibility of a jury award exceeding the policy limits, and that discovery of [Page 32] defendant's assets could be a factor inducing settlement. We do not hold that, as a general rule, a plaintiff in an automobile accident case will be entitled to discovery of defendant's assets.

On the contrary, we would expect that it will only be in the exceptional case that a plaintiff may have sufficient "good cause" to permit such discovery.

Where sufficient good cause is present, a defendant's alleged right of privacy must give way. Consequently, we hold that the trial court's denial of defendant's motion was not clearly erroneous.

Affirmed.

FOOTNOTES

1 89 Mich App 11; 279 NW2d 564 (1979).

2 85 Mich App 203; 270 NW2d 654 (1978).

3 68 Mich App 360; 242 NW2d 775 (1976).

4 *Parkins v Brown,* 241 F2d 367 (CA 5, 1957), *Porter v Funkhouser,* 79 Nev 273; 382 P2d 216 (1963).

5 *Ray v Detroit*, 67 Mich App 702; 242 NW2d 494 (1976).

6 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Rule 302.2, 1980 pocket parts, p 18.

7 *Daniels v Allen Industries, Inc*, 391 Mich 398, 405; 216 NW2d 762 (1974).

8 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Rule 310, 1980 pocket parts, p 56.

9 91 Mich App 90; 284 NW2d 126 (1979).

10 *Wilson v WA Foote Memorial Hospital, supra,* 95-96.

11 391 Mich 398; 216 NW2d 762 (1974).

12 See, *Daniels v Allen Industries, Inc, supra.*

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MI Decisions That Cite This Case

Decided February 4, 1981. Leave to appeal applied for.

Thick v Lapeer Metal Products Company
103 Mich App 491, 302 NW2d 902
Published Michigan Court of Appeals Opinion

Opinion by Allen, J. Before: T.M. Burns, P.J., and Allen and D.F. Walsh, JJ.

Docket No(s) 48019
Disposition: Affirmed.

Allen, J.

Allen, J.

Respondent, Transamerica Insurance Group (Transamerica) appeals by leave granted from a September 27, 1979, opinion and order of the Workers' Compensation Appeal Board (Appeal Board), Chairman Gillman dissenting, finding (1) Transamerica liable for compensation payments for an injury sustained by petitioner in April, 1969, and (2) refusing to credit Transamerica for $20,000 paid pursuant to a redemption agreement made by Great American Insurance Company, the carrier on December 7, 1973, the last day of petitioner's work. The second finding presents an issue of first impression.

Petitioner was employed, primarily as a press operator, by respondent Lapeer Metal Products for a ten-year period from 1963 to 1973. On April 17, 1969, petitioner's right leg was smashed between two bins when her foreman drove a hi-lo truck into a scrap bin. Petitioner was standing between the two bins when the incident occurred. She returned to work the next day and asked to be seen by doctors because the injury was bothering her “severely”. She was treated by plant physicians for six months but experienced progressively increasing pain. She consulted her own doctor who, following a myelogram, found a herniated [Page 494] disc. In May, 1970, she was hospitalized, and, on June 1, 1970, the disc was removed by Dr. Herzog, an orthopedic surgeon. Petitioner was off work from April, 1970, until November, 1970, during which time Transamerica voluntarily paid compensation benefits. Petitioner returned to “very light work” in November, 1970, and, except for six weeks in February and early March, 1973, continued working under restrictions of no bending or heavy lifting until December 7, 1973, when she felt a sharp pain in the same area of her back where surgery had been performed. Petitioner has not been regularly employed since December 7, 1973.

On March 4, 1974, petitioner filed a petition for workers' compensation benefits. The petition named both Transamerica and Great American Insurance as respondents and claimed personal injury dates of February 17, 1969, March 17, 1969, and December 7, 1973, as well as an occupational disease date of December 7, 1973. On March 19, 1976, seven weeks prior to the hearing before the administrative law judge, petitioner entered into a redemption agreement for $20,000 with Great American Insurance for the period Great American was on the risk.[1] Following the hearing on May 6, 1976, the administrative law judge found petitioner was totally disabled as a result of the accident on April 17, 1969, and ordered Transamerica, the carrier at the time of the accident, to pay workers' compensation benefits.

Transamerica appealed to the Appeal Board which, on September 28, 1979, in a two-to-one decision, sustained the administrative law judge's finding that petitioner was disabled as a result of the April 17, 1969, accident but modified the award by finding that petitioner was only partially [Page 495] disabled and that Transamerica was entitled to receive credit for the benefits paid voluntarily by Great American Insurance prior to the redemption agreement, but was not to receive any credit for the $20,000 redemption. One member of the Appeal Board disagreed, finding that on December 7, 1973, petitioner's wrenching of her back was a work-related incident which contributed to her disability and thus the case was one of aggravation of the original injury, making the injury date December 7, 1973, the last day worked, but that because Transamerica was not on the risk on that date and Great American had redeemed its liability, petitioner was barred from recovery.[2] Transamerica's application for leave to appeal to this Court was granted on May 22, 1980. Two grounds for reversal of the majority opinion are raised on appeal.

I

It is first contended that the Appeal Board majority erroneously applied legal principles

"inconsistent with the general principle that work-related aggravation of a pre-existing condition is compensable with liability fixed at the last day of work". The flaw in this argument is the assumption that petitioner's injury in April, 1969, was in [Page 496] fact aggravated during the three-year period she was on favored work. Whether events subsequent to June 30, 1969, the date Great American Insurance became the insurer, constituted an "aggravation" of the April, 1969, injury or a new injury is a question of fact. If a new injury or aggravation of the original injury in fact occurred, then liability would fall on Great American and not on Transamerica. *Kubicsek v General Motors Corp*, 57 Mich App 517; 226 NW2d 546 (1975). Conversely, if petitioner's disability resulted from the April, 1969, injury, even though her condition progressively deteriorated, Transamerica alone would be liable for compensation benefits. *Mullins v Dura Corp*, 46 Mich App 52; 207 NW2d 404 (1973). The Appeal Board majority found that petitioner's disability was caused by the April, 1969, injury and further found that subsequent work incidents neither aggravated the injury nor resulted in a new injury. In the absence of fraud, findings of fact in workers' compensation hearings may not be set aside if such findings are supported by substantial, competent and material evidence. MCL 418.861; MSA 17.237(861). *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243; 262 NW2d 629 (1978). The majority opinion carefully sets forth the facts upon which the majority's conclusion is predicated. Our review of the transcript discloses that the findings are based on substantial, competent and material evidence. We find no error on issue I.

II

Having determined that only one injury for which benefits are payable is involved, we turn to the question of whether the $20,000 paid petitioner by the subsequent insurer, Great American [Page 497] Insurance, must be credited to the payments otherwise due petitioner from Transamerica. While there are numerous cases which address the question of the respective liability of different insurers of different employers, the instant case appears to be the first case raising the issue of recovery from different insurers of the same employer, one of which has entered into a redemption agreement.

It is well settled that concurrent recovery may be allowed for two separate disabling injuries, even though the first injury has been redeemed. *Herrala v Jones & Laughlin Steel Corp*, 43 Mich App 154; 203 NW2d 752 (1972), *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979). However, a claimant may not twice recover for a *single disabling* injury. *Stanley v Hinchliffe & Kenner*, 395 Mich 645; 238 NW2d 13 (1976). Public policy is against double recovery for the same injury. *Cline v Byrne Doors, Inc*, 324 Mich 540; 37 NW2d 630 (1949).

Transamerica argues that, since the Appeal Board has determined that there is only one disabling injury in the instant case, allowing petitioner to retain the $20,000 received under the redemption agreement would amount to a double recovery for a single disabling injury. The transcript of the hearing on redemption discloses that the parties did not intend to redeem liability for the April 17, 1969, injury but intended to redeem only such liability as Great American Insurance would have for the period it was on the risk.

"THE COURT: Back on the record.

"Mrs. Thick, you understand what you are doing here? What you are doing is settling not for your original injury where you were pinned by a truck, but you are settling for anything that might have happened from June 30, 1969, up through the last time you ever [Page 498] worked at Lapeer Metal Products. Do you understand that?

"A. Yes.

"THE COURT: Okay. You understand that any rights you might have for Workmen's Compensation against Lapeer Metal Products prior to June 30, of 1969, you still have. This does not wipe that out. You understand that?

"A. Yes."

Since Great American Insurance did not become the carrier until after April 17, 1969, and since the parties intended to redeem only the liability for anything happening from June 30, 1969 (the date Great American Insurance became the insurer), it follows that petitioner is not twice recovering for liability for the injury which occurred on April 17, 1969. At the time the redemption agreement was entered into, both insurers were parties respondent and petitioner was claiming that two separate injury dates were involved. Thus, both Transamerica and Great American Insurance were potentially liable. Great American Insurance entered into the redemption agreement to relieve its potential liability. The fact that the Appeal Board subsequently found only one injury date and thus no liability on the part of Great American Insurance should not negate the parties' understanding that the $20,000 settlement was in settlement of the second insurer's potential liability. Under these circumstances, we conclude that the public policy prohibiting double recovery for the same injury was not violated and petitioner may retain any benefit gained by the $20,000 redemption agreement.

Affirmed, costs to petitioner.

FOOTNOTES

1 After June 30, 1969, Great American Insurance was on the risk.

2 "Clearly this is (and we so find) a case of multiple injuries and/or the aggravation by work duties of the original surgery residuals, such as to establish under Section 301 an injury date as of December 7, 1973, plaintiff's final day of work [*Regis v Lansing Drop Forge Co*, 25 Mich App 637 (1970); *Gilbert v Reynolds Metal Co*, 59 Mich App 62 (1975); *Gibbs v Keebler Co*, 56 Mich App 690 (1974); and *Kubicsek v General Motors Corp*, 57 Mich App 517 (1975)]. Accordingly, plaintiff's 1969 injury, while the most significant, is merged into the latter date of injury, by operation of Section 301. * * *

"Quite simply, this is a classic two-carrier, two-dates-of-injury dispute. The last day of work is found to be the date of injury. Liability for that date has been redeemed. The prior carrier has no liability. The decision of the referee is reversed."

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MI Decisions That Cite This Case

Decided August 27, 1984. Rehearing denied post, 1215.

Thick v Lapeer Metal Products
419 Mich 342, 353 NW2d 464
Michigan Supreme Court Opinion

Opinion by Boyle, J. Levin and Brickley, JJ., concurred with Boyle, J.Opinion by Williams, C. J.Dissenting opinion by Kavanagh, J. Ryan and Cavanagh, JJ., concurred with Kavanagh, J.

Calendar No. 2.
Docket No(s) 67031
Lower Court Docket No(s) 48019
Disposition: Reversed.

Boyle, J. | **Williams, C. J.** | **Kavanagh, J. (dissenting).**

Next >

Boyle, J.

At issue in this case is whether a nonsettling insurance carrier in a workers' compensation case may offset its liability by the amount of the settlement paid by a second carrier for injuries determined to be covered solely by the non-settling carrier. Both the Workers' Compensation Appeal Board and the Court of Appeals refused to allow such a credit, and the non-settling carrier appeals. We reverse.

I

Plaintiff Marilyn B. Thick suffered a lower back injury in April, 1969, while employed by defendant Lapeer Metal Products Company. The injury necessitated disc surgery and resulted in some time off work as well as a change in work assignment until December 7, 1973, when she experienced a sharp back pain. Plaintiff has not returned to work since that date.

Defendant Lapeer was insured by two carriers successively during the period relevant to plaintiff's claim. Defendant Transamerica Insurance Group insured Lapeer for workers' compensation claims accruing up to and including June 30, 1969, at which time Great American Insurance Company took over the risk. Great American is not a party to this action.

In March, 1974, plaintiff filed a petition for benefits arising from her back condition, naming her employer Lapeer and both carriers as defendants. Before the hearing, Great American agreed to [Page 346] settle its potential liability by paying plaintiff $20,000. The record of the hearing of approval of the redemption agreement establishes that the hearing referee clarified the settlement as eliminating only the employer's *post-June 30, 1969,* liability *(i.e.,* that insured by Great American) for plaintiff's condition and that any pre-existing liability remained unresolved. The hearing then proceeded against the remaining defendants, Lapeer and Transamerica, as to prior liability.

In short, both the hearing referee and the WCAB found plaintiff's back condition to be solely attributable to her earlier April, 1969, injury. Accordingly, Transamerica was held liable for the full amount of benefits owed from that date forward. The Court of Appeals affirmed, agreeing with the WCAB that Transamerica was not entitled to a credit for the $20,000 settlement paid by Great American. Transamerica appeals, challenging the denial of credit as well as the lower courts' determination that plaintiff's condition is solely attributable to the April, 1969, injury.

II

In affirming the WCAB's denial of credit to Transamerica for the $20,000 redemption, the Court of Appeals in effect treated the settlement as addressing a separate, later injury. Since the settlement by its terms was limited to post-June 30, 1969, injuries, the Court concluded that plaintiff was "not twice recovering for liability for the injury which occurred on April 17, 1969". *Thick v Lapeer Metal Products Co*, 103 Mich App 491, 498; 302 NW2d 902 (1981). Thus, Transamerica was denied credit notwithstanding the factual finding that only one "injury" had occurred. This result is [Page 347] inconsistent with the policy against double recovery in workers' compensation cases.

The fundamental principle underlying workers' compensation is full compensation for injuries sustained. Equally clear is the proposition that workers' compensation law does not

favor double recovery. See *Stanley v Hinchliffe & Kenner*, 395 Mich 645, 657-659; 238 NW2d 13 (1976); *Cline v Byrne Doors, Inc*, 324 Mich 540, 554-559; 37 NW2d 630 (1949) (Butzel, J., *concurring).* In *Stanley, supra,* the petitioner sought compensation benefits from his Michigan employer after having already received benefits for the same injury from his previous California employer. There we applied the foregoing principle to allow the Michigan employer credit for the benefits received in California.

In the instant case, by comparison, the petition for workers' compensation benefits was brought against the employer's two successive insurance carriers for benefits arising from plaintiff's back condition. When the petition was filed, both carriers were potentially liable. Before the hearing, one carrier settled, thereby releasing it from any further liability. After the hearing, it turned out that plaintiff's condition was solely traceable to an injury that predated the settling carrier's period of coverage. Thus, the settling carrier in fact bore no liability and, in hindsight, had improvidently settled.

We conclude that notwithstanding the non-liability of the settling carrier, the resulting judgment against the non-settling carrier must be reduced *pro tanto* by the settlement amount *to the extent that settlement was in satisfaction of the identical claim.* In reaching this result, we depart from the "dual-injury" analysis applied below.

[Page 348] Plaintiff sought benefits to compensate her for an injury or injuries sustained over a period that potentially spanned both carriers' periods of risk. The settling carrier assumed a later injury date and chose to redeem its potential liability. The hearing referee and the WCAB found that the later injuries related back to an earlier injury date that made the non-settling carrier fully liable. Implicit in that finding was a determination that *all* of plaintiff's employment-related back injuries were reducible to a single claim for benefits accruing at the earlier injury date.

We deal solely with an award against the non-settling carrier of benefits arising from *all* of plaintiff's back injuries, and a settlement with the settling carrier arising from *some* of plaintiff's back injuries. We find the conclusion inescapable that the settlement for the later injury is necessarily subsumed by the award for all injuries, and therefore hold that Transamerica is entitled to a credit for the settlement amount. To hold otherwise would ignore the reality of the situation and create two claims where only one was found to exist.

Plaintiff correctly contends that *pro tanto* reduction of a judgment by the amount of a settlement reached is a principle of tort liability, [1] and that [Page 349] "[m]ost principles of tort law are founded in common law, and, consequently, such principles are not automatically applicable to workers' disability compensation law, unless made applicable by specific legislative enactment", but see *Solo v Chrysler Corp (On Rehearing)*, 408 Mich 345, 351-352; 292 NW2d 438 (1980) (applying equitable principles where workers' compensation statute "neither provides for, nor forbids" rescission of redemption agreement); *Wilson v Doehler-Jarvis Division of National Lead Co*, 358 Mich 510; 100 NW2d 226 (1960) (permitting recovery of interest on a compensation award where statute "neither provides for, nor forbids" such recovery).

Moreover, while our workers' compensation statute does not speak to the precise issue raised by the case at hand, § 811 of the act [2] does support provision of a credit under these circumstances:

"Any savings or insurance of the injured employee, or any contribution made by the injured employee to any benefit fund or protective association independent of this act, shall not be taken into consideration in determining the compensation to be paid under this act, *nor shall benefits derived from any other source than those paid or caused to be paid by the employer as provided in this act, be considered in fixing the compensation under this act."* (Emphasis added.)

In *Stanley, supra,* we adopted a liberal construction of that section to allow an insurer credit for a recovery obtained out of state, notwithstanding the apparent import of the emphasized language deny- [Page 350] ing consideration for benefits received from any source *other* than the employer. [3] In reaching that result, we stressed the primacy of the policy against double recovery of workers' compensation benefits, concluding that the crediting of foreign awards "is necessary to avoid injustice and to remain consistent with the principles of workmen's compensation". 395 Mich 659. The instant case, by contrast, involves benefits that are indeed traceable to the *same* employer and hence are to "be considered in fixing the compensation" under that section. No less here than in *Stanley* is the policy against double recovery to be applied to prevent "windfalls not intended by the act". 395 Mich 658.

In sum, not only does the redemption provision of our statute [4] "neither provide for, nor forbid" crediting under these circumstances, but § 811 and the workers' compensation principles enunciated in *Stanley* provide persuasive support for application of a rule to prevent double recovery for what are in fact the same injuries. [5]

Finally, we note that a contrary holding would create an unjustified distinction between plaintiffs employed by successively insured employers and those employed by self- or singly insured employers. As conceded by plaintiff's attorney during argument, the instant situation would not have [Page 351] arisen if Lapeer had been self-insured, since the resulting award or settlement would have been addressed to one party. It may be presumed that the same result would obtain if Lapeer were insured by a single carrier during the relevant period. Thus, we

find that the mere happenstance of successive carriers insuring Lapeer during the period of plaintiff's injuries should not benefit plaintiff to the extent of an extra $20,000 in compensation benefits. To paraphrase our statement in *Stanley, supra,* p 658:

"To preclude credits would allow claimants to receive windfalls not intended by the act. It would have the effect of allowing some workers to receive more compensation than their fellow employees who suffer from the same occupational disease simply because they [worked for an employer who changed insurance carriers during the period of the workers' disabilities]."

Such a windfall to employees of successively insured employers comports neither with the letter nor the spirit of our workers' compensation scheme.

We recognize that our holding today might reduce the incentive for insurers to redeem claims early, since a dilatory insurer will not have to fear imposition of a higher award that ignores settlements paid by coinsurers. Unaffected by today's holding, however, is the reality that the primary motivation for early settlement is the employer's strategic assumption that an early settlement will be for an amount *lower* than an eventual referee's award. [6] Thus, any incremental incentive provided [Page 352] by the prospect of no credit for redemptions paid by other insurers appears marginal when weighed against the policy disfavoring the double recoveries that would otherwise result.

The remaining issue raised by Transamerica, error in the WCAB's finding of an April, 1969, disability date, is without merit. We agree with the Court of Appeals that this finding was based on substantial, competent, and material evidence. See *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243, 250-254; 262 NW2d 629 (1978).

Reversed.

Levin and Brickley, JJ., concurred with Boyle, J.

FOOTNOTES

1 This construction of the act parallels the common-law rule that where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount. See *Larabell v Schuknecht*, 308 Mich 419; 14 NW2d 50 (1944); see generally 4 Restatement Torts, 2d, § 885(3), p 333; Prosser, Torts (4th ed), § 49, pp 304-305. The principle has been codified by our Legislature at MCL 600.2925d; MSA 27A.2925(4).

Significantly, the settlement is so credited "whether or not the person making the payment is liable to the injured person". 4 Restatement Torts, 2d, § 885(3), p 333; see, *e.g., Miller* v *Bock Laundry Machine Co,* 64 Ohio St 2d 265; 416 NE2d 620 (1980) (applying Texas law), *cert den* 451 US 987 (1981); *Duncan* v *Pennington County Housing Authority,* 283 NW2d 546 (SD, 1979). In addition, "[i]f the payment is made as full satisfaction for a specified item of damage, the claim against the [other tortfeasors] is terminated with respect to that item". 4 Restatement Torts, 2d, § 885, Comment *e,* p 335.

2 MCL 418.811; MSA 17.237(811).

3 The Legislature subsequently amended the statute to provide credits for such out of state awards. MCL 418.846; MSA 17.237(846) (effective January 1, 1982).

4 MCL 418.835; MSA 17.237(835).

5 Justice Butzel's observation in *Cline, supra,* p 557 is particularly apt:

"In the last analysis, there is only one claimant, one employer and one accident. The courts have held that it is neither within the meaning or the spirit of the act to allow double compensation by refusing to give credit for compensation paid for the same accident *by the same employer* or his insurer to the same employee in the making of a second award." (Emphasis added.)

6 With respect to the incentive dynamics of the insurer (in this case Great American) that has redeemed early, today's decision does not appear to affect the insurer's decision to redeem early. Whether or not another insurer will be credited with the redemption, the redeeming insurer is still relieved from any further liability and is still gambling that the redemption amount is less than an eventual referee's award. While that incentive might be further enhanced, and justice better served, by a rule allowing an improvidently redeeming insurer to recover the redemption amount in an action against the insurer determined to be liable, we decline to reach that issue which has been neither briefed nor argued in the instant case.

Williams, C. J.

I concur with my sister Boyle's opinion, as to both the result and much of the reasoning. However, I can only justify doing so by carrying the reasoning to its logical conclusion.

My sister Boyle correctly recognizes that workers' compensation law disfavors a double recovery of compensation as inequitable. The same principle must disfavor the occurrence of a windfall to the insurer. [1]

Transamerica was held liable for the entire disability and compensation award. My sister Boyle quite correctly holds that the injured worker is not entitled to receive a full recovery from Transamerica in addition to the $20,000 [Page 353] settlement reached with Great American. The full recovery must be reduced by $20,000 to avoid a double recovery. I agree that that is just and the correct result under workers' compensation law principles.

However, I do not find it just that Transamerica, which was liable for full compensation, should receive a $20,000 windfall and that Great American, which, it turns out, had no liability, should be out $20,000.

In justice, one cannot support giving a windfall to Transamerica by giving it the benefit of the settlement paid by Great American to the injured worker to avoid a double recovery to the injured. Why should Transamerica be $20,000 richer by not having to pay a liability it owed, and Great American $20,000 poorer for paying where it had no liability?

It is true that Great American did not have to settle, and perhaps it gained some advantage by settling. But as between Great American and Transamerica, Great American did what public policy favored, namely settled, whereas Transamerica contested liability and delayed recovery by the injured worker, a result the law seeks to avoid. The courts would do a disservice to public policy if they rewarded those who avoided following public policy as against those who pursued it. For this reason, I can only justify denying the injured worker double recovery by deducting from the second insurer's liability if it is understood that the second insurer is not entitled to a windfall, but is liable to indemnify the first insurer whose settlement provided the rationale for reducing the second insurer's total liability *pro tanto.*[2]

[Page 354] In conclusion, I justify my concurrence with the result and much of the reasoning of my sister Boyle by carrying the principle of no windfall one step further, so that neither the worker nor Transamerica is entitled to a windfall, and so that the public policy favoring settlements will be followed.

FOOTNOTES

1 Justice Boyle recognizes the possibility of this argument in her footnote 6.

2 In footnote 6 of Justice Boyle's opinion, she observes:

“While that incentive might be further enhanced, and justice better served, by a rule allowing an improvidently redeeming insurer to recover the redemption amount in an action against the insurer determined to be liable, we decline to reach that issue, which has been neither briefed nor argued in the instant case.”

Justice Boyle makes a good point: the effect of the credit on the improvidently settling insurer was not addressed by the present litigants. This is understandable since the party most concerned with this issue is Great American, which is not a party to this case.

However, I cannot reach my conclusion regarding Transamerica's credit without addressing the right of indemnification in Great American, despite the lack of briefing and argument on this issue, because there is no justification for one without the other.

Finally, in addition, Justice Boyle argues that “a contrary holding would create an unjustified distinction between plaintiffs employed by successively insured employers and those employed by self- or singly insured employers” *(ante,* p 350). The same argument applies to not recognizing a right to indemnification. But for the second insurer, the first or self-insurer would have been liable for the whole compensation award, and there would have been no windfall to the insurer.

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Kavanagh, J. *(dissenting).*

The decision of the Court of Appeals affirming the award approved by the Workers' Compensation Appeal Board was correct for the reasons set forth by Judge Allen in his opinion for the Court.

Judge Allen's observation adequately and accurately demonstrates there was no double recovery for the same injury:

“At the time the redemption agreement was entered into, both insurers were parties respondent and petitioner was claiming that two separate injury dates were involved. Thus,

both Transamerica and Great American Insurance were potentially liable. Great American Insurance entered into the redemption agreement to relieve its potential liability. The fact that the Appeal Board subsequently found only one injury date and thus [Page 355] no liability on the part of Great American Insurance should not negate the parties' understanding that the $20,000 settlement was in settlement of the second insurer's potential liability. Under these circumstances, we conclude that the public policy prohibiting double recovery for the same injury was not violated and petitioner may retain any benefit gained by the $20,000 redemption agreement." *Thick v Lapeer Metal Products, Co*, 103 Mich App 491, 498; 302 NW2d 902 (1981).

I would affirm.

Ryan and Cavanagh, JJ., concurred with Kavanagh, J.

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MI Decisions That Cite This Case

Decided November 8, 1983. Leave to appeal applied for.

Ignotov v Reiter
130 Mich App 409, 343 NW2d 574
Published Michigan Court of Appeals Opinion

Opinion by Per Curiam. Before: Danhof, C.J., and Bronson and W. R. Peterson,[1] JJ.

Docket No(s) 66565
Disposition: Reversed.

Per Curiam.

1 Circuit judge, sitting on the Court of Appeals by assignment.

Per Curiam.

Defendant was retained by plaintiff to represent him in a parental rights termination proceeding brought by plaintiff's ex-wife, Janice Everest, who sought termination of plaintiffs parental rights to enable her current husband to adopt plaintiffs natural daughter. Plaintiff's parental rights were terminated at a hearing on April 19, 1977, and plaintiff thereafter filed the instant legal malpractice action. After a bench trial, judgment was entered on behalf of plaintiff. Plaintiffs damages were found to be $25,000 and he was found to be 25% negligent. A judgment against defendant for 75% negligence in the amount of $18,750 plus $134 costs was entered by the trial court. Defendant's motion for new trial or judgment notwithstanding the verdict was denied. Defendant presently appeals as of right.

[Page 411] At trial, the testimony established that defendant was retained by plaintiff, who lived in Ohio, through a telephone contact. The original hearing date on the termination petition was adjourned several times and, in late February, defendant contacted plaintiff regarding a settlement proposed by Ms. Everest's attorney. Plaintiff rejected the proposed settlement and shortly thereafter received a letter from defendant stating in part:

"I believe that the conclusion of our conversation was that you did not wish to make any such offer and that under the circumstances you would not contest the Adoption Petition."

Defendant testified at trial that plaintiff rejected the settlement and refused to offer any counterproposal which would include a provision for child support. Plaintiff admits that he was in arrears in his child support payments and had not seen his daughter in more than two years. Plaintiff denied informing defendant that he would not contest the adoption proceedings. Defendant did not appear at the April 19, 1977, termination hearing and did not inform plaintiff of the hearing date.

In an action for legal malpractice, the plaintiff has the burden of proving:

"(1) the existence of the attorney-client relationship; (2) the acts which are alleged to have constituted the negligence; (3) that the negligence was the proximate cause of the injury and; (4) the fact and extent of the injury alleged." *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981), *lv den*413 Mich 913 (1982).

This Court recognized in *Grant* that the element of proximate cause is often problematic:

[Page 412] "'The recovery sought is usually the value of the claim in suit in the proceeding in which the negligent act occurred, if the client was a plaintiff in that action, or, if he was a defendant, the amount of the judgment imposed upon him, and, in accordance with general rules as to proximate cause, it is generally held that before such recovery can be had the client must establish that, absent the act or omission complained of, the claim lost would have been recovered or the judgment suffered avoided. Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.' 45 ALR2d 5, § 2, p 10.

* * *

"From the authorities cited above, it would appear that the 'suit within a suit' concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents

the client from bringing a cause of action (such as where he allows the statute of limitations to run), where the attorney's failure to appear causes judgment to be entered against his client or where the attorney's negligence prevents an appeal from being perfected. In such cases, it is at least arguably true that the suit within a suit requirement serves to insure that the damages complained of due to the attorney's negligence are more than mere speculation." (Footnote omitted.) *Grant, supra,* pp 691, 693.

Plaintiff here failed to establish that the proximate cause of his injury was defendant's failure to appear at the termination hearing. Plaintiff presented no evidence to show that he would have appeared at the hearing willing to work out an alternative settlement to prevent the termination of his parental rights. Although the trial judge concluded that plaintiff might have finally realized that defendant's advice "was correct and that if he wanted to cease halt *[sic]* the termination of his parental rights he must recognize the legal fact that he had an obligation to pay back and future [Page 413] support", there was no evidence in the record to support this contention.

Since we agree with defendant's first allegation of error, we do not address the two remaining issues raised by defendant.

Reversed. Costs to defendant.

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MI Decisions That Cite This Case

Decided December 2, 1985. Leave to appeal applied for.

Varney v O'Brien
147 Mich App 397, 383 NW2d 213
Published Michigan Court of Appeals Opinion

Opinion by R. B. Burns, P.J. Before: R. B. Burns, P.J., and R. M. Maher and G. R. Deneweth,[1] JJ.R. M. Maher, J., concurred.Concurring opinion by G. R. Deneweth, J.

Docket No(s) 77680
Disposition: Remanded.

R. B. Burns, P.J. | G. R. Deneweth, J. (concurring in part and dissenting in part).

1 Circuit judge, sitting on the Court of Appeals by assignment.

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R. B. Burns, P.J.

Plaintiff brought this action against the Genesee County Sheriff and seven named deputies for assault without lawful authority, excessive force, destruction of evidence, and deprivation of civil rights under 42 USC 1983. Pursuant to local court rule, the case was mediated and the value of plaintiff's claim was assessed at $7,500. Both parties rejected the mediation award and the case was tried.

At trial, during its deliberation, the jury sent a handwritten note to the judge asking if it could "find liability without compensatory or punitive damages". The judge responded in handwriting on the same note, "You should attempt to complete the seven sheets comprising the verdict forms and you may find whatever amount of damages the evidence warrants whether it be none, nominal or any other amount".

[Page 401] The jury returned a verdict in favor of all defendants on Counts I and II. Under Count III, the civil rights count, only defendant Safford was found liable. The jury did not assess damages against Safford. The foreman of the jury, in reciting the verdict, was allowed to explain why the jury found no damages. The foreman stated that the jury had found that the disciplinary action taken against Safford by the sheriff's department had been "appropriate".[2]

In the days that followed the trial, the parties made several post-trial motions. After hearing, the trial judge, in a written opinion, substantially ruled against plaintiff on almost all issues. The court recognized that its reply to the jury's question during deliberation had been partly erroneous. In *Carey v Piphus*, 435 US 247; 98 S Ct 1042; 55 L Ed 2d 252 (1978), the Court held that a deprivation of constitutional rights which is not shown to have resulted in actual damages entitles the plaintiff to an award of nominal damages. The trial judge said that he would cure the erroneous instruction by approving plaintiff's motion for additur. The amount of additur which the trial judge granted was $1.

Plaintiff also had made a post-trial motion requesting that the trial court grant attorney fees to him pursuant to 42 USC 1988. Defendants moved to have attorney fees and costs awarded to them pursuant to GCR 1963, 316 and Genesee County Circuit Court Rule 29, because plaintiff had rejected the mediation award. Originally, the trial [Page 402] court granted both motions and, offsetting the fees, found that defendants owed $5.23 to plaintiff.

In granting plaintiff's motion for attorney fees under § 1988, the court stated that it had not considered the issues on which plaintiff had not prevailed. Also, plaintiff had presented actual costs totalling $7,815.14, but the trial court granted costs only for the amount of $786.25. The court explained that some of plaintiff's actual costs had been for docket fees, deposition expenses, witness expenses and the cost of charts and maps. The court found that these costs were not recoverable under 42 USC 1988.

Plaintiff then moved for reconsideration of the trial judge's disposition of attorney fees. Two years after the court's original opinion, the trial judge reversed himself and stated that the policy considerations which were promoted by 42 USC 1988 prohibited defendants from recovering attorney fees, and that § 1988 governed to the exclusion of county or state court rules. The trial court disallowed defendants' motion for attorney fees and granted plaintiff

attorney fees in the amount of $14,667 and costs in the amount of $786.25 for a total of $15,453.25.

Defendants appeal from the order granting plaintiff attorney fees and denying attorney fees to defendants. Plaintiff responds but does not cross-appeal.

I

Did the trial judge abuse his discretion in determining that plaintiff was a "prevailing party" entitled to an award of attorney fees under 42 USC 1988?

Title 42 USC 1988 provides that in federal civil rights actions "the court, in its discretion, may [Page 403] allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs".

In *Hensley v Eckerhart*, 461 US 424, 433; 103 S Ct 1933, 1939; 76 L Ed 2d 40, 50 (1983), the United States Supreme Court, citing *Nadeau v Helgemoe,* 581 F2d 275, 278-279 (CA 1, 1978), held that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit". The Supreme Court characterized this standard as a "generous formulation".

In the instant case, the jury found one of the eight defendants liable on one of the three counts. The defendnat who was found liable on the civil rights count appears to have been the defendant most responsible for the alleged assault on plaintiff.

On appeal, the trial court's determination of whether or not plaintiff "prevailed" may be overturned only if this Court finds that the trial judge abused his discretion. *Reichenberger v Pritchard,* 660 F2d 280, 288 (CA 7, 1981). Because the jury did find plaintiff's civil rights had been violated by one defendant, and because the Supreme Court has adopted a "generous formulation" of the term "prevailing party" under 42 USC 1988, we cannot say that the trial court abused its discretion in finding plaintiff a "prevailing party".

II

Was the amount of attorney fees awarded pursuant to 42 USC 1988 reasonable?

The amount of an attorney fee must be determined on the facts of each case. The starting point for determining a reasonable fee is the number of [Page 404] hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley,* 461 US 433. In the instant case, there is no dispute as to the hours expended or the hourly rate.

Next, the level of a plaintiff's success is relevant to the amount of fees to be awarded. In *Hensley, supra,* 461 US 434, the Court explained:

" *This factor is particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief.* In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" (Footnote omitted; emphasis added.)

In regard to the first question, the Supreme Court wrote:

"In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers, as in this case—counsel's work on one claim will be unrelated to his work on another claim.

* * *

"In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.,* pp 434-435.

Since the instant case involved common core [Page 405] facts and related legal theories, the suit cannot be viewed as a series of discrete claims. In awarding attorney fees the trial judge stated that he did not consider any issue upon which plaintiff did not prevail. Therefore, we focus upon the second inquiry, "the significance of the overall relief obtained". *Id.,* p 435.

In the instant case, plaintiff brought three related counts against eight defendants and prevailed only upon the count specifically addressing the civil rights violation and then against only one defendant. Plaintiff was awarded $1 in damages. Because the relief that plaintiff obtained was slight, the fee award in the instant case should have been limited. *Id.,* pp 436, 438, fn 14. Because the opinion and order of the trial court did not consider the significance of the results achieved by plaintiff, we remand to the trial court for a determination of the reasonableness of the attorney award in light of *Hensley.*

III

Should a local court rule which allows a party to collect costs and attorney fees incurred after mediation be enforced in favor of defendants?

Fee awards are authorized by 42 USC 1988 in order to encourage public interest and civil rights litigation by private individuals.[3] A prevailing [Page 406] plaintiff should ordinarily recover an attorney fee unless special circumstances would make such an award unjust. On the other hand, a prevailing defendant in a civil rights case may recover attorney fees only if the trial court, in its discretion, determines that the suit was vexatious, frivolous or brought to harass. *Hensley, supra,* 461 US 429, fn 2.

We agree with the trial judge that the instant suit cannot be viewed as frivolous. Accordingly, the trial court did not abuse its discretion in denying defendant attorney fees under 42 US 1988.

Defendants also contend they were entitled to receive attorney fees pursuant to Genesee County Court Rule 29, which concerns mediation and provides in pertinent part:

"In the event both parties reject the evaluation of the mediation board and the judgment or verdict is within 10 percent above or below the mediation board's evaluation, each party shall be responsible for his own costs from the date of mediation. Should the verdict or judgment be more than 10 percent above the evaluation of the mediation board, the Defendant shall be taxed actual costs, and should the verdict or judgment be more than 10 percent below the evaluation of the mediation board, the Plaintiff shall be taxed actual costs."

Prior to trial in this case, a mediation panel assessed the value of plaintiff's claim at $7,500. Both parties rejected the mediation evaluation. Since the verdict was "more than 10 percent below the evaluation of the mediation board", if the [Page 407] court rule is applied, plaintiff is required to pay actual costs. Rule 29.14 of the relevant local court rule defines "actual costs" to "include those costs and fees taxable in any civil action, and in addition, an attorney fee at the rate of $350.00 for each day of trial in Circuit Court".

Thus, the issue here involves the interplay between a federal statute which awards this plaintiff attorney fees and a local court rule which awards them to the defendants. The trial judge reversed his initial decision that offset the fee awards against each other, finding that the federal statute had preempted the local court rule. We agree.

The attorney fee award to a prevailing plaintiff under 42 USC 1988 is intended to encourage those deprived of their civil rights to seek legal redress as well as to ensure victims of discrimination access to the courts. *Hensley, supra.* The right to attorney fees created by 42 USC 1988, while procedural for some purposes, is designed to achieve a substantive objective —compliance with the civil rights laws. *Chesny v Marek,* 720 F2d 474, 479 (CA 7, 1983).

The local court rule involved in this case is similar to the mediation rules under the General Court Rules,[4] GCR 1963, 316.7, 3.16.8. See MCR 2.403(0). In *Maple Hill Apartment Co v Stine*, 131 Mich App 371, 375; 346 NW2d 555 (1984), our Court, while recognizing that the line of demarcation between substantive and procedural rules is not easy to resolve, found that the provision for the award of costs, GCR 1963, 316.8, "may reasonably be classified as 'procedural' in nature". The policy underlying the rule is to place the burden of litigation costs upon the party who insists upon a [Page 408] trial by rejecting a proposed mediation award. 131 Mich App 376.

We think that the effectiveness of 42 USC 1988 would be undermined if the rejection of a mediation award that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting an award of attorney fees. *Chesny, supra,* p 478.

This is not a situation where defendants may recover attorney fees in defending the counts which did not allege civil rights violations, because the record before us does not indicate that the counts are so distinct that in actuality there were two or three different lawsuits. In sum, because all the counts in the instant case involve a common core of facts and related legal theories and because Congress through 42 USC 1988 has expressed a desire to encourage private enforcement of civil rights, we conclude that the local court rule upon which defendants rely has been preempted and, therefore, defendants are not entitled to recover attorney fees.

IV

Should a plaintiff who has been awarded $1 in damages be allowed to collect costs in disregard of GCR 1963, 526.6?

GCR 1963, 526.6 provides:

"Costs in Certain Trivial Actions in Circuit Court. In any action brought in the Circuit Court for damages in contract or tort, if the plaintiff recovers less than 100 dollars, unless his claim is reduced below 100 dollars by counterclaim, he shall recover no more cost than damages."

Defendants have not cited, nor are we aware of, any case which holds that a civil rights action [Page 409] under § 1988 is a tort for purposes of GCR 1963, 526.6. Moreover, in the instant case, plaintiff presented actual costs to the trial court totaling $7,815.14. The trial judge

allowed only $768.25, or approximately 10% of these costs, in reliance upon *Northcross v Bd of Ed of Memphis City Schools*, 611 F2d 624 (CA 6, 1979). Thus, the only costs that were allowed were those expenses "included in the concept of attorney's fees as 'incidental and necessary expenses incurred in furnishing effective and competent representation,' and thus are authorized by section 1988". *Id.,* p 639. The over $7,000 in costs which were not allowed were "those costs incurred by a party to be paid to a third party, not the attorney for the case, which cannot reasonably be considered to be attorney's fees". *Id.*

Therefore, the costs which defendants now contest are in actuality part of the attorney fee award which we have addressed in our discussion of the previous issues.

Remanded.

R. M. Maher, J., concurred.

FOOTNOTES

2 At trial, Sheriff O'Brien testified that Safford was disciplined because he falsely certified that plaintiff had refused to take a Breathalyzer test. A drunk driving charge against plaintiff was then dismissed because plaintiff never received the opportunity to take the Breathalyzer test. Safford was suspended from work without pay for two weeks because of the incident.

3 As Justice Brennan wrote in *Hensley, supra,* pp 57-58:

"In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned.

"'All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

"'In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.'" (Quoting S Rep No. 94-1011, 94th Cong., 2d Sess, Report 2.) (Footnote omitted.)

4 The General Court Rules concerning mediation were not adopted until after the mediation award on this case was rejected.

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G. R. Deneweth, J. ***(concurring in part and dissenting in part).***

I concur that the circuit court did not abuse its discretion in holding plaintiff to be the prevailing party and concur that a remand is necessary to determine the reasonableness of the attorney fee award, but find myself unable to agree that 42 USC 1983 preempts the mediation rule.

I believe that the majority has misjudged the interplay of the federal remedy sought in state court and that state court's procedural rules.

Congress, in its infinite wisdon, has chosen to grant federal and state courts concurrent jurisdiction over deprivation of civil rights claims pursu- [Page 410] ant to 42 USC 1983. Congress must be presumed to know that the state courts employ differing procedural rules which could well effect the remedy in a 42 USC 1983 action. Nonetheless, concurrent jurisdiction was allowed without any express intent to preempt local procedure and without an exhibition of any purpose to exercise Congress's paramount authority over the subject of attorney fees. 42 USC 1988 simply states in relevant part:

"[T]he court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs."

The interplay of state procedural laws which operate in state court suits to enforce federal claims has been addressed by the United States Supreme Court in *Dickinson v Stiles*, 246 US 631; 38 S Ct 415; 62 L Ed 908 (1918), and *Missouri, K & T R Co of Texas v Harris*, 234 US 412; 34 S Ct 790; 58 L Ed 1377 (1914). Both cases involved claims brought in state courts where concurrent jurisdiction existed. They may be summarized as holding that state procedural law may operate in state court suits to enforce federal rights where state law does not erect artificial barriers to the use of the federal courts. 1 Derfner & Wolf, Court Awarded Attorney Fees, § 14.03, p 14-15.

The mediation rule in question raises no barrier to the use of the federal courts. Plaintiff elected to bring his action in *state court* to enforce a federal right. This was purely a voluntary and personal decision perhaps based on strategic reasons. He could have pursued his remedy in federal court and no question of mediation sanctions would have arisen. Having chosen to

bring his action in state court, with its attendant procedural advantages and/or limitations, plaintiff cannot now complain that the mediation rule should not apply to him.

[Page 411] I would hold that the mediation rule is not "preempted" and that any award under it should offset an award to plaintiff under 42 USC 1983.

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MI Decisions That Cite This Case

Decided July 22, 1986.

Ignotov v Reiter
425 Mich 391, 390 NW2d 614
Michigan Supreme Court Opinion

Opinion by Levin, J. Williams, C.J., concurred with Levin, J.Concurring opinion by Boyle, J.Dissenting opinion by Riley, J. Brickley and Cavanagh, JJ., concurred with Riley, J.Archer, J., took no part in the decision of this case.

Calendar No. 16.
Docket No(s) 73095
Lower Court Docket No(s) 66565
Disposition: The judgment of the Court of Appeals is affirmed by equal division.

Levin, J. | Boyle, J. | Riley, J.

Next >

Levin, J.

The issue presented in this legal malpractice action is whether the trial judge clearly erred in finding that a lawyer's negligence was a cause of the termination of his client's parental rights. We conclude that the judge did not err, and would reverse the judgment of the Court of Appeals which set aside a money judgment in favor of the client.

I

Samuel S. Reiter was retained by Daniel T. Ignotov to represent Ignotov in proceedings concerning his daughter, Dana Sue. These proceedings were initiated by Ignotov's ex-wife, Janice Everest, as the first step in having Dana Sue adopted by Janice Everest's husband. Ignotov had not communicated with his daughter nor paid child support [Page 394] for two years, thereby providing statutory authority to terminate his parental rights. [1]

Ignotov spoke to Reiter on the telephone and sent him a retainer and a letter expressing his thoughts. [2] Discussions ensued between Reiter and Everest's lawyer. Her lawyer made an offer in settlement that would have required Ignotov to pay back child support and increased future support. In return, Everest would agree to suspend the proceedings for two years. Ignotov rejected the offer.

Reiter testified that Ignotov was unwilling to pay child support and that he had advised Ignotov that unless he modified his stance he would lose his parental rights. [3] Ignotov testified he knew he [Page 395] had to pay child support, but rejected the settlement offer because it did not provide for visitation rights and contained other provisions he found objectionable, such as requiring counseling and having Dana Sue change her last name to Everest.

Shortly after Ignotov rejected the settlement offer, Reiter wrote to Ignotov stating: “I believe that the conclusion of our conversation was that you did not wish to make any such [counter] offer and that under the circumstances you would not contest the Adoption Petition.” The letter also stated: “As soon as I receive Notice of the Hearing date on the Petition I will notify you of it and will consult with you as to further actions.”[4]

Ignotov's parental rights were terminated following a hearing. Although Reiter was notified of the hearing, he neither notified Ignotov of the date of the hearing nor appeared on his behalf. [5] Reiter's [Page 396] failure to appear was not inadvertent. When Reiter failed to appear, the probate judge telephoned him. Nevertheless, Reiter did not appear.

Ignotov commenced this action alleging legal malpractice. After a bench trial, the judge found that Ignotov's damages were $25,000, and that he was twenty-five percent comparatively negligent. A judgment against Reiter for $18,750 was entered. The Court of Appeals reversed. [6]

II

Ignotov established that he had retained Reiter to represent him and that Reiter had breached

his obligation to exercise due care when he failed to notify Ignotov of the date of the hearing or to appear on that date. Reiter argues that Ignotov nevertheless may not recover damages because he did not show that had Reiter appeared at the hearing he would have been able to prevent the termination of Ignotov's parental rights. The Court of Appeals agreed with Reiter, stating that Ignotov had presented no evidence that he would have appeared at the hearing prepared to settle.

When it has been established that a lawyer failed to represent his client properly, it then becomes necessary to determine whether, if the client had been properly represented, a more favorable result would have been achieved. In the instant case, a more favorable result might have been achieved either by a successful defense or by a settlement on terms more favorable than the result that ensued.

[Page 397]

A

The result adverse to Ignotov in the proceedings in which Reiter failed to appear was not inevitable. If Reiter had appeared and had represented Ignotov at the hearing, Ignotov's parental rights might not have been terminated. While the evidence of nonpayment and noncommunication for two years permitted the probate judge to terminate Ignotov's parental rights, consideration of the best interests of the child might have led the judge to conclude that termination was not warranted. Reiter did not show that Ignotov could not have avoided the termination of his parental rights.

B

While Ignotov did not show that had he been properly represented he would have prevailed and his parental rights would not have been terminated, the trial judge properly considered whether a more favorable result might have been achieved through a settlement. The judge's finding that Ignotov might have achieved a more favorable result through settlement, and his determination of the amount of damages to be awarded for depriving Ignotov of the opportunity to achieve a more favorable result through settlement, are not clearly erroneous.

The judge acknowledged that without some recognition by Ignotov of his support obligation it was not likely that he could have avoided the termination of his parental rights. The judge reasoned, however, that had Ignotov continued to be properly represented he might have realized the weakness in his position and settled by agreeing to some acceptable payment before the termination of his parental rights.

Ignotov's ex-wife had made a settlement offer [Page 398] that required Ignotov to pay back and future child support, but did not require termination of Ignotov's parental rights. She thus might have agreed to a counter proposal not involving termination of his parental rights.

Ignotov's letter to Reiter stating in effect that if he were forced to pay child support he would demand visitation rights does not compel the conclusion that he would have allowed his parental rights to be terminated if he could thereby have avoided paying child support. It appears that Ignotov sought to retain the ability to regain custody of his daughter because he was apprehensive about her fate should anything happen to her mother.

While Ignotov might have insisted on maintaining a weak, if not indefensible, bargaining position he might indeed, as the judge found, after receipt of notice of the hearing date, have developed, at or shortly before the hearing, a negotiating stance more likely to bring about a settlement and made a counter proposal acceptable to his ex-wife or a payment that would have satisfied the judge that his parental rights should not be terminated. [7]

Even stubborn clients are entitled to continued representation. A lawyer may seek permission from the court to withdraw from further representation of a client. A lawyer may not, however, simply abandon his client.

C

We have considered, but do not address, the suit within a suit doctrine adverted to in the opinion of [Page 399] the Court of Appeals and the briefs of counsel. [8] In the instant case, damages were awarded because the lawyer had deprived the client of the opportunity to resolve the controversy by settlement, not on the basis that the client would have prevailed had the matter gone to judgment. [9]

In the instant case, both the breach and the loss were clearly established. Reiter breached his duty to exercise due care and Ignotov lost his parental rights. The disputed factual issue was whether the breach caused the loss.

The Court of Appeals ruled as a matter of law that Ignotov was required to show that if he had been notified of the hearing, he would have appeared prepared to settle. The judge, who sat as trier of fact, found that had Reiter notified Ignotov of the date of the hearing as he had promised the matter might well have been settled before the hearing with a result more favorable to Ignotov than the result that ensued.

Reiter undertook to represent Ignotov and failed to do so. Ignotov lost his parental rights. Damages were properly awarded for the lost opportunity to resolve the matter by settlement.

The settlement value of a matter in controversy is determinable without regard to, and does not depend on, whether the parties are willing to settle on that basis. Ignotov was not required to show that "but for" Reiter's failure to exercise due care a more favorable or acceptable settlement would assuredly have been achieved. It was for the trier of fact to [Page 400] assess the likelihood that Ignotov would have achieved a result through settlement more favorable than the result that ensued.

Williams, C.J., concurred with Levin, J.

FOOTNOTES

1

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing *may* issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [Emphasis supplied. MCL 710.51; MSA 27.3178(555.51).]

2 The letter included the following statement: "Its just that I cant rely on her mothers judgment and I would want my daghter should anything happen to her mother." [Sic.]

3 Reiter testified that Ignotov "said that he would rather that things remain the way they were with him paying no support, remaining in the background, being available for his wife. He was sure based upon [sic] his wife's prior behavior that there would be another breakdown in whatever [marital] relationship [she had]. In fact, he told me that was her fourth marriage, and he was positive that there would come within the near future another time in which she would leave the children, abandon this child and he wanted to be able to remain in the background and available for that child."

4 The full text of the letter is as follows:

> Dear Dan,
>
> I enclose herewith a copy of the proposal submitted to me by your ex-wife's attorney.
>
> As I stated over the phone this is only a proposal and I believe they *would be amenable to a counter proposal.* However, it will require some effort upon your part of some recognition of your obligation to support your daughter before we can come to any agreement which would result in their withdrawing their Petition for Adoption.
>
> I believe that the conclusion of our conversation was that you did not wish to make any such offer and that under the circumstances you would not contest the Adoption Petition.
>
> As soon as I receive Notice of the Hearing date on the Petition I will notify you of it and will consult with you as to further actions.
>
> Very truly yours,
>
> /s/ Samuel S. Reiter [Emphasis supplied.]

5 At the trial, Reiter acknowledged that he should have appeared at the hearing. He offered no excuse for his failure to appear. He said he believed that if Ignotov appeared at the hearing and did not acknowledge a willingness to pay child support, he would be jailed for contempt. He also said he believed that if Ignotov refused to pay child support until he received full visitation rights, the probate judge would definitely terminate Ignotov's parental rights.

6 *Ignotov v Reiter*, 130 Mich App 409; 343 NW2d 574 (1983).

7 Ignotov testified that after his parental rights were terminated he paid $1,750 of his back child support obligation of $2,811 pursuant to a settlement worked out by another lawyer.

8 Compare *Daugert v Pappas,* 104 Wash 2d 254; 704 P2d 600 (1985), with *Jenkins v St Paul Fire & Marine Ins Co,* 422 So 2d 1109 (La, 1982), *Romanian American Interests, Inc v Scher,* 94 AD2d 549; 464 NYS2d 821 (1983), *Glidden v Terranova,* 12 Mass App 597; 427 NE2d 1169 (1981), and *Winter v Brown,* 365 A2d 381 (DC App, 1976).

9 Expert testimony regarding settlement value may in some cases be required where the client seeks to recover on that basis and the claim in the underlying action or proceeding is for money damages.

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Boyle, J.

I concur in the result reached by Justice Levin.

The Court of Appeals in the case at bar clearly erred when it required the plaintiff to establish that " *the* proximate cause of his injury was defendant's failure to appear at the termination hearing." *Ignotov v Reiter*, 130 Mich App 409, 412; 343 NW2d 574 (1983) (emphasis added). It is well-established that in Michigan the burden is on the plaintiff to establish only that the defendant's negligence is *a* proximate cause of the plaintiff's damages. *Kirby v Larson*, 400 Mich 585, 605; 256 NW2d 400 (1977); *Sedorchuk v Weeder*, 311 Mich 6, 10-11; 18 NW2d 397 (1945); *Barringer v Arnold*, 358 Mich 594, 599-600; 101 NW2d 365 (1960); SJI2d 30.03

This Court has defined proximate cause as "a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220; 118 NW2d 397 (1962). Moreover,

> [t]he general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tort-feasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote, contingent, or [Page 401] speculative damages are not considered in conformity to the general rule. [*Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966). Citations omitted.]

The trial court in the case at bar found that a proximate cause of plaintiff's injury was defendant's negligence in failing to notify plaintiff of the hearing on the petition to terminate plaintiff's parental rights. The court also found that a proximate cause of plaintiff's injury was the plaintiff's negligence in failing to notify defendant that he would contest the petition regardless of plaintiff's refusal to settle according to his ex-wife's last settlement offer. These findings were supported by the record. Therefore, I agree with Justice Levin that the trial court did not clearly err on the finding of proximate cause.

Unlike Justice Levin, however, I believe the record establishes that damages were awarded for the loss of plaintiff's parental rights, not "the lost opportunity to resolve the matter by settlement." The trial court in its decision specifically awarded damages to Ignotov for "the loss of his child." Moreover, this case is unlike most cases involving malpractice in connection with the settlement of or failure to settle a case. See generally Anno: *Legal malpractice in settling or failing to settle client's case,* 87 ALR3d 168. This case did not involve Reiter's failure to disclose a settlement proposal to Ignotov, or the failure of Reiter to offer an authorized settlement proposal to Ignotov's ex-wife. Therefore, Reiter's misconduct did not directly result in the loss of an opportunity to settle.

The trial court's award for the instant plaintiff's loss of parental rights had a basis in the record. I would reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

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[Page 402]

Riley, J.

I respectfully dissent from the opinions of my colleagues and would affirm the conclusion reached by the Court of Appeals in *Ignotov v Reiter*, 130 Mich App 409; 343 NW2d 574 (1983).

In an action for legal malpractice, the plaintiff has the burden of proving:

> "(1) the existence of the attorney-client relationship; (2) the acts which are alleged to have constituted the negligence; (3) that the negligence was the proximate cause of the injury and; (4) the fact and extent of the injury alleged." *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d

26 (1981), lv den 413 Mich 913 (1982). [1]

> This Court recognized in *Grant* that the element of proximate cause is often problematic:
>
> "'The recovery sought is usually the value of the claim in suit in the proceeding in which the negligent act occurred, if the client was a plaintiff in that action, or, if he was a defendant, the amount of the judgment imposed upon him, and, in accordance with general rules as to proximate cause, it is generally held that before such recovery can be had the client must establish that, [Page 403] absent the act or omission complained of, the claim lost would have been recovered or the judgment suffered avoided. Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.' 45 ALR2d 5, § 2, p 10.
>
> * * *
>
> "From the authorities cited above, it would appear that the 'suit within a suit' concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run), *where the attorney's failure to appear causes judgment to be entered against his client*[2] or where the attorney's negligence prevents an appeal from being perfected. In such cases, it is at least arguably true that the suit within a suit requirement serves to insure that the damages complained of due to the attorney's negligence are more than mere speculation." (Footnote omitted.) *Grant, supra,* pp 691, 693. [*Ignotov, supra,* 411-412. Emphasis added.]

The plaintiff's action clearly falls within the aforementioned emphasized language, "where the attorney's failure to appear causes judgment to be entered against his client. ..." It is the defendant's failure to appear on behalf of the plaintiff that the plaintiff is claiming caused him to suffer [Page 404] damages, i.e., loss of parental rights. [3] Therefore, I am persuaded that the "suit within a suit" concept is applicable in this instance. Pursuant to the "suit within a suit" concept, the plaintiff must prove, inter alia, that the defendant's negligence was a proximate cause of his damages. Included within the element of "proximate cause" is the requirement that the plaintiff establish cause in fact. Moreover, even if cause in fact is established, there remains the question of proximate cause, whether the defendant should be legally responsible for the injury to the plaintiff. I believe that, restricted to the question of cause in fact, the "but for" test should be implemented in this case: "An act or omission is not regarded as a cause of an event if a particular event would have occurred without it." Prosser & Keeton, Torts (5th ed), § 41, p 265. Accordingly, pursuant to the "suit within a suit" concept, the plaintiff must establish, as part of the proximate cause element, that, but for the negligence complained of, the plaintiff would have been successful in the defense of the action in [Page 405] question. In applying the "suit within a suit" concept to the facts of this case, the Court of Appeals held:

> Plaintiff here failed to establish that the proximate cause of his injury was defendant's failure to appear at the termination hearing. Plaintiff presented no evidence to show that he would have appeared at the hearing willing to work out an alternative settlement to prevent the termination of his parental rights. Although the trial judge concluded that plaintiff might have finally realized that defendant's advice "was correct and that if he wanted to cease halt [sic] the termination of his parental rights he must recognize the legal fact that he had an obligation to pay back and future support," there was no evidence in the record to support this contention. [*Ignotov, supra,* 412-413.]

The particular damage alleged by the plaintiff was the loss of parental rights. Therefore, as part of the plaintiff's burden of proof to establish liability on behalf of the defendant, the plaintiff had to prove cause in fact, i.e., but for the attorney's negligence the plaintiff would have retained his parental rights. [4] While I disagree with the Court of Appeals use of "the proximate cause" language, I believe that the record clearly shows that the plaintiff has not established causation in this case. Thus, I agree with the Court of Appeals determi- [Page 406] nation that the plaintiff failed to carry his burden of proof. I would affirm.

Brickley and Cavanagh, JJ., concurred with Riley, J.

Archer, J., took no part in the decision of this case.

FOOTNOTES

1 I agree with Justice Boyle that under element three, the language "the proximate cause" should be, in accordance with Michigan law, "a proximate cause." *Kirby v Larson*, 400 Mich 585; 256 NW2d 400 (1977). Nevertheless, I do not believe that this mandates a different conclusion than that reached by the Court of Appeals in the instant case. While the plaintiff is required to prove the defendant's negligence was a proximate cause of his damages, an essential aspect of the element of proximate cause is the requirement that the plaintiff establish cause in fact. Only after it is established that the defendant's conduct has in fact been a cause of the plaintiff's damages is it necessary to address the question whether the defendant should be held legally responsible for the damages, i.e., is there proximate cause. See *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977), and Prosser & Keeton, Torts (5th ed), §§ 41,

42. Consequently, because I believe that the plaintiff has failed to prove that the defendant's negligence was the cause in fact of his damages, the erroneous application by the Court of Appeals of "the proximate cause" to the facts of this case, instead of "a proximate cause," does not change the correctness of their conclusion.

2

> A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the *attorney's failure to appear caused judgment to be entered against him as a defendant.* In addition to proving negligence, a client must show that *but for* his attorney's negligence he would have been successful in the original litigation; in effect, he must prevail in two distinct suits. [Note, *Attorney malpractice,* 63 Colum L R 1292, 1307 (1963). Emphasis added. See *Basic Food Industries, supra,* 692.]

3 It appears that Justice Levin considered but did not embrace the "suit within a suit" doctrine, reasoning that damages were awarded because the defendant deprived the plaintiff of the opportunity to settle the case, and not on the basis that the client would have been successful had the case gone to judgment. *Ante,* p 399. With regard to any lost opportunity to settle this case prior to trial, I am in agreement with Justice Boyle to the extent that "[t]his case did not involve Reiter's failure to disclose a settlement proposal to Ignotov, or the failure of Reiter to offer an authorized settlement proposal to Ignotov's ex-wife." (Citing 87 ALR3d 168.) *Ante,* p 401. Regarding any lost opportunity of settlement because of Reiter's failure to appear, I believe Justice Levin's rationale improperly circumvents the "case within a case" doctrine. In *Basic Food Industries, supra,* 693, the Court of Appeals stated that the doctrine had limited application but did encompass a situation where the attorney's failure to appear caused judgment to be entered against the client. Concomitant with the attorney's failure to appear is also the lost potential for settlement. Thus, I do not believe that an attorney's failure to appear, causing judgment to be entered against a client, should be distinguished from the loss of any settlement opportunity because of the same failure to appear for the purposes of the "suit within a suit" doctrine.

4 The plaintiff's burden of establishing that the defendant's negligence was a cause in fact of the injury is not affected by the defense of comparative negligence.

> There is some debate over what is to be compared under comparative negligence, negligence or causation. The problem in certain respects is one of terminology. Causation in fact is an absolute concept, which by its nature is incapable of being divided into comparative degrees—it either exists or it does not. The adoption of comparative negligence, therefore, should not affect this preliminary determination. [Prosser & Keeton, Torts (5th ed), § 67, p 474. See authority cited in footnotes.]

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MI Decisions That Cite This Case

Decided June 17, 1986. Leave to appeal denied, 426 Mich —.

Frankenmuth Mutual Insurance Company, Inc v Eurich
152 Mich App 683, 394 NW2d 70
Published Michigan Court of Appeals Opinion

Opinion by Per Curiam. Before: Cynar, P.J., and R. B. Burns and F. X. O'Brien,[1] JJ.

Docket No(s) 85079
Disposition: Affirmed.

Per Curiam.

1 Circuit judge, sitting on the Court of Appeals by assignment.

Per Curiam.

Defendant Ray Eurich appeals as of right from an order of summary judgment by the Saginaw County Circuit Court declaring that plaintiff, Frankenmuth Mutual Insurance Company, Inc., had no duty to defend defendant or provide him coverage for damages arising out of a fire. Prior to entry of the order, the trial judge [Page 685] issued a three-page opinion, setting forth the basis of his decision.

The facts are not in substantial dispute. Defendant Eurich is a plumbing, heating, and building contractor. In 1973, he began construction of the River Greens office complex. He purchased from Frankenmuth a commercial insurance policy which included coverage for comprehensive general liability. The term of the policy ran from October 1, 1973, to October 1, 1976. On June 2, 1976, the completed structure was sold to George and Linda Schanz. On June 3, 1976, Eurich wrote across the face of an insurance premium installment billing that he had sold the building and requested that the policy be discontinued.

On February 12, 1979, the office complex was completely destroyed by fire. From the ashes arose several lawsuits in which Eurich was named as a principal defendant or as a third-party defendant. The suits alleged that Eurich did not comply with applicable fire code provisions or that he designed and built an office complex which was not firesafe.

New Hampshire Insurance Group, a subrogee of George and Linda Schanz, filed suit against Eurich and others in early 1981. On April 17, 1981, Frankenmuth wrote Eurich a letter ackowledging it had received a copy of the summons and had referred the matter to local counsel "[i]n accordance with our duty to defend you under the terms of your policy with us." The letter also advised him that he might wish to retain his own counsel to consult with the firm selected by plaintiff because the suit claimed damages in excess of the policy limits.

A second letter, dated August 3, 1981, advised Eurich of additional pending suits in which he was involved. In that letter, plaintiff, Frankenmuth, reserved the right to deny coverage, claiming that [Page 686] the fire occurred after the policy period expired and that the "products hazards—completed operations hazards" exclusion precluded coverage. However, plaintiff continued to represent Eurich pending further investigation.

Plaintiff thereafter filed the instant declaratory action, seeking a determination that it had no duty to defend Eurich or to provide coverage. Plaintiff then brought a motion for summary judgment, pursuant to GCR 1963, 117.2(3), now MCR 2.116(C)(10). Eurich asserted that the insurance agent from whom he had purchased the policy had represented that the policy provided "full coverage" and did not inform him about the exclusion. Eurich also alleged that plaintiff's initial representation that it was obliged to defend him estopped plaintiff from now asserting that it had no obligation to provide coverage or defend under the terms of the insurance contract. The judge denied plaintiff's motion without prejudice, stating that there were questions of fact which should be developed before he could consider granting summary judgment.

On October 15, 1984, a hearing was conducted on plaintiff's renewed motion for summary judgment. The trial judge, thereafter, issued an opinion, finding that the fire had occurred outside the policy term and that consequently plaintiff's policy provided Eurich no coverage. An order to that effect was entered, which listed the circuit court docket numbers of eleven

pending suits against Eurich in which the trial court concluded plaintiff had no duty to defendant. Eurich now appeals and we affirm.

The insurance policy at issue in this case is an "occurrence" type policy. That is, a policy holder is covered for claims which arose during the term of the policy. This is in contrast to a "claims made" [Page 687] type of policy in which coverage is provided for those claims which are discovered and brought against the insurer during the term of the policy.[2] Thus, in the case at bar, plaintiff has a duty to defend and provide coverage if, and only if, the alleged act or misdeed which constitutes the basis for Eurich's liability occurred during the time the policy was in effect. There is no dispute that the policy came into existence on October 1, 1973, and continued until June 3, 1976, when Eurich voluntarily cancelled the policy because of the sale of the building. Furthermore, it is not disputed that the fire occurred in 1979.

The question we are presented with is whether the "occurrence" of Eurich's negligent act was sometime between 1973 and 1976, when he constructed the building,[3] or in 1979, when the fire occurred. We conclude it is the latter. In *Moss v Shelby Mutual Ins Co*, 105 Mich App 671; 308 NW2d 428 (1981), this Court concluded that an accident or occurrence occurs when the injuries arise. In *Moss,* a wooden deck was constructed on a home in 1966. The deck collapsed in 1973, injuring a number of people. Suit was brought against the construction company alleging negligent construction. The *Moss* Court concluded that the "occurrence" occurred in 1973 and that the 1966 insurer of the construction company was not liable under the "occurrence" type liability policy.

Similarly, in *Employers Mutual Liability Ins Co of Wisconsin v Michigan Mutual Auto Ins Co*, 101 Mich App 697; 300 NW2d 682 (1980), this Court concluded the occurrence was the date of the accident, not the date the negligent act was performed which gave rise to the subsequent accident.

[Page 688] We find these cases to be applicable to this case. The fire occurred in 1979, which is the relevant occurrence date for purposes of the insurance policy at issue. Since the policy was not in effect in 1979, plaintiff is not liable on the policy and has no duty to defend.

Before concluding, however, we wish to briefly address two specific challenges defendant makes to the grant of summary judgment. First, Eurich argues that there is an issue of fact concerning whether the fire comes within a policy exclusion for completed operations and products hazards, as was the case in *Moss, supra.* He alleges that, when he purchased the policy, he told his insurance agent that he wanted "full coverage." However, what coverage or what exclusions the parties negotiated is of no concern to this case. Whatever coverage he purchased ended in June, 1976, when he cancelled the policy. While it may well be that, had he continued the policy, the fire would have been covered, the undisputed fact remains that Eurich did not continue the policy.

Next, Eurich argued below that plaintiff, having commenced to defend in the underlying action, should now be estopped to deny its duty to defend. While Eurich does not properly frame this argument for review by this Court, plaintiff does address the issue on appeal and the issue is of sufficient concern to merit brief comment by this Court. We believe plaintiff acted properly in defending Eurich until such time as the question of its duty to defend was resolved. Not only did this protect defendant's interest, it also protected plaintiff's interests in the event it was determined that plaintiff did have such a duty. However, this does not mean that plaintiff should not be able to withdraw its defense after a determination favorable to plaintiff.

[Page 689] We would, however, expect the withdrawal to proceed in a manner designed to avoid prejudicing Eurich's ability to proceed with his own defense. This is not so much a burden on plaintiff as it is on the attorneys retained by plaintiff to defend defendant. If these attorneys do not continue to represent Eurich in his employ, we expect that they will cooperate with any substitution of counsel and to fully comply with the Code of Professional Responsibility.[4]

The judgment of the circuit court is affirmed. Costs to plaintiff.

FOOTNOTES

2 See *Stine v Continental Casualty Co*, 419 Mich 89, 96-100; 349 NW2d 127 (1984), for a discussion comparing the two types of policies.

3 As indicated above, the claims against Eurich are based upon his allegedly improper construction of the building.

4 See DR 2-110 (Withdrawal From Employment).

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MI Decisions That Cite This Case

Decided December 2, 1986.

Varney v Genessee County Sheriff (On Remand)
156 Mich App 539, 402 NW2d 57
Published Michigan Court of Appeals Opinion

Opinion by R. B. Burns, P.J. Before: R. B. Burns, P.J., and R. M. Maher and Bronson, JJ.

Docket No(s) 95217
Disposition: Remanded.

R. B. Burns, P.J.

ON REMAND

[Page 541]

R. B. Burns, P.J.

This case comes to us by the way of a remand from the Supreme Court for reconsideration in the light of *Marek v Chesny,* 473 US —; 105 S Ct 3012; 87 L Ed 2d 1 (1985).

Plaintiff brought this action against the Genesee County Sheriff and seven named deputies for assault without lawful authority, excessive force, destruction of evidence, and deprivation of civil rights under 42 USC 1983. Pursuant to local court rule, the case was mediated and the value of plaintiff's claim was assessed at $7,500. The parties rejected the mediation award and the case was tried.

At trial, during its deliberation, the jury sent a handwritten note to the judge asking if it could “find liability without compensatory or punitive damages.” The judge responded in handwriting on the same note, “You should attempt to complete the seven sheets comprising the verdict forms and you may find whatever amount of damages the evidence warrants whether it be none, nominal or any other amount.”

The jury returned a verdict in favor of all defendants on Counts I and II. Under Count III, the civil rights count, only defendant Safford was found liable. The jury did not assess damages against Safford. The foreman of the jury, in reciting the verdict, was allowed to explain why the jury found no damages. The foreman stated that the jury had found that the disciplinary action taken against Safford by the sheriff's department had been “appropriate.”[1]

In the days that followed the trial, the parties made several posttrial motions. After hearing, the [Page 542] trial judge, in a written opinion, substantially ruled against plaintiff on almost all issues. The court recognized that its reply to the jury's question during deliberation had been partly erroneous. In *Carey v Piphus*, 435 US 247; 98 S Ct 1042; 55 L Ed 2d 252 (1978), the Court held that the deprivation of constitutional rights not shown to have resulted in actual damages entitles the plaintiff to an award of nominal damages. The trial judge said he would cure the erroneous instruction by approving plaintiff's motion for additur. The amount of additur which the trial judge granted was $1.

Plaintiff made a posttrial motion requesting that the trial court grant attorney fees to him pursuant to 42 USC 1988. Defendants moved to have attorney fees and costs awarded to them pursuant to GCR 1963, 316 and Genesee Circuit Court Rule 29, because plaintiff had rejected the mediation award. Originally, the trial court granted both motions and, offsetting the fees, found that defendants owed $5.23 to plaintiff.

In granting plaintiff's motion for attorney fees under § 1988, the court stated it had not considered the issues on which plaintiff had not prevailed. Also, plaintiff had presented actual costs totalling $7,815.14, but the trial court granted costs only for the amount of $786.25. The court explained that some of plaintiff's actual costs had been for docket fees, deposition expenses, witness expenses and the cost of charts and maps. The court found that these costs were not recoverable under 42 USC 1988.

Plaintiff then moved for reconsideration of the trial judge's disposition of the issue of attorney fees. Two years after the court's original opinion, [Page 543] the trial judge reversed himself and stated that the policy considerations which were promoted by 42 USC 1988 prohibited defendants from recovering attorney fees and that § 1988 governed to the exclusion of county

or state court rules. The trial court disallowed defendants' motion for attorney fees and granted plaintiff attorney fees in the amount of $14,667 and costs in the amount of $786.25 for a total of $15,453.25.

We held that the local court rule had been preempted by 42 USC 1988.

In *Marek v Chesny, supra,* the Supreme Court was confronted with the issue of whether attorney fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 USC 1988 when the plaintiff recovers a judgment less than the offer.

The Court held:

> Here, respondents sued under 42 USC § 1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.
>
> Unlike the Court of Appeals, we do not believe that this "plain meaning" construction of the statute and the Rule will frustrate Congress' objective in § 1988 of ensuring that civil rights plaintiffs obtain "effective access to the judicial process." *Hensley v Eckerhart*, 461 US 424, 429, 76 L Ed 2d 40, 103 S Ct 1933 (1983), quoting HR Rep No. 94-1558, p 1 (1976). Merely subjecting civil rights [Page 544] plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court. See HR Rep No. 94-1558, p 7 (1976). [473 US —.]

Genesee Circuit Court Rule 29 provides:

> In the event both parties reject the evaluation of the mediation board and the judgment or verdict is within 10 percent above or below the mediation board's evaluation, each party shall be responsible for his own costs from the date of mediation. Should the verdict or judgment be more than 10 percent above the evaluation of the mediation board, the Defendant shall be taxed actual costs, and should the verdict or judgment be more than 10 percent below the evaluation of the mediation board, the Plaintiff shall be taxed actual costs.

In our opinion both 42 USC 1988 and the Genesee Circuit Court Rule 29 should be utilized by the court in assessing costs.

The case is remanded to the circuit court for assessment of costs.

FOOTNOTES

1 At trial, Sheriff O'Brien testified that Safford was disciplined because he falsely certified that plaintiff had refused to take a Breathalyzer test. A drunk driving charge against plaintiff was then dismissed because plaintiff never received the opportunity to take the Breathalyzer test. Safford was suspended from work without pay for two weeks because of the incident.

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