

no-fault newsline

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Examinations Under Oath Versus Depositions: Can A Non-Party's Testimony Create A Question Of Fact?

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SECRET WARDLE NOTES

In a recent opinion, the Michigan Court of Appeals held where an innocent third party is involved, in this case a medical provider, deposition testimony by the non-parties which is completely contradictory in nearly all relevant respects to the same individuals' pre-litigation Examinations under Oath testimony was sufficient to create a genuine issue of material fact sufficient to defeat a motion for summary disposition.

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In *The Detroit Medical Center v Michigan Prop & Cas Guaranty Ass'n, et al*, an unpublished opinion per curiam issued July 26, 2016 (Docket No. 326793), the Court of Appeals was asked to consider whether the inconsistent testimony of two non-parties was sufficient to bar a medical provider's right to collect first party no-fault benefits.

In June 2010, Danielle Pinkney was operating a Jeep Liberty without a license and was severely injured in an accident. The vehicle was titled only in the name of her fiancé, James Talison. Talison's no-fault insurer, American Fellowship Mutual Insurance Company, totaled the vehicle and investigated whether it had an obligation to provide first party no-fault benefits to Pinkney. The principal inquiry was whether Pinkney was operating the vehicle with Talison's permission. A claimant injured while operating a motor vehicle when the claimant unlawfully took the motor vehicle is barred from recovering no-fault benefits. MCL 500.3113(a).

During its investigation, American Fellowship conducted examinations under oath (EUO) of Pinkney and Talison. Their testimony was clear, consistent, and unequivocal – at the time of the motor vehicle accident Pinkney was operating the Jeep Liberty without Talison's permission, she had not previously had permission to do so, and she had never driven the Jeep Liberty or Talison's other vehicles. American Fellowship notified the Detroit Medical Center (DMC), one of Pinkney's medical providers, that it was denying their request for payment because Pinkney had operated the vehicle unlawfully and without Talison's permission.

Nearly a year later, in June 2011, the DMC sued American Fellowship for no-fault benefits claiming \$65,211 for the care and treatment of Pinkney's injuries. On a side note, soon after litigation commenced, American Fellowship filed for bankruptcy and was declared insolvent. The Michigan Property and Casualty Guaranty Association (the Association) assumed American Fellowship's potential obligation to pay first party no-fault benefits. Neither Pinkney nor Talison were personally named in the suit.

During litigation, the DMC deposed both Pinkney and Talison to investigate whether or not Pinkney had permission to drive the vehicle. Their testimony caught everyone off guard – both Pinkney and Talison repeatedly and unequivocally admitted under oath they lied during their respective EUOs. They testified that nearly 90% of the down payment was provided by Pinkney, that she had her own set of keys, and that she drove the vehicle on an almost daily basis with the full knowledge and consent of Talison. Most important, they both admitted that Pinkney was operating the vehicle with Talison's permission at the time of the accident.

Following the deposition, the Association filed a motion for summary disposition arguing that the deposition testimony where Pinkney and Talison recanted their EUO testimony was not enough to create a question of fact. The DMC responded by arguing that, at the very least, the two contradictory statements were sufficient to create a question of fact on their own. In addition to the explanations they provided, the DMC produced affidavits from three individuals attesting to the fact that Pinkney had permission to use the vehicle. Also, both Pinkney and Talison testified that they had lied in their EUOs for financial gain believing that the insurance company would pay off the vehicle's loan balance only if the unlicensed Pinkney did not have permission to use the vehicle. Despite that testimony, the trial court granted summary disposition holding a factual issue cannot be created by deposition testimony which simply contradicts EUO testimony.

On appeal, the Court of Appeals focused on "the *Gamet* Rule." The *Gamet* Rule is essentially an evidentiary rule precluding any substantive consideration of affidavits of parties contrary to harmful deposition testimony to create a genuine issue of material fact. *Gamet v Jenks*, 38 Mich App 719 (1972). However, in overruling the Circuit Court's grant of the Association's motion for summary disposition, the Court of Appeals held the *Gamet* Rule, which has long been unchallenged, was inapplicable to the present case.

First, the Court distinguished the procedural posture by noting that the DMC was not relying on affidavits from Pinkney and Talison that simply contradicted their EUO testimony. Instead, the Association and the DMC had the opportunity to take extensive deposition testimony from Pinkney and Talison concerning the factual issues relevant to permissive use of the vehicle.

Additionally, the Court noted under the *Gamet* Rule prior EUO statements were conclusively binding absent any explanation. Significantly, however, during their depositions Pinkney and Talison provided clear, concise explanations for recanting their prior EUO testimonies.

Most importantly, the Court noted because neither Pinkney nor Talison were parties to the instant action it would be "fundamentally unfair to apply the *Gamet* rule to the [DMC] in that procedural posture, given that the [DMC] had absolutely nothing to do with the EUOs and was entitled to engage in its own discovery..."

Essentially, the Court held because it was the DMC and neither Pinkney nor Talison who were attempting to contrive a factual issue the *Gamet* Rule did not apply and the lower court erred, not just in refusing to consider the contradictory statements but also in its refusal to consider the affidavits of others.

Though this holding would seem at odds with the basic principles of MCL 500.3113(a) because Pinkney would benefit if the DMC were successful, the Court unequivocally stated that "the *Gamet* Rule should not be employed to deprive an innocent party such as the medical center from attempting to make its case simply because of a potential indirect benefit to a purported wrongdoer."

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