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After Further Review: When an Injury Can Be Apportioned to Multiple Defendants

By D. Kyle Bierlein **May 13, 2019**

In *Estate of Teodorico Q. Gomez, et al.* v *Farm Bureau General Ins. Co. of Mich (On Recon)*, unpublished opinion per curiam of the Court of Appeals, issued May 7, 2019 (Docket No. 341812), the Michigan Court of Appeals vacated its prior opinion in the same matter after granting Defendant Farm Bureau's Motion for Reconsideration. Farm Bureau was represented in the trial court and on appeal by Secrest Wardle.

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The Court's reversal did not necessarily invalidate its legal reasoning in its previous Opinion related to apportionment of damages. Rather, the Court gave renewed consideration to previously overlooked facts that had been in the record all along, which led to a different finding as to whether apportionment was applicable in the instant case.

In *Gomez*, Plaintiffs were involved in a motor vehicle accident in which Plaintiffs' vehicle was struck by a vehicle driven by Ronel Hana and owned by Raad Hana ("Defendant Hana"). The second vehicle indirectly involved in the accident was operated by Defendant Michael Yax ("Defendant Yax"). At the time of the accident, Defendant Yax was insured by USAA under a policy with bodily injury liability limits of $100,000 a person and $300,000 a crash. USAA offered its policy limits to Plaintiffs, however, Plaintiffs did not accept the offer. Plaintiffs sought UM benefits from Farm Bureau under a policy issued to Plaintiffs. The Farm Bureau policy afforded UM benefits in the amount of $100,000 a person and $300,000 a crash. The relevant language of the Farm Bureau policy stated:

> "3. The amount payable for this Uninsured Motorist Coverage will be reduced by any amounts paid or payable for the same bodily injury:
>
> …
>
> c. by or on behalf of any person or organization who may be legally liable for the bodily injury to the extent of any insurance applicable, and any assets not exempt from legal process."

Farm Bureau filed for summary disposition pursuant to MCR 2.1116(C)(10), arguing it was entitled to setoff for any amounts paid or payable by Defendant Yax under the USAA policy. The trial court denied Farm Bureau's

Motion for Summary Disposition without prejudice holding that because there was yet to be an apportionment of fault as to each Defendant driver, Farm Bureau's Motion for Summary Disposition was premature.

Originally on appeal, the Michigan Court of Appeals held that whether the injury was divisible was a question of fact. Farm Bureau had contended there was a single, indivisible injury making the apportionment of fault irrelevant. Plaintiffs alleged the injuries were potentially divisible.[1] At that time, the Court reasoned that Defendant Hana could have struck Plaintiffs' vehicle causing certain injuries and still, Defendant Yax's second collision could have caused separate and distinct injuries.

On Defendant Farm Bureau's Motion for Reconsideration, the Court of Appeals noted the trial court provided in its order that Plaintiffs "allege that the vehicle T. Q. Gomez was driving was also struck by the vehicle [Yax] was driving when that vehicle changed lanes." However, in Plaintiffs' amended Complaint, it was alleged Defendant Hana and Defendant Yax had been involved in a "road rage" incident when Defendant Yax swerved, causing Defendant Hana to cross the center line and collide with Plaintiffs vehicle. Evidence submitted demonstrated there was only one collision between Plaintiffs and Defendant Hana resulting in the Plaintiffs' injuries.

Based on this evidence, the Court vacated its prior ruling holding there to be no genuine issue of material fact that only one impact occurred. Therefore, Plaintiffs were unable to demonstrate the injuries were divisible rendering an apportionment of fault irrelevant. As only one collision occurred, the Court held that language in Defendant Farm Bureau's policy applied, setting off the amount payable for UM coverage. Plaintiffs once again attempted to argue in the alternative that USAA's offer was not an amount payable because it was not accepted. The Court found the argument meritless, finding an amount payable to be "what could have been received on the basis of the tortfeasor's policy limits, not what was actually paid."

The Court reversed its previous Order denying Farm Bureau's summary disposition and vacated the stipulated judgment previously awarding each Plaintiff $100,000 payable by Farm Bureau and remanded for further proceedings consistent with its Opinion.

[1] On appeal, Plaintiff additionally argued USAA's offer was not an amount payable because Plaintiff did not accept the offer. The Michigan Court of Appeals stated that argument was without merit as the definition of "payable" includes what could have been received, not what was actually paid.

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