STATE OF MICHIGAN

COURT OF APPEALS

ASHLEY GRANADOS-MORENO,

Plaintiff-Appellant,

v

ROBERT FACCA,

Defendant-Appellee,

and

MEDICAL CONSULTANTS NETWORK, LLC,

Defendant.

UNPUBLISHED
March 3, 2020

No. 346598
Macomb Circuit Court
LC No. 2017-004313-NO

Before: MURRAY, C.J., and SWARTZLE and CAMERON, JJ.

MURRAY, C.J. (*dissenting*).

For the reasons outlined below, and with due respect to the majority opinion, I would affirm the trial court's order granting defendant Robert Facca's motion for summary disposition.

In reviewing de novo the trial court's decision under MCR 2.116(C)(10), I would hold that the trial court properly relied on *Dyer v Trachtman*, 470 Mich 45, 50; 679 NW2d 311 (2004), rather than *Dubuc v El-Magrabi*, 489 Mich 869 (2011), when determining whether defendant owed any duty to plaintiff. Although the relevant statement in *Dyer* may be dicta, it contains persuasive reasoning, and *Dubuc* is merely an order that does not contain any analysis or reasoning to apply in future cases like this one.

The majority relies on *Dubuc*, 489 Mich at 869, for the proposition that "an individual may maintain a cause of action for tortious interference with a contractual relationship against [an] [independent medical examination (IME)] physician when that physician makes false and misleading statements in his or her report." In pertinent part, the *Dubuc* order states:

> [w]hen the complaint allegations are viewed in a light most favorable to the plaintiff, she did allege an unjustified instigation of the breach by the defendants.

> The Court of Appeals erred when it concluded, as a matter of law, that the defendants were motivated by a legitimate business interest, which, in this case, was a determination to be made the jury. [*Dubuc*, 489 Mich at 869.]

However, for a Supreme Court order to be binding, it must "constitute[] a final disposition of an application and contain[] a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). The *Dubuc* order, which constituted only one paragraph, does not contain a sufficient basis in fact or reason to either be binding on this Court or provide any useful guidance. The order simply reversed, in part, this Court's opinion, and the language quoted above is the only reasoning provided. *Dubuc* did not adopt the dissenting opinion in this Court, which did contain a rationale. As such, the *Dubuc* order is neither binding nor does it establish a basis on which to conclude that a genuine of issue of material fact exists. Additionally, the *Dubuc* order appears to be a review of an order issued after review of the pleadings, MCR 2.116(C)(8), and this appeal is from a decision under MCR 2.116(C)(10).

Dyer's discussion about IME physician liability, though arguably dicta, still provides the most useful guidance from the Supreme Court. *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). In *Dyer*, the plaintiff brought suit against an IME physician for injuries he allegedly sustained as a result of the IME examination. *Dyer*, 470 Mich at 47. The Court held that a limited relationship did exist between an IME physician and a patient. *Id*. at 49. In explaining this relationship, the *Dyer* Court held that "[t]he limited relationship imposes fewer duties on the examining [IME] physician than does a traditional physician-patient relationship. But it still requires that the examiner conduct the examination in such a way as not to cause harm." *Id*. at 53. The Court clarified that in this limited relationship, while an IME physician must act so as not to cause harm to a patient, the relationship is for an information gathering purpose rather than a diagnostic purpose. *Id*. at 51. "[A]n IME physician has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care." *Id*. at 49. The *Dyer* Court held that a physician's purpose during an IME is not to "provide a diagnosis or treatment of medical conditions[,]" but to "gather information for the examinee or a third party for use in employment or related financial decisions." *Id*. at 51. Notably, for our purposes, the *Dyer* Court stated, "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports." *Id*. at 50.

"[W]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Carr*, 259 Mich App at 384 (citations and quotation marks omitted). The *Dyer* Court's statements regarding IME physician liability was not a hypothetical proposition or an extraneous statement. *Dyer*, 470 Mich at 50. The statement was "germane to," even if not "necessarily decisive of," the issue in *Dyer*. *Carr*, 259 Mich App at 384. At issue in *Dyer* was whether an IME physician could be liable to a patient, and what type of relationship existed between the two. *Dyer*, 470 Mich at 48-49. In

the course of that discussion, the Court stated that an IME physician is not liable for the conclusions reached in a report.[1] *Id*. at 50.

Here, defendant argues that he is not liable to plaintiff because, as an IME physician, he was not liable for the results he reported after the IME. Unlike the plaintiff in *Dyer*, plaintiff here did not claim any harm or injury after the examination that would suggest defendant did not "conduct the examination in such a way as not to cause harm." *Id*. at 53. Nor was there any evidence presented that defendant harmed or injured plaintiff in any way during the IME. Thus, the statement in *Dyer*, that "[t]he IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports[]," provides that defendant is not liable to plaintiff simply because she was dissatisfied with the result of his report or the content contained (or not) in the report. *Dyer*, 470 Mich at 50.

For these reasons, I would affirm the trial court's final order.

/s/ Christopher M. Murray

[1] This statement in *Dyer* was recently relied in part upon by this Court in *Sabbagh v Hamilton Psychological Servs, PLC*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 342150); slip op at 7, 8 (quoting *Dyer*, 470 Mich at 50 (emphasis added), "an 'IME physician, acting at the behest of a third party, *is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports* . . . .' ", and holding that "the Supreme Court's reasons for finding a limited relationship between an IME physician and an examinee apply equally to all healthcare providers authorized to conduct IMEs, or their functional equivalent.").