

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BASEL BRIKHO, M.D.,

Plaintiff-Appellee,

V

ULTICARE,

Defendant-Appellant.

UNPUBLISHED

January 4, 2007

No. 258649

Wayne Circuit Court

LC No. 03-333093-CK

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Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff damages of \$24,856.41, plus interest, costs, and attorney fees, for a total judgment amount of \$26,349.77. The judgment was entered after the court granted plaintiff's motion to deem as admitted, pursuant to MCR 2.312, plaintiff's requests for admissions to which defendant did not timely respond, and also granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

I.

Plaintiff's complaint alleges that plaintiff provided medical services to "patients insured by the Defendant at the request of and agreement to pay by Defendant on contract and credit basis in the amount of" \$28,951, that demand for payment had been made, and that defendant refused to pay. In its answer, defendant denied the relevant allegations in the complaint. Defendant attached an affidavit from its claims administrator stating that she had reviewed defendant's claims and accounts payable and had determined that defendant was not indebted to plaintiff in the amount specified in the complaint.

Plaintiff contends that defendant and PPOM, L.L.C., were parties to a contract, the "Comprehensive Agreement," in which defendant agreed to pay health care providers for covered services provided to defendant's members. Although plaintiff claims that defendant acted as an insurer, defendant denies that it is an insurer under Michigan law. Rather, defendant states that it served as an administrator of the Wayne County HealthChoice of Michigan Program.

On October 24, 2003, plaintiff served requests for admissions, requests for production, and interrogatories. Plaintiff requested defendant to admit "[t]hat Defendant is indebted to

Plaintiff in the amount \$28,951.00 pursuant to the itemized statement attached . . . .” On October 31, 2003, plaintiff served a second set of requests for admissions, requests for production, and interrogatories.

On November 21, 2003, defense counsel faxed to plaintiff’s counsel a proposed stipulation and order to extend the deadline for responding to the requests for admissions. Plaintiff’s counsel responded by requesting minor modifications to the proposed stipulation and order and advising that he would sign the same. Defense counsel did not respond.

On December 11, 2003, plaintiff filed a motion “for order of admission” pursuant to MCR 2.312, for summary disposition pursuant to MCR 2.116(C)(9) and (10), and for an order compelling discovery and costs. On January 7, 2004, defendant filed its response to the motion and served its answers to discovery on plaintiff. As an explanation for defendant’s failure to timely respond, defense counsel stated that on November 20, 2003, he decided to go to an out of state funeral on the following day, and that his attention was diverted from his work because his father was hospitalized from November 19 through December 23, 2003. Within defendant’s response to plaintiff’s motion, defendant requested “that this Court permit it to withdraw any admissions that arose [by operation] of law under MCR 2.312, and to allow Ulticare to make denials as are appropriate in the interests of justice.”

In an order dated January 28, 2004, the court granted plaintiff’s motion to deem the requests admitted pursuant to MCR 2.312, and granted plaintiff’s motion for summary disposition pursuant to MCR 2.116(C)(9) and (10).

On March 5, 2004, the court entered the judgment in plaintiff’s favor, and subsequently denied defendant’s motions for reconsideration. In the opinion denying reconsideration, the court provided additional explanation for its decision not to allow defendant to submit late responses. The court cited foreign authority for the proposition that “[g]enerally, an attorney’s personal affairs, unless the attorney is injured or dies, are not deemed ‘good cause’ for amendment or withdrawal of matters admitted.”

## II.

Defendant argues that the trial court abused its discretion by failing to allow it to withdraw or amend the admissions that arose because of its failure to timely respond. We agree.

Pursuant to MCR 2.312(D), a matter admitted under the rule “is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission.” The decision to allow an amendment is within the trial court’s discretion and will not be overturned absent an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991). The Michigan Supreme Court recently adopted this definition for an abuse of discretion:

[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . *When the trial court selects one of these principled outcomes, the trial court has not abused its discretion* and, thus, it is proper for the reviewing court to defer to the trial court’s judgment. . . .[

*Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809, 817 (2006) (internal quotation marks, brackets and citations omitted; emphasis added).]

This is the “default” standard. *Id.*

### III.

MCR 1.105 provides: “These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.” In *Janszyk v Davis*, 125 Mich App 683, 691-692; NW2d (1983), this Court faced a similar situation, and stated:

When a trial judge is asked to decide whether or not to allow a party to file late answers to the request for admissions, he is in effect called upon to balance between the interests of justice and diligence in litigation. . . . The severity of the sanctions should be tempered by the consideration of the equities involved. . . . In other words, a rigid rule is sometimes unjustified; but too lenient a rule will undermine the policy of the court rule itself. [Internal citations and quotation marks omitted.]

*Janszyk* identified three factors that should be balanced when determining whether to allow late answers to requests for admissions:

[T]he trial judge is to balance three factors in determining whether or not to allow a party to file late answers. First, whether or not allowing the party to answer late will aid in the presentation of the action. . . . In other words, the trial judge should consider whether or not refusing the request will eliminate the trial on the merits. Obviously, this factor militates against granting summary judgment. Second, the trial court should consider whether or not the other party would be prejudiced if it allowed a late answer. Third, the trial court should consider the reason for the delay: whether or not the delay was inadvertent . . . . [*Janszyk, supra* at 692-693 (internal citations omitted).]

Here, the first factor weighs in favor of allowing the late answers, because forbidding the late answers will preclude a trial on the merits. The second factor weighs in favor of allowing late answers as well because plaintiff will still be free to prove the matters treated in the requests for admissions that are denied by defendant, and if he does so, he may be entitled to receive his costs and attorney fees expended in doing so. MCR 2.312(C).<sup>1</sup> The third factor also weighs in

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<sup>1</sup> MCR 2.312(C) provides:

If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party pay the expenses incurred

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favor of allowing the late answers. The evidence indicates that the delay was inadvertent, owing to the funeral attended by defense counsel, and the hospitalization of his father. Because all of the factors weigh in favor of allowing the late answers in this instance, the trial court's denial of leave to file late answers was outside the range of principled outcomes.

We also find that the trial court strayed outside the range of principled outcomes because of its reliance on foreign authority for an overbroad rule that “[g]enerally, an attorney’s personal affairs, unless the attorney is injured or dies, are not deemed ‘good cause’ for amendment or withdrawal of matters admitted.” Michigan courts are not bound by foreign authority, see *The Mable-Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 494 n 5; 686 NW2d 770 (2004), and the Michigan Court Rules and Michigan case law do not dictate that the death or illness of an attorney is the only “personal affairs” circumstance that may be deemed good cause for amendment or withdrawal of matters admitted. Moreover, the severity of the sanction must be tempered by consideration of the equities involved. *Janczyk, supra* at 692.

#### IV.

The trial court abused its discretion in failing to allow defendant to withdraw or amend the admissions that arose because of its failure to timely respond, as this ruling was not within the range of principled outcomes under the facts in this case. Since the trial court’s judgment in plaintiff’s favor was based entirely on the admissions which we hereby reverse, the judgment is hereby reversed.

Reversed and remanded for proceedings consistent with this opinion. The trial court “may condition amendment or withdrawal of the admission[s] on terms that are just.” MCR 2.312(D)(1). We do not retain jurisdiction.

/s/ Joel P. Hoeksra  
/s/ Kurtis T. Wilder  
/s/ Brian K. Zahra

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in making that proof, including attorney fees. The court shall enter the order unless it finds that

- (1) the request was held objectionable pursuant to MCR 2.312,
- (2) the admission sought was of no substantial importance,
- (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
- (4) there was other good reason for the failure to admit.