

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL

Priority Health,  
Petitioner,

v

MTT Docket Nos. 16-000784  
and 16-000785 Consolidated

Michigan Department of Treasury,  
Respondent.

Tribunal Judge Presiding  
Steven H. Lasher

ORDER GRANTING RESPONDENT’S MOTION FOR RECONSIDERATION

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

On October 13, 2017, Respondent filed a Motion for Reconsideration stating that the Tribunal erred in denying its Motion based upon an incorrect standard for summary disposition. Respondent further contends that the Tribunal mischaracterized its position and although the mischaracterization “did not cause the Tribunal to deny [Respondent’s] Motion for Summary [D]isposition, the misstatement . . . could cause confusion amongst taxpayers . . . .”<sup>1</sup>

The Tribunal has considered the Motion and the case file and finds that the Tribunal did err in denying Respondent’s Motion for Summary Disposition. More specifically, the Tribunal relied upon the standard found in *Arbelius v Poletti*,<sup>2</sup> holding that the asserted claim could be supported by evidence at trial. However, as the Court of Appeals has previously indicated, pursuant to *Smith v Globe Life Insurance*,<sup>3</sup> that reliance upon *Arbelius* was in error and that:

the test is not whether “a record ‘might be developed’ ” or “when the court is satisfied that ‘it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome’ ” but rather whether “evidentiary proofs [are presented] creating a genuine issue of material fact for trial.” To the extent that prior decisions of this Court allowed “plaintiffs to *promise to offer* factual support for their claims at trial” those decisions were overruled.<sup>4</sup>

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<sup>1</sup> Respondent’s Motion for Reconsideration at 7.

<sup>2</sup> *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 435 (1991).

<sup>3</sup> *Smith v Globe Life Insurance*, 460 Mich 446; 597 NW2d 28 (1998).

<sup>4</sup> *S G Cemetery Ass’n, Inc v City of Sterling Heights*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2003 (Docket No. 239000).

Thus, Petitioners were required not only to promise to present documentation to support its claim at trial but, rather, were required to present the actual documentation in support of its own Motion for Summary Disposition or the response to Respondent's Motion for Summary Disposition. Here, no such documentation was offered and the Tribunal erred in relying upon Petitioners' counsels' assertions that such documentation would be offered.

Further, the Tribunal finds that the Michigan Supreme Court in *Lowrey v LMPS & LMPJ, Inc.*,<sup>5</sup> reaffirmed the standards as reflected in *Quinto v Cross & Peters Co.*,<sup>6</sup> and *Maiden v Rozwood*,<sup>7</sup> in holding that:

This Court has further described the nonmovant's burden to avoid summary disposition after the movant has satisfied its burden through one of these two courses of actions:

Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Assn*, 202 Mich App 233, 237; 507 NW2d 741 (1993). [*Quinto*, 451 Mich at 362–363; 547 NW2d 314.]

This Court reaffirmed *Quinto* and the proper application of MCR 2.116(C)(10) in *Maiden*, 461 Mich at 121, 597 NW2d 817, stating that “[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.”<sup>8</sup>

Thus, in applying the proper standards the Tribunal finds that Petitioners have failed to establish that there are genuine issues of material fact remaining. More specifically, Petitioners failed to submit any documentation establishing the existence of a material factual dispute. Rather, Petitioners' counsel merely asserted that it *could* be produced at trial. As such, the record only sets forth a mere allegation that there are genuine issues of material fact remaining and does not actually affirmatively establish the same. As such, Petitioners “cannot survive summary disposition” and Respondent's Motion should be granted.

A palpable error is one that is easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, or manifest.<sup>9</sup> Respondent has demonstrated a palpable error relative to the

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<sup>5</sup> *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1; 890 NW2d 344 (2016).

<sup>6</sup> *Quinto v Cross & Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996).

<sup>7</sup> *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

<sup>8</sup> *Lowrey*, 500 Mich at 7 – 8.

<sup>9</sup> See *Luckow Estate v Luckow*, 291 Mich App 417 (2011).

granting of summary disposition in this case that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected.<sup>10</sup> This is, however, limited to the above analysis.

With regard to Respondent's remaining contention that the Tribunal misstated its position, Respondent clearly admits that the correction of the same would not change the disposition of the case. The Tribunal finds that it did not err in finding that Respondent's FAQs add a requirement not found within the statute; however, even if the Tribunal misrepresented Respondent's position, it is not grounds for granting reconsideration on this point given that the interpretation of the FAQ does not, in this case, change the disposition. Rather, there are simply no material facts remaining in this case and summary disposition is appropriate in favor of Respondent.

Therefore,

IT IS ORDERED that Respondent's Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

#### APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a claim of appeal with the Michigan Court of Appeals.

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal of right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."<sup>11</sup> A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.<sup>12</sup> The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.<sup>13</sup>

By Steven H. Lasher

Entered: October 31, 2017  
krb

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<sup>10</sup> See MCR 2.119(F).

<sup>11</sup> See MCL 205.753 and MCR 7.204.

<sup>12</sup> See TTR 213.

<sup>13</sup> See TTR 217 and 267.