STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY WILSON,

Plaintiff-Appellant,

V

GENERAL MOTORS CORPORATION,

Defendant-Appellee,

and

AVIS RENT A CAR SYSTEM, d/b/a AVIS RENT A CAR,

Defendant.

UNPUBLISHED
October 26, 2001

No. 216230
Wayne Circuit Court
LC No. 96-615952 NI

Before: Talbot, P.J., and Doctoroff and White, JJ.

WHITE, J. (*concurring*).

I concur in the majority's determinations regarding the applicability of the tort reform law. I do not, however, agree with the majority that plaintiff waived the issues whether the trial court erred by allowing defendant to introduce evidence that plaintiff initially brought suit against Avis, and by allowing defendant to use the allegations in plaintiff's original complaint as admissions. Nor do I agree that plaintiff waived the issue whether the trial court erred in allowing defendant to present evidence of her worker's compensation settlement for a prior injury when plaintiff had waived her claim for economic damages before trial. I conclude that plaintiff did not waive the issues and that the trial court's rulings were erroneous. Nevertheless, I concur in the affirmance on the basis that the errors were harmless.

I

Plaintiff filed a motion in limine to bar reference to the fact that she brought suit against Avis initially, and the fact that she later settled with Avis. The trial court ruled that defendant could not make reference to the settlement, but allowed defendant to introduce evidence that plaintiff initially brought suit against Avis and to use plaintiff's pleadings as admissions. Once the trial court ruled that defendant could introduce evidence that plaintiff initially brought suit against Avis, plaintiff's counsel appropriately sought to explain the matter to the jury in opening statement to protect against the jury potentially concluding that plaintiff brought a non-

meritorious case or otherwise speculating on the reason for Avis' absence from the courtroom.[1] The majority concludes that by doing so, plaintiff "opened the door" to such evidence, and thus cannot be heard to complain on appeal. However, I would treat counsel's conduct as damage control in the face of the court's ruling, rather than a voluntary and abrupt change in strategy.

The trial court's ruling allowing defendant's proposed use of the complaint was error. MCR 2.111(A) permits a party to state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds. *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co,* 234 Mich App 550, 573-574; 595 NW2d 176 (1999); *Rodriguez v Solar of Michigan, Inc,* 191 Mich App 483, 489 n 2; 478 NW2d 914 (1991), citing *Slocum v Ford Motor Co,* 111 Mich App 127, 133-134; 314 NW2d 546 (1981), and *Larion v Detroit,* 149 Mich App 402, 405-409; 386 NW2d 199 [1986]).

In *Slocum, supra,* the Court held that the defendant/third-party plaintiff's allegations in the third-party complaint could not be used by the plaintiffs as admissions. In *Larion, supra,* this Court applied the reasoning of *Slocum* to a case involving multiple defendants, rather than a third-party complaint, stating that "a party should not be placed in the position of having to forego a claim at the risk of having inconsistent allegations treated as admissions." *Larion, supra* at 407.[2]

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[1] This tactical decision is analogous to that of a criminal defense attorney who, after the court has ruled against the defendant on the issue of the admissibility of the defendant's prior convictions, mentions the convictions in opening statement and examines the defendant regarding the matter on direct.

[2] This Court further stated:

> Our decision is in accord with the trend described in McCormick on Evidence, (3d ed, 1984), § 265, pp 780-782:
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> > "An important exception to the use of the pleadings in the case as admissions must be noted. A basic problem which attends the use of written pleadings is uncertainty whether the evidence as it actually unfolds at trial will prove the case described in the pleadings. Traditionally, a failure in this respect, i.e., a variance between pleading and proof, could bring disaster to the pleader's case. As a safeguard against developments of this kind, the common law evolved the use of counts, **each a complete separate statement of a different version of the same basic claim, combined in the same declaration, to take care of variance possibilities.** The same was done with defenses. Inconsistency between counts or between defenses was not prohibited; in fact it was essential to the success of the system. **Also essential to the success of the system was a prohibition against using allegations in one count or defense as admissions to prove or disprove allegations in another. . . . .** The modern equivalent of
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> (continued…)

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> the common law system is the use of alternative and hypothetical forms of statement of claims and defenses, regardless of consistency. It can readily be appreciated that *pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission.* ***To allow them to operate as admissions would render their use ineffective and frustrate their underlying purpose. Hence the decisions with seeming unanimity deny them status as judicial admissions, and generally disallow them as evidential admissions.***
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> "The trend is to expand the application of the exception described above to the general rule of admissibility to include, not only the common law practice and modern hypothetical and alternative allegations, but in addition situations in which a more skillful pleader would have avoided the pitfalls of admissions by resorting to one of those techniques. * * * ***The same trend is evident in cases involving separate actions against different defendants to recover for the same injury.*** The trend is consistent with the prevailing view that the primary purpose of pleadings is to give notice and that alternative or hypothetical allegations are not usable as admissions, but the extent to this it will prevail is difficult to estimate." (Footnotes omitted; emphasis added.) [*Larion, supra* at 408-409. Some emphasis added.]

The current (1997) edition of Federal Practice and Procedure states the exception more forcefully than did McCormick as quoted in *Larion* and *Slocum, supra*:

> Fed.R.Civ.Proc. 8(e)(2) permits a pleader who is in doubt as to which of two or more statements of fact is true to plead them alternatively or hypothetically, regardless of consistency. When this is done, an admission in one alternative in the pleadings in the case does not nullify a denial in another alternative as a matter of pleading. Since the purpose of alternative pleadings is to enable a party to meet the uncertainties of proof, **policy considerations demand that alternative pleadings not be admitted either as an admission of a party-opponent or for the purpose of impeachment.**
>
> Unequivocal admissions made by counsel during the course of trial are judicial admissions binding on his client. **The scope of a judicial admission** by counsel **is restricted to unequivocal statements as to matters of fact** which otherwise would require evidentiary proof; it **does not extend to counsel's statement of his conception of the legal theory of a case.** [M. Graham, 30B Federal Practice and Procedure: Evidence § 7026, pp 272-273 (1997 Interim Edition). Emphasis added.]

Although the issue was not waived and the trial court's decision was erroneous, the error was harmless under the circumstance that the jury concluded that plaintiff was not injured or damaged.

II

Plaintiff also argues that the trial court reversibly erred in allowing defendant to present evidence of her worker's compensation settlement for a prior injury when plaintiff had waived her claim for economic damages before trial. I also do not agree that this issue was waived. I conclude, however, that the admission of evidence of the settlement, as distinguished from the properly admitted evidence that plaintiff suffered from pre-existing injuries that affected her ability to work, did not affect plaintiff's substantial rights in this case. Similarly, the reference to a prior work loss that was the result of wrist problems, rather than back problems, was minimal and harmless.

/s/ Helene N. White