STATE OF MICHIGAN

COURT OF APPEALS

SCION, INC. d/b/a SCION STEEL,

Plaintiff/Garnishee Plaintiff-Appellant,

v

RICARDO MARTINEZ, JOSEPH ZANOTTI, PETER FEAMSTER, and HERSH COMPANY, INC.,

Defendants-Appellees,

and

FORD MOTOR COMPANY,

Garnishee Defendant,

and

GONZALEZ CONTRACTING SERVICES d/b/a GONZALEZ MANUFACTURING TECHNOLOGIES and INDUSTRIAL DESIGN INNOVATIONS, INC.,

Intervenors-Appellees.

UNPUBLISHED
March 3, 2011

No. 295178
Macomb Circuit Court
LC No. 2008-005018-CK

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff/Garnishee Scion, Inc. d/b/a Scion Steel (Scion), appeals as of right the trial court's opinion and order granting intervenors, Industrial Design Innovations, Inc. (IDI), and Gonzalez Contracting Services, Inc. d/b/a Gonzalez Manufacturing Technologies (Gonzalez) (collectively, "intervenors"), leave to intervene, invalidating Scion's writ of garnishment, and

ordering that funds held in escrow be released to IDI.[1] We vacate the trial court's order and remand for further proceedings.

On appeal, Scion claims error in the trial court's decision to permit intervenors to intervene. Before the trial court, Scion objected to intervenors' post-judgment motion to intervene on the grounds that MCR 2.614(A)(1), which provides for an automatic 21-day stay of execution on a judgment, did not provide a basis for intervenors to intervene in order to seek to invalidate the writ of garnishment. Scion argued that MCR 2.614(A)(1) was not intended to protect lien creditors. The trial court decided the motion to intervene under the relevant court rule, MCR 2.209(A)(3):

> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
>
> * * *
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A trial court's decision on a motion to intervene is reviewed for an abuse of discretion. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). A trial court abuses its discretion "'when the decision results in an outcome falling outside the principled range of outcomes.'" *Id*., quoting *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). The proper interpretation of a court rule is reviewed de novo as a question of law. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

Intervenors filed their motion to intervene over a month after the court entered the consent judgment favorable to Scion, and nearly a month after Scion's writ of garnishment was filed pursuant to the judgment. The trial court granted the motion to intervene without considering the timeliness of the motion. MCR 2.209(A) provides that, "On *timely* application a person has a right to intervene in an action . . . ." (Emphasis added.) In *Dean v Dep't of Corrections*, 208 Mich App 144, 150-151; 527 NW2d 529 (1994), this Court explained that:

> *There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant.* See 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil (2d ed), § 1916, p. 444. "It must be very obvious that a great distinction must be observed between an intervention occurring before judgment is rendered ... and another case in which intervention is sought, as in the instant

[1] According to intervenors' brief on appeal, Gonzalez and IDI have entered into an agreement to divide equally any amounts recovered through post-judgment collection efforts.

> case, after judgment has been rendered." *Czajkowski v Lount*, 333 Mich 156, 164; 52 NW2d 642 (1952). Further, we note that the "[p]rovision . . . authorizing intervention . . . 'at any time' relates to time actions are pending in court." *Id.*
>
> In the instant case, intervening plaintiffs made a less-than-strong showing that intervention was appropriate. They merely claimed that their action and the main action had a question of law in common and that intervention would not unduly delay or prejudice the adjudication of the original parties' rights. Nowhere in their motion do intervening plaintiffs explain why they failed to move for intervention while the main action was pending. And, rather than exercising considerable reluctance, the trial court expressed a great willingness to grant the motion without questioning its timeliness. *Although we recognize the trial court's discretion in such matters, we conclude that routinely granting motions to intervene in a case in which judgment favorable to the intervenors has already been entered, without questioning the timeliness of such motions, constitutes an abuse of discretion.* [Emphasis added; other alterations in original.]

Thus, *Dean*, 208 Mich App at 150-151, demonstrates that a post-judgment motion to intervene should be viewed with reluctance, that there is a higher threshold for granting such a motion, and that a trial court's decision to grant a post-judgment motion without considering timeliness may constitute an abuse of discretion. In this case, intervenors filed their motion to intervene on July 2, 2009—over a month after the court entered the May 27, 2009 consent judgment in Scion's favor, and nearly a month after the writ of garnishment was filed on June 4, 2009. Even assuming intervenors did not have knowledge of this action before the consent judgment was entered, and acknowledging that no other party represented intervenors' interest, allowing intervention at this stage was improper. Allowing intervention at this late stage was highly prejudicial to Scion. Intervenors sought to intervene in order to invalidate Scion's writ of garnishment, so that their own interest in the relevant funds [$38,098.57 garnishee defendant, Ford Motor Company (Ford) owed to defendant Hersh Company, Inc. (Hersh)], would take priority. They challenged the validity of the writ of garnishment on the basis of Scion's failure to comply with the automatic 21-day stay provision, MCR 2.614(A)(1), but none of the original parties, including Hersh, objected to the writ on that basis. Under the circumstances, the trial court's decision to grant the motion to intervene, without considering the timeliness of the motion, constituted an abuse of discretion.[2] Accordingly, we vacate the trial court's order

[2] While the issue of intervention under MCR 2.209(A)(3) in general is preserved for appellate review because it was raised before and addressed by the trial court, the timeliness issue is arguably unpreserved. *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009). The only mention of timeliness below was a single line in the brief in support of the motion to intervene asserting that the motion was timely because intervenors first learned about the writ on June 29, 2009. Scion did not argue that the motion was untimely, and there was no discussion of timeliness at the hearing at which the trial court orally granted the motion to intervene. Nonetheless, we address the issue because failure to do so would result in manifest injustice. See *Id.*; *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). We note that the Court seems to have done likewise in *Dean*, 208 Mich App at 150-151.

granting the motion to intervene, invalidating the writ of garnishment, and ordering the release of funds to IDI.

In light of our conclusion that the trial court's decision must be vacated, we decline to address Scion's argument, raised for the first time on appeal, that intervenors lacked standing to challenge the writ of garnishment. We note that this state's standing jurisprudence has changed since the parties filed their appellate briefs. See *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010).

Scion also argues on appeal that the trial court erred in invalidating the writ of garnishment on the basis of Scion's failure to comply with the 21-day automatic stay provision, MCR 2.614(A)(1), because that provision does not apply to a consent judgment, at least in the absence of an objection to immediate enforcement. We disagree with Scion's argument that MCR 2.614(A)(1) did not apply to the consent judgment in this case. Under the circumstances of this case, however, we agree that the trial court erred in invalidating the writ on the basis of Scion's failure to comply with MCR 2.614(A)(1).

The proper interpretation of a court rule is reviewed de novo as a question of law. *Hinkle*, 467 Mich at 340, but "a trial court's findings of fact are reviewed for clear error," *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

MCR 2.614(A) provides, in relevant part:

> (1) *Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry*. . . .
>
> (2) The following orders may be enforced immediately after entry unless the court orders otherwise on motion for good cause:
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> (a) A temporary restraining order.
>
> (b) A preliminary injunction.
>
> (c) Injunctive relief included in a final judgment.
>
> (d) An interlocutory order in a receivership action.
>
> (e) In a domestic relations action, an order before judgment concerning the custody, control, and management of property; for temporary alimony; or for support or custody of minor children and expenses. [Emphasis added.]

Scion argues that the requirement of the 21-day stay period does not apply to a consent judgment. We disagree. MCR 2.614(A) contains no exception for a consent judgment, and there is no apparent reason to treat a consent judgment differently in this context. "In general, *judgments, including consent judgments*, entered by our courts are final and binding," and may be set aside only on the basis of certain limited grounds enumerated in MCR 2.612, such as mistake or fraud. *Staple v Staple*, 241 Mich App 562, 564, 572; 616 NW2d 219 (2000)

(emphasis added). We find no published opinion addressing whether MCR 2.614(A) applies to consent judgments.

In *Hinkle*, the Michigan Supreme Court held that MCR 2.614(A)(1) "does not apply to *voluntary payments* in satisfaction of a judgment." *Hinkle*, 467 Mich at 338 (emphasis added). The Court reasoned that MCR 2.614(A)(1), "precludes *execution* on a judgment, not voluntary payment by a party willing to satisfy a judgment. Nothing in the plain language of the rule restrains a party liable for a judgment and the party entitled to satisfaction of the judgment from expediting the resolution of the litigation by effecting payment without resorting to formal methods of execution." *Id*. at 341 (emphasis in original). The Court noted that "[e]xecution refers to the coercive process for collection of judgments." *Id*. at 342 n 7.

In this case, Hersh consented to the judgment but did not make a voluntary payment. *Hinkle*, 467 Mich at 337, was based on the plain language of MCR 2.614(A)—execution of a judgment versus a voluntary payment—and what occurred here was *execution* on a judgment (through a writ of garnishment), not a voluntary payment by the liable party. The court rule makes no exception for a consent judgment. We therefore disagree with Scion's argument that MCR 2.164(A) *does not apply* to the consent judgment at issue. Had Hersh objected to the filing of the writ of garnishment before the expiration of the 21-day stay period, invalidating the writ on the basis of Scion's failure to await the expiration of the 21-day stay period may have been appropriate.

Nor was there any waiver of the 21-day stay requirement. At the May 27, 2009 hearing Scion's counsel placed the terms of the parties' settlement on the record. He indicated that both the consent judgment against Hersh and the separate judgment (not at issue here) against the three individual defendants-appellees, Ricardo Martinez, Joseph Zanotti, and Peter Feamster, would be "immediately enforceable." This exchange followed:

> *THE COURT:* All right. Counsel, is that a complete recitation of the settlement agreement?
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> *MR. THOEN [Counsel for Hersh and Martinez]:* I don't believe there was, would be immediately enforceable. Although, you know, for all practical purposes I don't know whether that –
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> *MR. DECKER [Feamster's counsel]:* I have an objection to the immediately enforceable aspect of it. I don't believe we talked about that. I would want the three, normal three-week appeal term, just to meet with counsel to discuss resolution.
>
> *MR. ACOSTA [Scion's counsel]:* Well, it's a consent judgment, Your Honor. There is no appeal to a consent judgment.
>
> *THE COURT:* Well, I don't know the answer to that question. If you're looking to me, I'd have to do some research to determine that. If a judgment's entered, typically you have three weeks to appeal that judgment. If it's a consent judgment, my rudimentary understanding would be that you still have three weeks to appeal it, although it's more difficult to appeal a judgment you've consented to.

MR. DECKER: And that's my understanding, your Honor.

MR. THOEN: Well, I can tell you I don't know.

THE COURT: I'm not saying that I know either, but my, my sense –

MR. DECKER: (Inaudible) you have the three weeks before it is collectible.

MR. THOEN: Well, I guess for, so we don't get stuck on this impasse, Your Honor, it's a consent judgment. I think the parties are in agreement with that. Whatever the court rules provide, they provide.

THE COURT: All right. You'll have collection remedies as provided by law.

MR. ACOSTA: Yes, Your Honor.

THE COURT: All right. We're in agreement with that.

MR. DECKER: Fair enough, Your Honor.

Thus, Hersh merely agreed to "whatever the court rules provide" with respect to the time for enforcement. The court rules provide for an automatic 21-day stay. The trial court did not clearly err in finding that the parties "did not concede that the judgment would be immediately enforceable."

Accordingly, we disagree with Scion that MCR 2.614(A)(1) did not apply to the consent judgment at issue here. Nonetheless, for the reasons explained above, we conclude that the trial court abused its discretion in permitting intervenors to challenge the validity of the writ of garnishment on the basis of Scion's violation of MCR 2.614(A)(1) through an untimely motion to intervene. On that basis, we agree with Scion that the trial court erred in invalidating the writ and ordering the release of funds to IDI.

Finally, Scion argues that the trial court erred in concluding that the June 4, 2009 writ of garnishment did not have priority over IDI's security interest. The trial court so ruled because it concluded that the writ was invalid. Having already concluded that the trial court erred in invalidating the writ, we agree with Scion that the writ had priority over IDI's security interest.

We review issues of statutory construction de novo as questions of law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

Under MCL 440.9317(1)(b):

A security interest or agricultural lien is subordinate to the rights of 1 or more of the following:

* * *

> (b) Except as otherwise provided in subsection (5), a person that becomes a lien creditor before the earlier of the following:
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> (i) The time the security interest or agricultural lien is perfected.
>
> (ii) The time 1 of the conditions specified in section 9203(2)(c) is met and a financing statement covering the collateral is filed.

Thus, IDI's security interest is subordinate to Scion's rights if Scion became a lien creditor before either MCL 440.9317(1)(b)(i) or (ii) was met. For purposes of either MCL 440.9317(1)(b)(i) or (ii), IDI's security interest was perfected, at the earliest, when its financing statement was filed, because MCL 440.9310(1) provides, with certain exceptions no one claims are relevant here, that a financing statement must be filed to perfect a security interest.

"Lien creditor" includes "[a] creditor that has acquired a lien on the property involved by attachment, levy, or the like." MCL 440.9102(zz)(a).

> A claimant who has obtained a judgment on an obligation and then obtained a lien by levy or the like also is a common claimant with lien creditor status. To determine exactly when lien creditor status arises with respect to such a claimant, it is necessary to look at state law outside Article 9. Typically, state law provides for lien creditor status for judgment creditors after execution is levied by the sheriff. [1 The Law of Debtors and Creditors, § 7:166]

"Michigan follows the general rule that a garnishment lien attaches upon service of the writ." *Michigan Tractor & Machinery Co v Elsey*, 216 Mich App 94, 97; 549 NW2d 27 (1996) (citation and quotation marks omitted). Thus, Scion became a lien creditor upon service of the writ of garnishment. As noted, the writ of garnishment was filed on June 4, 2009. Although Scion claims that the writ was also served on June 4, 2009, it appears from a proof of service contained in the lower court file that the writ was served on Ford on June 5, 2009. Either way, Scion became a lien creditor before IDI filed its financing statement on June 18, 2009. Thus, we agree with Scion that IDI's security interest is subordinate to Scion's rights under the writ of garnishment.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause