STATE OF MICHIGAN

COURT OF APPEALS

EMILY KINCAID,

Plaintiff-Appellee,

v

ROBERT CROSKEY and WOLPIN COMPANY, d/b/a TRI-COUNTY BEVERAGE COMPANY WAYNE COUNTY,

Defendants,

and

EXAM WORKS,

Nonparty-Appellant.

UNPUBLISHED
November 21, 2013

No. 310148
Wayne Circuit Court
LC No. 11-004918-NI

EMILY KINCAID,

Plaintiff-Appellee,

v

ROBERT CROSKEY and WOLPIN COMPANY, d/b/a TRI-COUNTY BEVERAGE COMPANY WAYNE COUNTY,

Defendants-Appellants,

and

CLIFFORD LEE, JR.,

Intervening Plaintiff.

No. 311857
Wayne Circuit Court
LC No. 11-004918-NI

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In Docket No. 310148, nonparty, Exam Works, appeals by leave granted the trial court order granting in part plaintiff's request for discovery of certain documents pertaining to two physicians used by defendants, Robert Croskey and Wolpin Company (d/b/a Tri-County Beverage Company, Wayne County), in conducting independent medical examinations (IMEs) of plaintiff.[1] In Docket No. 311857, defendants appeal by leave granted the trial court order granting plaintiff's motion in limine precluding the admission of evidence regarding plaintiff's failure to use a seat belt.[2] We vacate the trial court's orders and remand for further proceedings.

This action arises out of an automobile accident that occurred on June 24, 2010. Plaintiff and intervening plaintiff, Clifford Lee, Jr., are city of Detroit police officers. Plaintiff and Lee were dispatched and responding to an armed robbery in progress. Lee was driving an unmarked police vehicle, but had activated the emergency lights and siren. Plaintiff was the front seat passenger. While proceeding westbound on Plymouth Road, Croskey, driving a tractor trailer owned by his employer, Wolpin Company, pulled into the roadway resulting in the police car striking the rear of defendants' vehicle. Plaintiff sustained injuries.

In Docket No. 310148, Exam Works contests the propriety of the trial court's order granting discovery to plaintiff of financial and ownership documentation pertaining to Exam Works and the two physicians performing IMEs on plaintiff for defendants, Joseph Walkiewicz, D.O., and Gino Sessa, M.D.[3] Specifically, the trial court permitted the disclosure of income and financial information involving the physicians and Exam Works, which was limited in duration but not restricted solely to the examinations performed on plaintiff and included the gross income of the physicians received from "defense medical examinations" with Exam Works.

"This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). Questions of law pertaining to the interpretation and application of court rules are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

"'Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice. In light of that commitment, [the Supreme Court] has repeatedly emphasized that discovery rules are to be liberally construed . . . to further the ends of justice.'" *Domako v Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991) (citation omitted). In accordance with MCR 2.302(B)(1), parties may obtain discovery of any matter that is "'relevant to the subject matter

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[1] *Kincaid v Croskey*, unpublished order of the Court of Appeals, entered June 21, 2012 (Docket No. 310148).

[2] *Kincaid v Croskey*, unpublished order of the Court of Appeals, entered March 7, 2013 (Docket No. 311857).

[3] Based on the arguments on appeal, Exam Works is not contesting the portion of the trial court's order that required the release of documents specifically relating to the IMEs performed on plaintiff or the physicians' resumes.

involved in the pending action' or that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Bauroth v Hammoud*, 465 Mich 375, 381; 632 NW2d 496 (2001), quoting MCR 2.302(B)(1). Discovery "should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Domako*, 438 Mich at 360 (citation and internal quotation marks omitted). "Restricting parties to formal methods of discovery would not aid in the search for truth, and it would only serve to complicate trial preparation. MCR 1.105 expressly states that the court rules are 'to be construed to secure the just, speedy, and economical determination of every action . . . .'" *Id.*

Limitations on discovery, however, do exist. Specifically, "Michigan's commitment to open and far-reaching discovery does not encompass fishing expedition[s]." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) (quotation marks and citation omitted). "Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id.*

The challenge posited by Exam Works encompasses the propriety of the requested discovery from a nonparty and the method used to secure the discovery. Examining the method employed by plaintiff, relevant portions of the Michigan Rules of Court include:

MCR 2.302 provides, in relevant part:

> (B) **Scope of Discovery**.
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> (1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> * * *
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> (3) *Trial Preparation; Materials*.
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> (a) Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

* * *

(4) *Trial Preparation; Experts*. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial.

(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

MCR 2.305 states, regarding the procedure for issuing a subpoena for taking a deposition:

(A) General Provisions.

(1) After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.

(2) The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated documents or other tangible things relevant to the subject matter of the pending action and within the scope of discovery under MCR 2.302(B). The procedures in MCR 2.310 apply to a party deponent.

(3) A deposition notice and a subpoena under this rule may provide that the deposition is solely for producing documents or other tangible things for inspection and copying, and that the party does not intend to examine the deponent.

* * *

(B) Inspection and Copying of Documents. A subpoena issued under subrule (A) may command production of documents or other tangible things, but the following rules apply:

(1) The subpoena must be served at least 14 days before the time for production. The subpoenaed person may, not later than the time specified in the subpoena for compliance, serve on the party serving the subpoena written objection to inspection or copying of some or all of the designated materials.

(2) If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending.

(3) The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials. MCR 2.313(A)(5) applies to motions brought under this subrule.

MCR 2.310, pertaining to the request for production of documents, provides with regard to nonparties:

(A) Definitions. For the purpose of this rule,

(1) "Documents" includes writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.

* * *

(B) Scope.

* * *

(2) A party may serve on a nonparty a request

(a) to produce and permit the requesting party or someone acting for that party to inspect and test or sample tangible things that constitute or contain matters within the scope of MCR 2.302(B) and that are in the possession, custody, or control of the person on whom the request is served; or

(b) to permit entry on land.

* * *

(D) Request to Nonparty.

(1) A request to a nonparty may be served at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).

(2) The request must be served on the person to whom it is directed in the manner provided in MCR 2.105, and a copy must be served on the other parties.

(3) The request must

(a) list the items to be inspected and tested or sampled, either by individual item or by category, and describe each item and category with reasonable particularity,

(b) specify a reasonable time, place, and manner of making the inspection and performing the related acts, and

(c) inform the person to whom it is directed that unless he or she agrees to allow the inspection or entry at a reasonable time and on reasonable conditions, a motion may be filed seeking a court order to require the inspection or entry.

(4) If the person to whom the request is directed does not permit the inspection or entry within 14 days after service of the request (or a shorter time if the court directs), the party seeking the inspection or entry may file a motion to compel the inspection or entry under MCR 2.313(A). The motion must include a copy of the request and proof of service of the request. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.

(5) The court may order the party seeking discovery to pay the reasonable expenses incurred in complying with the request by the person from whom discovery is sought.

(6) This rule does not preclude an independent action against a nonparty for production of documents and other things and permission to enter on land or a subpoena to a nonparty under MCR 2.305.

The cited court rules by virtue of their language and referenced relationships to one another indicate that the proper method of discovery of this information was not strictly followed by plaintiff. Discovery of documents from a nonparty is by deposition, MCR 2.302(B)(4)(i), (ii), whether it involves the actual taking of testimony or not, MCR 2.305(A)(3), and written requests for production, MCR 2.310(B)(2). The subpoenas issued by plaintiff do not indicate the intent of plaintiff to "examine the deponent." MCR 2.305(A)(3).

Plaintiff focuses on the language of MCR 2.302(B)(4)(a)(iii), which permits a trial court to "order *further* discovery by other means. . . ." (Emphasis added.) The use of the term "further" in this subsection of the rule must be read in conjunction with the preceding subsection, (B)(4)(a)(ii), which permits "[a] party [to] take the deposition of a person whom the other party expects to call as an expert witness at trial." "In interpreting a rule, this Court must read its language in the context of the entire rule in order to produce an harmonious whole." *Colista v Thomas*, 241 Mich App 529, 536; 616 NW2d 249 (2000). The implication that arises from the order and content of the subrules suggests that a litigant must first take the deposition of the expert and then, if unsatisfactory, may proceed to seek alternative means of discovery from the court. In this instance, plaintiff has not scheduled or sought to take the deposition of either IME physician.

Plaintiff's discovery request is subject to limitation, with regard to both method and scope, consistent with caselaw and the rules of evidence. The interest, bias or prejudice of a witness, including an expert witness, is recognized as a proper subject of cross-examination. MRE 611(c). It is proper to cross-examine an expert about the number of times he or she has testified in court or was involved in a particular type of case. *Wilson v Stilwell*, 411 Mich 587, 599-600; 309 NW2d 898 (1981). It is also appropriate to cross-examine an expert to demonstrate a pattern of testimony for a specific attorney or a particular category of plaintiffs or defendants. *Id*. at 600-601. However, "such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court." *Id*. at 601. Evidence of an expert's credibility is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *Wischmeyer v Schanz*, 449 Mich 469, 475; 536 NW2d 760 (1995).

The pertinent discovery rule, MCR 2.302(B)(3)(a), provides, in relevant part:

> Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) *only* on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case *and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* [Emphasis added.]

In this instance, plaintiff has failed to demonstrate that alternative means, such as deposing defendants' experts, would not permit her "to obtain the substantial equivalent of the materials" or that the use of depositions would constitute an "undue hardship" to her. Certainly, at deposition the physicians could be asked questions regarding their relationship with Exam Works, the extent of their practices in performing this type of defense work and the amount of compensation received to demonstrate potential bias. It is unnecessary to obtain their detailed financial records for this purpose.

Although this Court has previously determined that alternative means of discovery, such as the submission of interrogatories to nonparty expert witnesses, is not precluded by the court rules, it has implied that the use of such alternative discovery mechanisms with this category of witnesses necessitates the existence of "compelling circumstances." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 617; 576 NW2d 709 (1998). The term "compelling" is defined as "tending to compel; overpower" and as "having a powerful and irresistible effect." *Random House Webster's College Dictionary* (1997). In a similar vein, MCR 2.302(B)(4)(b)(ii) references "exceptional circumstances," which has been defined as "circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by another means." MCR 2.302(B)(4)(b)(ii). There is nothing in the circumstances of this case to suggest the existence of "exceptional" or "compelling" circumstances necessitating the scope or method of discovery permitted by the trial court.

Based on our determination that the trial court erred in granting the discovery as ordered, we need not address defendants' alternative contention of error regarding the trial court's failure to preclude the discovery by imposition of a protective order under MCR 2.302(C). "An issue is

. . . moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

In Docket No. 311857, defendants appeal the trial court's grant of plaintiff's motion in limine precluding the submission of evidence regarding plaintiff's acknowledged failure to use a seatbelt. Defendants argue that evidence of plaintiff's failure to use the seatbelt should be admissible based on the assertion of common-law claims outside the no-fault act and to establish the comparative negligence of Lee, the driver of the vehicle in which plaintiff was a passenger, as a nonparty at fault. Specifically, defendants rely on a provision in the Detroit Police Department manual that states a departmental vehicle "[s]hall not be placed in motion until all persons have fastened all available seat restraints."

"This Court reviews a trial court's decision to admit evidence for an abuse of discretion; however, when the trial court's decision involves a preliminary question of law, such as whether a statute precludes the admission of evidence, a de novo standard of review is employed." *City of Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 275-276; 730 NW2d 523 (2006).

The relevant statutory provision, MCL 257.710e, provides in part:

> (3) Each operator and front seat passenger of a motor vehicle operated on a street or highway in this state shall wear a properly adjusted and fastened safety belt except as follows:
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> (a) A child who is less than 4 years of age shall be protected as required in section 710d.
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> (b) A child who is 4 years of age or older but less than 8 years of age and who is less than 4 feet 9 inches in height shall be properly secured in a child restraint system in accordance with the child restraint manufacturer's and vehicle manufacturer's instructions and the standards prescribed in 49 CFR 571.213.
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> (7) Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, that negligence shall not reduce the recovery for damages by more than 5%.

Our Supreme Court's decision in *Mann v St Clair Co Rd Comm*, 470 Mich 347; 681 NW2d 653 (2004), provides the historical context of the relevant statutory provision[4] and is

[4] We note that MCL 257.710e was amended in 2008, after the decision in *Mann* was issued and, therefore, the subsections of the statute referenced in the Supreme Court's ruling are not entirely consistent with the number of the subsections in the current version of the statute. 2008 PA 43.

pertinent to the issue as presented in this case. Addressing the history of the statutory enactment, the *Mann* Court stated, in relevant part:

> Before 1985, evidence of a plaintiff's failure to use a safety belt was not admissible in any tort action. *Romankewiz v Black*, 16 Mich App 119; 167 NW2d 606 (1969). In 1985, the Legislature adopted a safety belt law, MCL 257.710e, requiring front seat passengers in automobiles to wear safety belts and providing that failure to use a safety belt "may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle." MCL 257.710e(6). The safety belt law limits the amount by which recovery for damages may be reduced to no more than five percent of the damages: "such negligence shall not reduce the recovery for damages by more than five percent." MCL 257.710e(6).
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> Two years later, in deciding an automobile products liability action, this Court held that under the common-law a plaintiff's failure to wear a safety belt could be used at trial for purposes of comparative negligence. *Lowe v Estate Motors Ltd*, 428 Mich 439; 410 NW2d 706 (1987). In *Lowe* the accident occurred before the effective date of MCL 257.710e, and the Court's decision was not based on the statute.
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> As a result, in a tort suit there are two alternative grounds for admitting evidence of the failure to use a safety belt-the safety belt statute or common-law comparative negligence. The primary difference between the two is that when evidence of the failure to use a safety belt is admitted under the safety belt statute, there is a five percent cap on the reduction of damages; when evidence of the failure to use a safety belt is admitted under common-law comparative negligence, the safety belt statute and its cap do not apply. [*Id.* at 350-351 (footnote omitted).]

Determining the applicability of MCL 257.710e to the issue of damages, the Court further stated:

> The safety belt statute, MCL 257.710e, requires the use of safety belts in an automobile. It allows evidence of the failure to use a safety belt to be admitted in court to prove comparative negligence, while limiting the reduction for recovery of damages arising out of the ownership, maintenance, or operation of a motor vehicle to no more than five percent:
>
> > Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle.

Following the amendment of the statutory provision, subsections (3) and (4) now comprise the former subsection (3). Subsections (4) to (10) of the earlier version of the statute have been renumbered to subsections (5) to (11). Consequently, the cap provision, formerly designated subsection (6), as referenced in *Mann*, is now identified as subsection (7).

> However, such negligence shall not reduce the recovery for damages by more than five percent. [MCL 257.710e(6).]

We hold that the safety belt statute's cap on the reduction of damages is applicable only to tort actions brought under the no-fault act, MCL 500.3101 *et seq*.

> By its own terms, § 710e(6) is limited to "damages arising out of the ownership, maintenance, or operation of a motor vehicle." A loss involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle is a "motor vehicle accident" under the no-fault act. Tort liability arising from the ownership, maintenance, or use of a motor vehicle within Michigan has been abolished, allowing for certain exceptions within MCL 500.3135(3). Thus, the cap on reduction of damages for failure to wear a safety belt, § 710e(6), can only apply in those limited tort suits allowed under the no-fault act. As Justice BOYLE stated in her concurrence in *Klinke* [*v Mitsubishi Motors Corp*, 458 Mich 582,] 594; 581 NW2d 272 [(1998)], "[t]he fact that the safety belt statute tracks the language of the no-fault act demonstrates the Legislature's clear intent to apply the five-percent limitation on reduction of damages for a plaintiff's negligence within the context of the no-fault act." [*Mann*, 470 Mich at 352-354 (footnotes omitted).]

Within the context of defendants' assertion of negligence of Lee, as a nonparty at fault, MCL 600.2957 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
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> (3) Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

MCL 600.6304 provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer

special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

Premised on the statutory language and the ruling in *Mann*, we assume that the trial court technically erred in precluding the admissibility of evidence regarding plaintiff's failure to wear a seat belt. MCL 257.710e(7); *Mann*, 470 Mich at 352. But, there is no need to reverse because plaintiff offered to stipulate to the application of the full five percent statutory cap on damages. Therefore, there is neither harm nor benefit to defendants in the presentation of testimony from their proffered expert opining that the injuries plaintiff sustained would not have been as severe had she been wearing a seat belt at the time of the accident as the amount of reduction for any damages determined is statutorily limited. Further, defendants' assertion that plaintiff's failure to wear a seat belt should be admitted as evidence of her comparative negligence under the common law is unavailing. The provision in the Detroit Police Department manual does not alter the character of this action or remove it from the governance of the no fault act. "The gravamen of an action is determined by reading the claim as a whole." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993). Plaintiff sustained injuries while a

passenger in a motor vehicle that was involved in a collision with another vehicle. Other than failing to use her seat belt, defendants allege no other act of negligence on the part of plaintiff. The action falls squarely within the rubric of the no-fault act, which in turn necessitates the application of MCL 257.710e(7) because "the safety belt statute's cap on the reduction of damages is applicable only to tort actions brought under the no-fault act." *Mann*, 470 Mich at 352.

We do find the trial court's failure to address the nonparty at fault issue to be problematic. "If a nonparty is not joined in an action for whatever reason, the trier of fact may nonetheless determine that person's percentage of fault. . . . [T]he plain language of the statutes allows the trier of fact to allocate fault to a nonparty 'regardless of whether the person was or could have been named as a party to the action.' MCL 600.6304(1)(b); MCL 600.2957(1)." *Rinke v Potrzebowski*, 254 Mich App 411, 416; 657 NW2d 169 (2002). As explained in *Rinke*:

> Except in certain limited circumstances, the Legislature abolished joint liability in tort actions. *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). Now the liability of each defendant is several only. MCL 600.2956. The trier of fact is to determine the liability of each person in proportion to the person's percentage of fault, "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1); MCL 600.6304(1). Fault assessed against a nonparty does not determine the nonparty's liability; rather, it is "used only to accurately determine the fault of named parties." MCL 600.2957(3). [*Id.* at 415 (footnote omitted).]

As such, evidence should be admissible at trial regarding plaintiff's failure to use a seat belt in the context of ascertaining whether Lee was negligent in having failed to assure seat belt use by his passenger and the apportionment of liability by the trier of fact, if any, to Lee for plaintiff's injuries. Defendants raised this issue in the lower court, but the trial court failed to address the arguments proffered or to rule on the issue as it pertains to the nonparty at fault.

On appeal, plaintiff contests the propriety of Lee being a nonparty at fault based on the absence of any legal or statutory duty owed by Lee to ensure plaintiff's safety and asserting that Lee's alleged negligence did not cause plaintiff's injuries. These arguments were not, however, raised by plaintiff or addressed by the trial court and, therefore, are not properly presented for appellate review. Plaintiff also failed to refute defendants' argument that Lee, as the driver of the vehicle, owed a duty of due care to plaintiff, as his passenger.[5] This Court is not required to review issues raised for the first time on appeal, *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006), and, because the issues involve questions of fact, we decline to do so in the circumstances of this case.

[5] "Many duties recognized in tort are 'public' in that the duty does not specifically run to one person or group of persons. Motorists driving on Michigan roadways owe a duty to all drivers, passengers, pedestrians, and property owners (i.e., the public generally) to operate their vehicles with due care." *White v Beasley*, 453 Mich 308, 356; 552 NW2d 1 (1996).

We vacate the trial court's orders precluding the admissibility of evidence of plaintiff's failure to use a seat belt and granting discovery of the personal financial documents of the physicians performing independent medical examinations for defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly