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Is it Proper to Raise New Arguments or Submit New Evidence in a Motion for Reconsideration?

There may be times when a party facing an adverse summary disposition decision (whether it be the grant or denial of such a motion) wishes either to raise a new issue or submit new evidence in a motion for reconsideration under MCR 2.119(F). Is this proper? The weight of authority from the Michigan Supreme Court and Court of Appeals suggests a party proceed with caution.

Regarding submission of new evidence at the reconsideration stage, the Supreme Court in *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), refused to consider an affidavit that was not submitted in response to the defendant's motion for summary disposition, but was instead offered for the first time as part of the plaintiff's motion for reconsideration. In declining to consider the affidavit, the *Quinto* Court observed that it "was not before the trial court":

> The affidavit was filed with a motion for rehearing, *after* the trial court granted defendant's dispositive motion. In ruling on a motion for summary disposition, a court considers the evidence then available to it. . . . Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the second affidavit. [*Id.* at 366 n 5.]

Relying on *Quinto*, the Supreme Court reached the same result in *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999), holding that additional evidence submitted in a motion for reconsideration "was not properly before the [trial] court":

> Plaintiff offered the textbook passages for the first time in support of its motion for rehearing. In ruling on a motion for summary disposition, a court considers the evidence then available to it. Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the textbook evidence.

See also *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474 n 6; 776 NW2d 398 (2009) ("Attached to the motion for reconsideration, plaintiff submitted several affidavits in support of its assertion that that the individuals listed on Exhibit A were elected to Innovative AFC's board of directors in 1999. The circuit court properly declined to consider these affidavits, which were presented for the first time in support of plaintiff's motion for reconsideration.").

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At the same time, the Court of Appeals has recognized a trial court's discretion to consider new evidence presented by way of a motion for reconsideration. Most recently, in *Gary v Farmers Ins Exch*, ___ Mich App ___; ___ NW2d ___; 2023 WL 5808505 (2023), the Court considered medical records that the plaintiff provided when moving for reconsideration of the trial court's decision to grant summary disposition to the defendant because "the trial court exercised its discretion to accept the exhibits filed with the reconsideration motion." *Id.* at *2 n 3, citing *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012) ("Because the trial court considered the affidavits in making its ruling, we include them in our review de novo of the trial court's [summary disposition decision].").

While it is theoretically *possible* to successfully raise an issue for the first time in a motion for reconsideration, or even to present new evidence, that is certainly not the norm, and parties should not assume that it'll be successful.

Of course, the trial court also has discretion to *decline* to consider such evidence. See, e.g., *Zehel v Nugent*, 344 Mich App 490, 513 n 6; 1 NW3d 387 (2022) ("[A] trial court need not consider evidence presented for the first time on reconsideration that could have been presented initially."); *Yachcik v Yachcik*, 319 Mich App 24, 42; 900 NW2d 113 (2017) ("[A] court has full discretion to decline to consider evidence presented with a motion for reconsideration 'that could have been presented the first time the issue was argued.'") (citation omitted).

It appears that the trial court has similar discretion when it comes to new legal issues or arguments. On the one hand, the Court of Appeals has long recognized that a trial court does not abuse its discretion by refusing to consider arguments raised for the first time in a motion for reconsideration. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order."). And the general rule is that "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

But, the Court of Appeals has also recognized a trial court's discretion to consider new arguments raised in a motion for reconsideration. For example, in *Sutton v City of Oak Park*, 251 Mich App 345; 650 NW2d 404 (2002), which involved a statutory issue raised for the first time in a motion for reconsideration, the Court of Appeals recognized the discretion of trial courts to consider such a new argument:

> Initially, we address the position of plaintiff and the trial court regarding the motion for reconsideration that defendants' reliance on MCL 15.243(1)(s)*(ix)* was improper because it was not relied on in defendants' motion for summary disposition and that the trial court was therefore required to deny defendants' motion for reconsideration. This is not an accurate statement of the law because defendants' motion for reconsideration was brought under MCR 2.119(F), which, by its terms, does not restrict the discretion of the trial court in ruling on the motion. See MCR 2.119(F)(3). Clearly, whether MCL 15.243(1)(s)*(ix)* applies to the records at issue to exempt them from disclosure was presented both by the city council and defendants in their motion for reconsideration. [*Id.* at 348-349.]

The *Sutton* Court further recognized the Court of Appeals' own discretion to consider a legal issue on appeal even though it was raised for the first time in a motion for reconsideration:

> More importantly, the issue on appeal is a question of law, brought under MCR 2.116(C)(8), and the facts necessary for its resolution are before this Court. *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999) (An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented). [*Id.* at 349.]

Relying on its discretion, the *Sutton* Court ended up reversing the trial court's decision based on the belatedly-raised statutory issue. A separate concurring opinion further expanded on the arguable distinction between submitting new evidence in support of a motion for reconsideration and making new arguments:

> [W]hile a party may be precluded from submitting new *evidence* to the trial court in support of a motion for reconsideration, see *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v Cross & Peters*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996) (in ruling on a motion for summary disposition, a court considers *the evidence then available to it*), a party raising a newly asserted *basis* for dismissal in a motion for reconsideration does not necessarily run afoul of *Maiden* and *Quinto* in the appropriate circumstances. [*Id.* at 351 (Wilder, J., concurring).]

Similarly, in *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019), the Court of Appeals observed that preservation requirements may be overlooked in civil cases "if the

failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Id.* at 454 (citation and quotation marks omitted).

While it is theoretically *possible* to successfully raise an issue for the first time in a motion for reconsideration, or even to present new evidence, that is certainly not the norm, and parties should not assume that it'll be successful.

Welcome New Associate Editor

Kevin Cowan, *Associate Editor*

Kevin is an associate attorney at Smith Haughey Rice & Roegge in the Grand Rapids office. He works in SHRR's litigation practice group.

Kevin has experience working in a variety of legal settings involving all aspects of litigation. As a clerk at the 17th Circuit Court in Kent County, he conducted legal research for civil and criminal motion arguments and drafted proposed opinions and orders. During his time with the Michigan Department of Attorney General, he helped represent the state's Department of Corrections and its employees.

Kevin graduated from Central Michigan University with a bachelor's degree in law and economics. He earned his juris doctor from Michigan State University College of Law, where he also served as assistant managing editor for the International Law Review and participated in the Alvin L. Storrs Low-Income Tax-Payer Clinic.

Outside the practice of law, Kevin enjoys golfing, cooking, spending time with family and friends, and watching football, especially the Detroit Lions!