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# Monthly Newsletter

August 2014

## *Recent Decisions and Successes*

### *Kelly Dumoulin v. State Farm Mutual Automobile Insurance Company*

Wayne County Circuit Court, Judge Paul S. Teranes, Case No. 2011-015339-NI

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Plaintiff brought a first-party suit against State Farm to recover no-fault benefits for alleged injuries from a March 2011 motor vehicle accident. The case proceeded to trial in the Wayne County Circuit Court, with Plaintiff making a total claim exceeding $200,000. At trial, Elaine Sawyer presented State Farm's defense that primarily surrounded pre-existing osteoarthritic issues suffered by Plaintiff prior to the motor vehicle accident in question.

Ms. Sawyer presented and examined two independent medical physicians at trial. These physicians corroborated State Farm's defense, stating that Plaintiff's extensive past history supported the fact that the presented "acute" injuries were actually degenerative in nature. Additionally, Ms. Sawyer cross-examined Dr. Martin Kornblum, an orthopedic surgeon. Dr. Kornblum testified on direct examination that he believed the neck injury, for which he provided a fusion surgery, to be related to the accident. On cross-examination, Ms. Sawyer established the degenerative problems could have also led to the bulging discs found in diagnostic testing, in addition to the fact that Dr. Kornblum had not acquired any of Plaintiff's medical records pre-dating the accident.

Ms. Sawyer also cross-examined Dr. Anthony Oddo, a pain management doctor, regarding epidural injections given to Plaintiff for her low back and neck pain. A myriad of records told the story of an addictive narcotic history for Plaintiff. Ms. Sawyer established that not only did Dr. Oddo also not look into Plaintiff's past medical history, but he also took little-to-no-action after Plaintiff violated her opiate agreement with his office.

Mr. Dennis cross-examined Joseph Dumoulin, Plaintiff's husband and household service provider. Plaintiff altered her household service demand at the time of trial from what she had previously been claiming. This last-minute switch allowed Mr. Dennis' examination to raise doubt in the juror's minds regarding the veracity of Mr. Dumoulin's testimony.

Following the conclusion of proofs, a jury found that Plaintiff, Kelly Dumoulin, did not suffer any injury in the motor vehicle accident.

**Verdict:** No Cause-no injury
**Credit:** Elaine Sawyer and Brendan Dennis

### *Chassidy Brown v. Allstate Property & Casualty Insurance Company*

Wayne County Circuit Court, Judge Muriel D. Hughes, Case No. 2012-011415-CZ

Plaintiff sustained significant damage to the structure of her home and personal property after her house flooded with water from a damaged toilet located on the second floor of her multi-family dwelling. The home was a very large upper and lower two family flat which was quit claim deeded to the 20 year old insured by her mother. The insured was unemployed and did not have the means to purchase the home let alone maintain it. The loss occurred three months after the property was transferred to the insured. Allstate denied the claim and Plaintiff brought suit, making a demand for $250,000.00. Throughout the investigation of the claim, Plaintiff was inconsistent and fabricated the facts and circumstances surrounding the loss.

Plaintiff testified that she locked her home and left for Ohio to spend the weekend with her boyfriend. Upon returning home, Plaintiff discovered water throughout the house and traced the source of the water to a second floor toilet which had essentially been demolished. Plaintiff testified that she believed the loss occurred as a result of a lightweight, chrome, shower shelf that had fallen from the wall above the toilet, severely damaging the toilet lid and the tank, causing the leak. There was sufficient evidence, however, that the damage sustained to the toilet was intentional. Investigators reported that the hook that secured the chrome storage rack to the wall did not appear to be accidentally damaged. Furthermore, drop testing was conducted using an identical toilet and same shower rack. Three tests were conducted at 7.7 pounds, the weight of the rack and the contents that had been stored on it. Three additional tests were done with an increased weight of 13.3 pounds. At no point during the testing did the toilet even chip, let alone sustain significant damage capable of causing a leak.

Despite the fact vendors listed much of the content in the house as having wear and tear, Plaintiff reported she sustained damage to her personal property in excess of $150,000.00. She arrived at this number based on inventory forms from various vendors, but the forms from the vendors did not actually list any dollar amounts as to damages for any of the items. In fact, Plaintiff was seeking full value for items that were clearly already damaged. Furthermore, Plaintiff admitted she did not have knowledge of half of the items on the inventory forms.

These facts along with further misstatements indicative of fraud regarding delinquent property taxes and utility payments clearly indicated Plaintiff violated a number of provisions in her insurance policy including those related to misrepresentation and concealment. A Case Evaluation Panel agreed and essentially concluded that the claim was frivolous, awarding Plaintiff a nominal amount of $500.00. At trial, the jury found Plaintiff committed fraud and misrepresentation in the submission of her claim and that no cause of action existed.

**Verdict:** No Cause of Action
**Credit:** Patrick Anthony

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### *Terrensula Bonner v. State Farm Mutual Automobile Insurance Company*

Wayne County Circuit Court, Judge Muriel Hughes, Case No: 12-002318-NF

Plaintiff was involved in a motor vehicle accident in which Plaintiff was a passenger in a car that was rear ended while stopped at a traffic light. Plaintiff sought treatment at a local emergency room and then began treatment at a physical therapy facility in which Plaintiff testified he was made aware of at the emergency room. Plaintiff claimed injuries to his cervical and lumbar spine with associated radiculopathy as a result of the accident and continued to treat with chiropractors and other physical therapy facilities throughout the pendency of the litigation.

At trial, Defendant argued that Plaintiff suffered no more than superficial sprains and strains as a result of the motor vehicle accident which should have resolved shortly after the incident. Defendant put forth that the treatment rendered to Plaintiff was not reasonable nor was it reasonably necessary for Plaintiff's care, recovery and/or rehabilitation as it was overly excessive in nature. Defendant further relied on its expert Dr. Michael Sperl, who testified that he believed that, at most, Plaintiff suffered sprains and strains to the paraspinal muscles, and did not suffer from any disc pathology. Dr. Tarik Wasfie, one of Plaintiff's experts, agreed with Dr. Sperl. Following 1 ½ days of trial, the jury returned with a verdict of no cause finding that Plaintiff did not incur any expenses as a result of the motor vehicle accident.

**Verdict:** No Cause
**Credit:** Michael Jolet and Geoffrey Blake

### *Matthew Franks v. State Farm Mutual Automobile Insurance Company*

Ingham County Circuit Court, Judge Clinton Canady, III., Case No.: 2011-1042-NI

Plaintiff was involved in an automobile accident in which his vehicle was backed into by another vehicle at a very low speed, causing minimal damage to his vehicle. Plaintiff did not seek medical attention following the accident but had a myriad of pre-existing conditions which dated back years before the 2009 automobile accident.

At trial, Defendant argued to the jury, that the injuries Plaintiff was alleging were exacerbated by the motor vehicle accident, but said injuries were not the result of the motor vehicle accident. Further, Defendant argued its Motion for Directed Verdict regarding Plaintiff's claims for replacement services and attendant care. Plaintiff testified that he had never been disabled by any of his treating physicians from doing any type of replacement services and/or attendant care. Plaintiff further testified that the same services he was receiving from his daughter and his wife were provided before the motor vehicle accident due to his chronic condition and surgery. Additionally, Defendant also argued its Motion for Directed Verdict regarding Plaintiff's medical bills. Plaintiff's expert witness could not testify that Plaintiff's injuries were a direct result stemming from the motor vehicle accident. Furthermore, Plaintiff's expert could not delineate Plaintiff's alleged injuries due to the fact that Plaintiff failed to completely disclose all of Plaintiff's other injuries, including the slip and fall before and after the accident. Defendant further argued that Plaintiff's medical bills submitted after September 30, 2010 were subject to the one year back rule pursuant to MCL 500.3145. The court ruled in favor of the Defendant on each of the respective Motions for Directed Verdict. Lastly, Defendant argued that Plaintiff was not entitled to any wage loss because he was disabled before the accident and had applied for disability.

Following 3 days of trial, the jury deliberated for almost two hours and returned with a verdict of no cause, finding that Plaintiff did not sustain any injuries arising from the motor vehicle accident.

**Verdict:** No Cause
**Credit:** Michael Jolet and Michael K. Faust, II

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### *Kyra Hollins v. State Farm Mutual Automobile Insurance Company*

Wayne County Circuit Court, Judge Maria L. Oxholm, Case No.: 2012-015465-NF

Plaintiff was involved in a low-impact collision in 2012. Plaintiff did not complain of any injuries at the scene of the accident and did not seek medical attention immediately following the accident. Plaintiff claimed to the jury that she sustained injuries to her neck, back, and head and sought damages predominately for MRI bills totaling nearly $23,000.00. Additionally, Plaintiff presented claims for household replacement services, chiropractic treatment, and physical therapy.

At trial, Defendant presented evidence that Plaintiff did not seek medical treatment until 2 days after the motor vehicle accident with a chiropractor she had never treated with prior to the accident. Defendant also argued that Plaintiff presented to Henry Ford Hospital 3 times following the accident where there were negative findings for neck pain, back pain, and headaches, contradicting her claims of injury. During the same time period, Plaintiff testified that she was unable to bathe herself, put clothes on, cook, or clean. Defendant, however, presented the jury with Plaintiff's Facebook profile, which showed Plaintiff drinking and partying during the same time frame.

To dispute Plaintiff's claims that the MRI testing was necessary, Defendant argued there were not any credible findings by her physicians of a neurological abnormality or complaints of radicular pains in her extremities to warrant the extensive MRI testing of her neck and back. Defendant also argued that Plaintiff presented with no symptoms or complaints consistent with a closed head injury to warrant the MRI of her brain. Defendant also countered Plaintiff's argument that she did not have a financial interest in this lawsuit by presenting evidence that Plaintiff sought wage loss benefits from State Farm as late as June of 2014 despite being unemployed since 2009.

Following the 2 day trial, the jury returned a verdict finding that although Plaintiff sustained an injury, State Farm was not liable for any of the outstanding expenses incurred, including medical expenses and household replacement services.

**Verdict:** No Cause
**Credit:** Michael Jolet and Shawn Lewis

# Additions at Hewson & Van Hellemont P.C.

**We would like to announce the addition of two new associate attorneys to our staff this month:**

## Joshua D. Trexler

Joshua Trexler graduated from Michigan State University, where he received a B.A. in Social Science. Mr. Trexler also graduated from the Michigan State University College of Law, *Magna Cum Laude*, in 2013.

Mr. Trexler has background working with practice groups in commercial litigation and malpractice defense of insurance agents. Mr. Trexler will be focusing his practice at Hewson & Van Hellemont, P.C. around first and third party protection No-Fault benefits.

## Jeffrey A. Hoard

Jeffrey Hoard graduated in 2008 from the Honors College at Michigan State University where he earned a Bachelor of Arts with Honor majoring in Political Science Pre-law. Mr. Hoard then attended the Michigan State College of Law, where he graduated *Magna Cum Laude* in 2012. While in law school, Mr. Hoard was an editor for the College's Journal of Medicine and Law. Mr. Hoard also participated in the College's Civil Rights Clinic, where he successful litigated civil rights actions in state and federal court.

Mr. Hoard was admitted to the State Bar of Michigan in 2012. He clerked for the Honorable William E. Collette of the 30th Circuit Court for two years prior to joining Hewson & Van Hellemont, P.C.

# Recent Opinions

### *Dennis O'Leary v. State Farm Mutual Automobile Ins. Co.*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 313976

July 29, 2014

**Insurer successfully appealed order to pay attorney fees because the attorney fees were unreasonable and the delay in denying insurance benefits to Plaintiff was not unreasonable.**

Plaintiff was injured in a 2009 motor vehicle accident and subsequently underwent several surgeries for his alleged injuries, including a neck/cervical surgery and two lumbar spine surgeries.

State Farm initially paid benefits on Plaintiff's behalf, but the payments were suspended after the claim representative became aware of inconsistencies in the notes of Plaintiff's medical providers. The inconsistencies caused the claim representative to question if the injuries were actually caused by the accident and an IME was scheduled to look further into the matter.

Dr. Philip Mayer conducted an IME in February 2010 and concluded that the two lumbar surgeries that had been performed prior to that date were not related to the accident. He reported that MRI images showed Plaintiff's spinal conditions to be degenerative in nature. Based on this assessment, State Farm denied Plaintiff's claim for the surgeries because they were unnecessary and unrelated to the accident. Plaintiff then filed suit against State Farm seeking first-party no-fault benefits.

At trial, State Farm presented the testimony of Dr. Mayer and Dr. Mark Delano, a neuroradiologist. Dr. Delano testified that Plaintiff had "arthritic degenerative changes" in his spine and that imaging did not show any signs of post-traumatic issues.

The jury, however, returned a verdict for the Plaintiff, who then moved for attorney's fees under both the no-fault act and as case evaluation sanctions. The court granted Plaintiff's motion for attorney's fees after an evidentiary hearing, ruling that State Farm had unreasonably refused to timely pay the benefits.

State Farm appealed the granting of attorney's fees. Under the no-fault act, attorney fees are only payable on overdue benefits for which an insurer has unreasonably delayed in paying or refused to pay. The trial court ruled that the four month delay from when benefits were cutoff and when the IME was scheduled was unreasonably long. The appellate court disagreed, however, noting the scheduling difficulties that arise when scheduling an IME. They held that a four month delay was not an unreasonable delay in denying benefits and therefore held the trial court abused its discretion in awarding attorney fees under the no-fault act.

State Farm also appealed the granting of attorney's fees as case evaluation sanctions under MCR 2.403(O). When a party is entitled to attorney's fees as case evaluation sanctions, they are entitled to a reasonable fee. The appellate court noted a trial court's fee analysis begins "by determining the fee

customarily charged in the locality for similar legal services," and "[t]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith v. Khouri*, 481 Mich 510, 528-531; 751 NW2d 472 (2008). The appellate court held that Plaintiff failed to establish that their fees were reasonable and remanded the issue for the trial court to decide consistent with the procedures described in *Smith*.

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### *Vincent J. Duquette v. Troy M. Reister*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 316026

June 19, 2014

**In a suit brought after a collision between an automobile and a snowmobile, Defendant was properly granted summary disposition because no reasonable juror could find the Defendant was more at fault than the Plaintiff, as required by MCL 500.3135(2)(b).**

Plaintiff and another individual were operating snowmobiles at night. Plaintiff was on the lead snowmobile as they approached the intersection of Carland Road and McBride Road. Plaintiff testified he looked for traffic, then looked back to see if the other rider was still with him. He then turned and "took off" crossing the street without seeing the oncoming automobile driven by Defendant.

Prior to impact, Defendant was traveling 55 miles per hour. Upon seeing the snowmobile dart in front of the vehicle, Defendant was able to hit the brakes and slow down to 45 miles per hour (10 miles per hour under the speed limit) before colliding with the snowmobile.

Plaintiff filed suit and Defendant subsequently moved for summary disposition, arguing that Plaintiff was more than 50 percent at fault for the accident and therefore was not entitled to recovery based on MCL 500.3135(2)(b). The trial court granted Defendant's motion and Plaintiff appealed.

The Court of Appeals acknowledged that questions of fact regarding comparative fault are generally for the jury and are not subject to summary disposition. However, under MCR 2.11(C)(10), summary disposition is appropriate if no reasonable juror could find the Defendant was more at fault than the Plaintiff.

It was undisputed that Defendant had the right of way. The local police sergeant testified that he concluded Plaintiff failed to yield the right of way and was consequently at fault for the accident. Further, Defendant was not driving recklessly, in fact he was driving at a speed below the posted speed limit.

In light of this, the Court of Appeals agreed with the trial court that no reasonable juror could find the Defendant was more at fault than the Plaintiff. The trial court's order granting summary disposition in favor of Defendant was affirmed.

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### *Crystal Barnes v. Farmers Ins. Exchange, et al.*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 314621

July 29, 2014

**Trial court's dismissal of Plaintiff's lawsuit was affirmed because MCL 500.3113(b) requires at least one owner of a motor vehicle to own a requisite insurance policy on the motor vehicle in order to collect PIP benefits under the no-fault act.**

Plaintiff and her mother, Joyce Burton, lived together and were the only titled owners of a 2004 Chevrolet Cavalier. Burton had a series of health problems that resulted in the amputation of both of her legs, leaving her unable to drive. As a result, she allowed her Allstate insurance policy on the vehicle to lapse. Since Burton was unable to drive, she requested that her friend, Richard Huling, use the Cavalier to drive her to and from church. Burton testified that she paid Huling to insure the Cavalier and Huling bought an auto insurance policy in his name through State Farm in 2008.

The title of the Cavalier remained in the name of Burton and Plaintiff but Huling began to regularly garage the vehicle at his home and only "from time to time" left the vehicle at Burton's house. Plaintiff, at times, would use the vehicle to drive herself to and from work and was driving the vehicle by herself when she was involved in an accident. Following the accident, Plaintiff applied for PIP benefits under Huling's State Farm policy. State Farm denied her benefits and she filed a lawsuit, originally naming the Michigan Assigned Claims Facility (MACF) and State Farm as defendants. Farmers Insurance was eventually substituted for the MACF.

State Farm subsequently filed for summary disposition, arguing that that the policy only covered Huling, the named insured. Farmers opposed State Farm's motion on the basis that Huling was a constructive owner of the vehicle, which meant that Plaintiff was required to recover her benefits from his policy with State Farm pursuant to MCL 500.3114. The trial court sided with State Farm and held that Huling was not the owner of the vehicle and obtained the policy for his own personal protection. This decision was never appealed.

Farmers also moved for summary disposition, arguing that the trial court's dismissal of State Farm meant Huling was not an owner of the vehicle. The trial court ruled that the no-fault act required at least one of the owners to have insurance and since neither Plaintiff nor Burton had insurance, Plaintiff was barred from seeking benefits under the no-fault act. As such, the trial court granted Farmers motion for summary disposition and Plaintiff appealed.

The issue on appeal was whether MCL 500.3113(b) barred Plaintiff from recovering PIP benefits because she was the owner of the vehicle and did not have insurance on it. Plaintiff relied on the Court's opinion in *Iqbal v. Bristol West Ins Group*, 278 Mich App 31; 748 NWD2 574, arguing the opinion allowed for an owner of a motor vehicle to collect PIP benefits as long as *anyone* had insurance on that motor vehicle.

The appellate court, however, did not agree with Plaintiff's broad reading of *Iqbal*. The court noted that "while Iqbal held that each and every owner need not obtain insurance, it did not allow for owners to avoid the

consequences of MCL 500.3113(b) if no owner obtained the required insurance." (Opinion at 4). In other words, if none of the owners of a vehicle maintain requisite coverage, none of the owners may recover PIP benefits, even if a non-owner has insured the vehicle. Since Huling was deemed to not be an owner of the motor vehicle and it was undisputed the only insurance policy on the motor vehicle was in his name, Plaintiff was ineligible to recover PIP benefits under the no-fault act. Accordingly, the trial court's decision to grant Farmer's motion for summary disposition was affirmed.

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### *Anne Schenck v. State Farm Mutual Automobile Ins. Co., et al.*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 315053
July 1, 2014

**Evidence of prior wage loss and disability payments were admissible and not barred by the collateral source rule because the evidence pertained to whether the Plaintiff suffered a serious impairment of a body function.**

Plaintiff suffered a fracture of her back after her vehicle was struck by another vehicle. Plaintiff had a $100,000 underinsured motorist policy with State Farm. After the accident, Plaintiff complained she was unable to drive or work and that her quality of life had been greatly reduced. Plaintiff collected over $86,000 in wage loss benefits and an additional $71,000 in disability. Eventually, the actions of Plaintiff began to contradict her claims, largely evidenced by the extensive amount she traveled. Among the trips she went on were a European Cruise and a sailing trip in Alaska.

Therefore, the main question at trial was whether or not the Plaintiff sustained a threshold injury, or serious impairment of a body function, in order to be able to collect her benefits under MCL 500.3135(1). Plaintiff sought to have evidence of her wage loss and disability payments ruled inadmissible before the jury but State Farm successfully argued the evidence was admissible to prove Plaintiff malingered in her returning to work. The jury found for Plaintiff, but only in the amount of $10,000, and Plaintiff appealed.

On appeal, the Court noted that determining if someone suffered a serious impairment of a body function required looking at that life both before and after the accident. Plaintiff testified that the accident prevented her from working or engaging in her pre-accident activities but State Farm offered proof to rebut that evidence, including the fact Plaintiff went on two long-distance vacations during that time. Likely even more compelling was testimony from the Plaintiff's own doctor who said Plaintiff's spine injury should have healed within 6 months. As the Court put it, "the evidence of payments provided motive for plaintiff to avoid retuning to work – traveling at will while continuing to collect approximately double her salary." The Court agreed that the evidence was admissible and since it was admissible to prove whether Plaintiff suffered serious impairment of a body function, and not to mitigate damages, the collateral source rule did not apply. Therefore, the ruling of the trial court was affirmed.

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### *William Stone v. Auto-Owners Ins. Co.*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 314427
August 5, 2014

**Plaintiff's wife died while operating a motor vehicle she owned, but Plaintiff was not entitled to survivor's loss benefits because his wife was not a named "insured" and the policy language did not expand the coverage to include her.**

Plaintiff, widower of Stephanie Stone, sought payment of survivor's loss benefits from Auto-Owners Insurance Company. Stephanie died in a motor vehicle accident in October of 2010 while driving a 2002 Ford Taurus which she owned and had registered in her name. Although she owned the vehicle, neither Stephanie nor Plaintiff obtained an insurance policy on the Taurus from any insurer. However, two months prior to the accident, Plaintiff's parents added the Taurus to their existing no-fault policy with Auto-Owners. Plaintiff and Stephanie had been listed as drivers under the policy since 2008 but not as the "insured." Even after the addition of the Taurus to the policy in 2010, Plaintiff's parents continued to be the only individuals listed as the "insured."

Plaintiff's mother testified that she told the insurance agency that Stephanie was the owner of the vehicle and paid a six-month premium to cover Stephanie's vehicle. She believed she would be receiving a new policy in Plaintiff's and Stephanie's name. Notes from the insurance agency, however, show that the agent was not aware that anyone besides Plaintiff's parents owned the vehicle. Additionally, Plaintiff's mother acknowledged that the policy for the Taurus listed only her and her husband as "insured" when they received their copy. The trial court, however, denied Auto-Owners motion for summary disposition because they accepted premiums from Plaintiff's parents and knew Stephanie did not live with them. The trial court denied Auto-Owner's motion for reconsideration and an appeal followed.

Auto-Owners argued on appeal that the trial court erred in denying their motion for summary disposition because Plaintiff was not entitled to survivor's loss benefits under MCL 500.3114(1). Plaintiff acknowledged that Stephanie was not listed as an "insured" on the policy and he does not dispute that he cannot recover survivors' loss benefits under MCL 500.3114(1). Rather, Plaintiff argues that he is entitled to survivors' loss benefits under MCL 500.3114(4), "which allows for vehicle occupants to claim benefits from the insurer of a vehicle's owner, registrant, or operator." (Opinion at 4).

The Court noted that an owner, registrant, or operator who is not a named insured my still be covered by the policy of the named insured if the insurance policy language expands the definition of "insured person" to include such persons. *Dobbelare II v Auto-Owners Ins Co*, 275 Mich App

527, 532-533; 740 NW2d 503 (2007). Plaintiff, however, was unable to present any language in the policy to expand the definition of "insured" to cover Stephanie. Therefore, Plaintiff was not entitled to survivor's loss benefits under MCL 500.3114(1) or (4).

The appellate court reversed the trial court's order denying Auto-Owners motion for summary disposition and remanded the matter for entry of an order granting the motion.

## *The Estate of Charlotte R. Morse v. Titan Insurance Company*

**Michigan Court of Appeals**

Unpublished Opinion - Docket No. 315053

July 1, 2014

**Trial court erred in reforming an insurance policy because the responsible insurance agency was not an agent of the insurer and therefore there was not a mutual mistake between Plaintiff and the insurer.**

Charlotte Morse and her husband owned several vehicles and insured them through Adrian Insurance Agency ("Adrian"). Ms. Morse and her husband owned several policies through Auto Owners that were set to expire on November 24, 2004. Five days prior to that date, on November 19, 2004, Ms. Morse went to Adrian to insure a 1996 Ford Taurus. She owned this vehicle but it was not insured at the time because she considered it an "extra" vehicle. Ms. Morse obtained an insurance policy for her Taurus through Titan Insurance Company ("Titan") and paid a premium for six months of coverage on November 19, 2004. The application prepared by the Adrian agent, however, listed the effective policy date as November 25, 2004. Later testimony showed there was confusion between Ms. Morse and the Adrian agent as to the actual date this policy was to become effective. However, based on the information provided by Adrian, Titan issued a policy to become effective on November 25, 2004.

Unfortunately, on November 24, 2004, Ms. Morse was rear ended while driving the Taurus. The accident caused her serious injuries and left her a quadriplegic. Titan denied any coverage for the accident because the accident occurred one day before the policy became effective.

Ms. Morse sued both Adrian and Titan, among others, in relation to her accident. She claimed breach of contract along with an equitable claim seeking reformation of her contract with Titan. Ms. Morse passed away during the course of litigation and her estate was substituted in as Plaintiff. Adrian settled with Plaintiff and the matter proceeded to trial against Titan only.

The jury found for Plaintiff, determining the policy went into effect on November 19, 2004. The trial court entered a judgment in favor of Plaintiff and reformed the insurance contract *nunc pro tunc* to make November 19, 2004, the date in which coverage began.

On appeal, Titan argued the trial court erred in denying it's motion for summary disposition on the issue of contract reformation and thereafter in reforming the policy without evidence of mutual mistake.

The appellate court stated courts will reform a contract to reflect the actual intent of the parties when there is clear evidence of mutual mistake. The court, however, did not find evidence of mutual mistake between Titan and Ms. Morse. It was undisputed that Titan did not have any contact with Ms. Morse and instead relied on information relayed by Adrian. Since Titan only communicated with Adrian, it would not have had any reason to intend for the policy to become effective on any other date than the date reported by Adrian. Therefore, there was not a mutual mistake between the parties.

Titan also appealed the trial court's finding that Adrian was an agent of both Plaintiff and Titan. The court agreed citing case law that held when an insurance policy "is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 301; 583 NW2d 548 (1998). The court held there was nothing in the record to support the trial court's finding of dual agency, stating "[b]eing a conduit to a transaction does not translate into being a dual agent." (Opinion at 6). Because Plaintiff could not establish dual agency in this situation, the alleged mistake by Adrian regarding the effective date of the policy could not be attributed to Titan.

The judgment was vacated and the matter was remanded for entry of a judgment of no cause in favor of Titan.

**AUGUST 2014**

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