HEWSON & VAN HELLEMONT, P.C.

Newsletter

April 2015

Recent Successful Decisions

Tyrone Williams v Affirmative Ins. Co of Michigan, et al.

Macomb County Circuit Court, Judge John C. Foster, Case No. 13-003886-NI

Plaintiff Tyrone Williams was involved in two separate motor vehicle accidents. The first accident occurred on February 26, 2011 in which Plaintiff was involved in a three-car accident. Plaintiff sued Affirmative Insurance Company of Michigan for injuries related to this accident. Plaintiff alleged injuries to his lower back, neck, and bilateral knees as a result of the February 26, 2011 motor vehicle accident. Plaintiff's medical treatment included an anterior cervical fusion surgery, chiropractic treatment, physical therapy, and numerous injections. Plaintiff was disabled from working and was prescribed replacement services and attendant care following the February 26, 2011 accident.

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The second accident occurred over two years later, on May 14, 2013. Plaintiff sued State Farm Mutual Automobile Insurance Company, the owner of the vehicle's insurance company. Police did not investigate the second accident, an ambulance did not arrive at the scene, and Plaintiff did not seek medical attention on the day of the accident. Further, Plaintiff continued on with his day and drove to a local car wash to hang out with his friends, visited his mother, and picked up his girlfriend from work later in the day. Plaintiff did not report the motor vehicle accident until two weeks after it occurred and failed to report any injuries. Plaintiff also waited two months to report the accident to State Farm. Further, Defendant State Farm pointed out that Plaintiff's attorneys filed claims for PIP benefits with Affirmative Insurance Company of Michigan through August 21, 2013 to prove that Plaintiff and his attorneys believed that he was not injured from the May 14, 2013 accident.

Plaintiff alleged the same injuries he sustained in the first accident to the May 14, 2013 motor vehicle accident. However, at trial, Defendant State Farm pointed out that at no point prior to May 14, 2013 did Plaintiff return to work, perform replacement services, or attendant care. In fact, Plaintiff claimed that he was receiving replacement services and attendant care the day prior to the second accident. In addition, Defendant State Farm pointed out that Plaintiff's neck, back, and knee complaints began prior to the May 14, 2013 accident and that Plaintiff did not seek medical treatment until almost three weeks later, which was an appointment scheduled prior to the second accident. Defendant State Farm's experts all testified that Plaintiff's injuries were degenerative in nature and were not related to the May 14, 2013 accident. Defendant State Farm also used Plaintiff's admission that he was involved in an altercation in January of 2013 and reports of a 2012 accident to evidence that the May 14, 2013 accident did not cause Plaintiff's injuries. Following five days of trial, the jury deliberated for almost two hours and returned a verdict of no injury in favor of State Farm.

Demand: $200,688.57 **Outcome:** No Injury Verdict **Credit:** Elaine Sawyer & Melissa Durity

News & Announcements

Committee on Model Civil Jury Instructions

Our own Jim Hewson has been appointed by the Chief Justice of the Michigan Supreme Court, Robert P. Young, Jr., as a member of the Committee to draft model civil jury instructions for the term that ends December 31, 2017. In this role, Mr. Hewson will be working on a panel of distinguished Michigan attorneys and judges to draft revisions to the Michigan Model Civil Jury Instructions.

News & Announcements Continued

Association of Legal Administrators

Our firm's administration belongs to the Association of Legal Administrators (ALA) organization and the Metro Detroit Chapter. In March, elections were held for the chapter. Melissa Clark was nominated and elected Vice President and Director of Business Partner Relations. Geri Calvetti was nominated and elected Treasurer. Both will hold these positions for the next year. Congratulations! In May, Melissa Clark will be attending the ALA National Conference in Nashville, Tennessee not only representing the chapter in her new role, but representing Hewson & Van Hellemont, P.C. as well.

Habitat for Humanity Fundraiser

Hewson & Van Hellemont held a firm-wide raffle for tickets to the Detroit Tigers opening day baseball game. The raffle raised $660.00, which was donated to Habitat for Humanity of Oakland County. Felicia Paramo and Margo Letwin were the lucky winners who won tickets to the game. The entire team at HV would like to thank all who participated and made this donation possible.

Welcome to Our New Associate Attorneys

Jeffrey Bove

Jeffrey Bove received his Bachelor's Degree in Business Administration from Western Michigan University's Haworth College of Business in 2009, majoring in marketing. In 2010, Mr. Bove attended Wayne State University Law School and received his Juris Doctorate in 2013.

During law school, Mr. Bove clerked at Blue Cross Blue Shield of Michigan's Office of General Counsel, served as a judicial intern at the Michigan Supreme Court, and interned at the Wayne County Circuit Court Civil Division. He was also a two -year member of the Wayne State University Law School National Mock Trial Team.

Mr. Bove joined a prominent medical malpractice firm during his third year of law school, where he was hired as an associate attorney after passing the bar in July 2013. During this time, Mr. Bove litigated complex medical malpractice actions, arguing motions in twenty of Michigan's fifty-seven circuit courts.

Kelly Hough-Breen

Kelly Hough-Breen attended James Madison College at Michigan State University and graduated with a degree in Social Relations in 1999. During college, she interned for then State Representative Bob Brown and also worked as a legislative intern at Dykema Gossett, PLLC. She then attended Wayne State University Law School and graduated in 2002, and was subsequently admitted to the State Bar of Michigan.

During law school, Ms. Hough-Breen was on the Board of Directors of the Student Trial Advocacy Program. She also was on the Board of Directors of the Free Legal Aid Clinic, serving as a Litigation Supervisor and student attorney. For two years, she worked and later volunteered at this clinic, servicing low income families and individuals in both family law and in juvenile abuse and neglect matters.

Ms. Hough-Breen has an extensive background in insurance defense. While a legal clerk for a defense firm, she assisted attorneys with their pending cases at both the state and federal levels. With over eleven years of experience working for two large law firms, she has handled workers' compensation cases and advocated on behalf of employers and their insurance carriers.

Bruce Rice

Bruce Rice graduated from Kent State University in 2006 where he received his Bachelor of Arts and Science degrees in Psychology and Justice Studies. While attending Kent State, he was a member of the Black United Student organization and played for the Kent State football team.

Mr. Rice attended Wayne State University Law School and received his Juris Doctorate in 2011. During law school, he served as a student attorney at the Free Legal Aid Clinic, Inc. Additionally, Mr. Rice served as a law clerk for the Honorable Muriel Hughes of the Third Circuit Court in 2010.

Mr. Rice is a member of the Wayne County Probate Bar Association and specializes in the Probate Administration, Litigation and Estate Planning. Prior to joining Hewson & Van Hellemont, P.C. in 2015, Mr. Rice worked as an associate attorney with a focus on Probate and Trust Administration at the Darren Findling Law Firm, P.C.

Julianne Bruley

Julianne Bruley graduated from the University of Michigan – Ann Arbor with a Bachelor's Degree in Psychology in 2008. Ms. Bruley then attended the University of Detroit – Mercy School of Law and earned her Juris Doctorate in 2011. While attending law school, Ms. Bruley was an active member of the Moot Court Board of Advocates.

Ms. Bruley began her legal career working at a Michigan law firm representing municipalities in both state tort and federal litigation. Prior to joining Hewson & Van Hellemont, Ms. Bruley was house counsel for an insurance defense firm handling first and third party litigation.

Marco C. Masciulli

Marco Masciulli is a 2009 graduate of Central Michigan University. Immediately after graduating college, Mr. Masciulli served as a special assistant to the Michigan Attorney General before attending law school at the Michigan State University College of Law where he earned his Juris Doctor in 2013. At his law school graduation ceremony, Mr. Masciulli had the incredible honor of delivering the commencement address after being selected as the class speaker by a group of his peers.

Mr. Masciulli was admitted to the State Bar of Michigan in 2013. Before joining Hewson & Van Hellemont, P.C. in February 2015, he spent more than a year at a Plaintiff's medical malpractice firm where he gained extensive experience in every aspect of civil litigation including second-chairing multiple trials. His experience also includes combatting fraud after working as both an intern and law clerk in the Mortgage and Deed Fraud Unit at the Wayne County Prosecutor's Office.

Henry E. Ibe

Henry Ibe graduated *cum laude* from Eastern Michigan University in December 2010 where he received a Bachelor of Science degree in Communication and a minor in Journalism. He went on to attend Wayne State University Law School and graduated in 2014.

In law school, Mr. Ibe was an intern for the Honorable John H. Gillis Jr. at the Third Circuit Court in Detroit, Michigan. He received the Warrior Pro Bono award for legal work performed as an intern at the Wayne State University Asylum and Immigration Law Clinic. He was later selected as a student attorney for the clinic specializing in various areas of immigration law. Mr. Ibe was also an active member of the school's Moot Court team and the Trial Advocacy Program. While participating in the Trial Advocacy Program, he placed first in the Fall 2013 competition.

Mr. Ibe was admitted to the State Bar of Michigan in 2014. Prior to joining Hewson & Van Hellemont, P.C. in 2015, he worked as an associate at a business law firm offering legal services to startups and entrepreneurs in the Detroit area.

Recent Opinions

Joseph Raschke v Citzens Insurance Co. of America, et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 318773

March 3, 2015

Plaintiff was unable to present sufficient evidence that he was insane at the time his claim accrued and therefore could not toll the statute of limitations.

Plaintiff appealed the trial court's order granting summary disposition in favor of Jeffrey Louis Ridley and Ridley–Mitchell Trucking, LLC. The appeal originated from a personal injury claim Plaintiff brought related to a motor vehicle accident which occurred on November 3, 2005. Plaintiff, however, did not file his suit within the applicable three-year limitations period, and the suit was subsequently dismissed.

On appeal, Plaintiff argued that the trial court erred in granting defendants' motion for summary disposition because Plaintiff was under the disability of insanity during the three-year period and therefore the period of limitations was tolled. MCL 600.5851(1) allows for a person who is insane at the time a claim accrues to bring the claim within 1 year of the time their disability is removed. However, to be considered a disability, the insanity must have existed at the time the claim accrued. Plaintiff failed to present sufficient evidence to create a factual issue that he suffered from insanity at the time his claim accrued. The vast majority of the evidence he presented originated more than three years after the date of the accident.

Plaintiff argued that his insanity was caused by the accident, which both caused a new mental condition and magnified preexisting conditions which included depression. However, Plaintiff was unable to present any evidence that a head injury occurred and also failed to connect his current mental condition with the accident. Therefore, the appellate court ruled that plaintiff failed to create a legitimate factual question that the accident caused his insanity and it affirmed the trial court's decision to grant summary disposition in favor of defendants.

Richard Brehmer v State Farm Mutual Automobile Ins.Co, et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 318839

March 17, 2015

The trial court's decision to grant Plaintiff's motion for JNOV was overturned because sufficient evidence was presented at trial regarding whether Plaintiff mitigated his damages to create a triable issue of fact for the jury to consider.

Plaintiff was operating a tractor in May of 2010 when he was struck by another motor vehicle. His tractor rolled over and caused injuries to his right arm and shoulder. Plaintiff had an underinsured motorist policy with Auto Owners. Plaintiff filed suit against the driver of the other vehicle, her insurer, and Auto Owners. The only issues at trial were whether or not Plaintiff's injury constituted a serious impairment of a bodily function and whether Plaintiff failed to mitigate his damages.

Plaintiff began physical therapy shortly after the accident. His primary care physician referred him to Dr. Michael Diment two months after the accident. Dr. Diment diagnosed Plaintiff with a torn rotator cuff, deformity to the dimple in the bone, and an injury to the shoulder socket. Dr. Diment prescribed additional physical therapy, but Plaintiff's shoulder continued to bother him. Plaintiff underwent surgery on his shoulder with Dr. Diment in October of 2010.

Dr. Diment noted in November of 2010 that Plaintiff may need formal physical therapy. However, he opined that Plaintiff could do at-home exercises he learned during his previous physical therapy appointments in lieu of formal physical therapy in the future.

Plaintiff's condition failed to improve by April 2011. At that time, Dr. Diment advised Plaintiff that additional surgery could be conducted that would involve manipulation of Plaintiff's shoulder under anesthesia. Dr. Diment advised Plaintiff that the operation was "somewhat risky" and Plaintiff subsequently decided to forego any additional surgery. Dr. Diment supported Plaintiff's decision.

Several experts examined Plaintiff or reviewed his medical records and testified at trial. Each doctor testified that Plaintiff should have undergone formal physical therapy. Additionally, each doctor testified that they would have recommended further intervention ranging from shoulder manipulation under anesthesia to cortisol injections.

The jury awarded Plaintiff $150,000 in past noneconomic damages, but found that Plaintiff did not have any future

noneconomic damages. Further, the jury found that Plaintiff failed to mitigate his damages and reduced the verdict by $50,000. The trial court entered a judgment on the verdict for $100,000 with costs and fees. Plaintiff subsequently filed a motion for judgment notwithstanding the verdict (JNOV). Plaintiff argued that Auto Owners failed to meet its burden of proof to show that Plaintiff had failed to mitigate his damages because it did not show that Plaintiff failed to follow his doctor's advice. The trial court agreed with Plaintiff and granted his motion for JNOV.

Auto Owners appealed the decision and argued the trial court improperly granted Plaintiff's motion for JNOV because a question of fact existed regarding whether Plaintiff mitigated his damages. The appellate court held that the doctrine of mitigation of damages asks whether a person used reasonable means to minimize their damages. The court held that there were at least two reasons why reasonable jurors could have reached different conclusion regarding whether Plaintiff mitigated his damages. These two reasons included Plaintiff's decision to forego additional surgery as well as whether Plaintiff reasonably performed his physical therapy.

The appellate court held that the evidence presented created a triable issue of fact regarding the reasonableness of Plaintiff's steps to improve his condition. Further, it held that the trial court acted as an impermissible 13th juror "when it substituted its determination of the weight of the evidence for the jury's determination." (Opinion at 5). Therefore, the trial court's decision to grant Plaintiff's motion for JNOV was reversed and the matter was remanded for reinstatement of the jury verdict.

Tamara Filas v Kevin Thomas Culpert, et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 317972
March 10, 2015

Affirming the trial court's dismissal of a claim after Plaintiff repeatedly refused to sign requested medical records release authorizations provided by Defendants.

Plaintiff filed suit alleging that she sustained serious injuries when she was rear-ended by Defendant Culpert when he was in the course of his employment with Defendant Efficient Design.

During the course of litigation, Plaintiff refused to sign record release authorizations that were requested by defendants. The trial judge informed Plaintiff that she was required to sign the authorizations and failure to do so would eventually lead to dismissal of the claim with prejudice.

Over the course of several years, Plaintiff presented numerous reasons for her failure to sign the requested authorizations. Her reasons included an opposition to the fact the requested records would be sent to a third-party for copying; Efficient Designs did not admit liability; she had "a problem with some of the clauses" on the authorizations; and she did not want some of her records provided to defendants.

Facing the threat of dismissal, Plaintiff agreed to sign the authorizations during a June 2013 hearing. Plaintiff hand delivered medical authorization forms to defense counsel shortly thereafter. These forms, however, were SCAO medical authorization forms and were not the authorization forms defendants had requested. Defendants stated that the SCAO forms are not accepted by many medical providers. Further, Plaintiff altered the forms and limited the authorizations to records for specific dates. Lastly, she did not provide numerous other authorizations that had also been requested.

Defendants thereafter requested that the trial court enter an order of dismissal. Plaintiff was given several more opportunities to agree to sign the correct authorizations, which she again refused. The trial court subsequently dismissed the case.

On appeal, Plaintiff argued that the trial court erred when it ordered her to sign record release authorizations provided by Efficient Designs during a hearing on its motion to compel discovery without first requiring Efficient Design to file a second motion to compel discovery. The appellate court disagreed, noting that defendants were entitled to liberal discovery of any matter, not privileged, that was relevant. The court affirmed the decision of the trial court to dismiss Plaintiff's claim with prejudice.

Carol Sue Clark v Progressive Ins. Co., et al.

Michigan Court of Appeals

Published Opinion - Docket No. 319454
March 5, 2015

Plaintiff failed to ensure her settlement for PIP benefits encompassed all claims to date and could not amend the terms of the settlement after discovering an additional claim.

Plaintiff suffered injuries in two separate motor vehicle accidents. On November 5, 2013, she settled her PIP claim with defendant Progressive Insurance Company for $78,000. The settlement agreed to be for *all PIP benefits incurred* as of November 5, 2013. Three days after agreeing to this settlement, Plaintiff received a bill for $28,000 related to shoulder surgery she underwent in May of 2013. Plaintiff had previously received a bill from the surgeon

that performed the surgery and that bill was included in the settlement. The $28,000 bill, however, was a separate charge for use of the surgery facility. Plaintiff had no knowledge of this bill until she received it.

Plaintiff subsequently moved for the trial court to rule that the settlement did not include the $28,000 charge. She argued that Progressive was aware of the bill and she was not, therefore the settlement should not include the bill because she would not have agreed to the same settlement had she known of the $28,000 bill. The trial court agreed with Plaintiff and held that the settlement did not include the $28,000 bill.

The appellate court, however, disagreed with this decision. According to that court, Plaintiff and her lawyer could have specified that the settlement would be reopened if any unforeseen charges that should have been included came to light. Plaintiff argued that Progressive, knowing of the $28,000 bill, should have asked Plaintiff if she had considered the bill before agreeing to a settlement. The appellate court reasoned that agreeing with Plaintiff's argument "would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision." (Opinion at 2). The appellate court disagreed with Plaintiff's argument and held that it was the obligation of Plaintiff's attorney to ensure the settlement encompassed all claims. "To shift what is rightly the obligation of Plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client – and his client alone – without any conflict." (Opinion at 3). Therefore, the ruling of the trial court was reversed and the matter was remanded for entry of an order enforcing the original settlement agreement.

Denis Prishtina v Auto Club Insurance Assn., et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 318912
March 10, 2015

Resident relative PIP coverage only applies to accidental bodily injury sustained by resident relative, not accidental bodily injuries sustained by a third party.

Plaintiff sustained injuries while operating a motorcycle after he was struck by a motor vehicle operated by Bryant Lee. At the time of the accident, Plaintiff resided at his parents' home, and his father had an insurance policy through ACIA on the vehicles he owned. Mr. Lee did not maintain an insurance policy on his motor vehicle. However, he lived with his father who maintained an Auto-Owner's insurance policy on the vehicles he owned. The trial court granted summary disposition in favor of ACIA and held that Auto-Owners was the first priority insurer for the payment of Plaintiff's PIP benefits.

On appeal, Auto-Owners argued that the trial court erred in denying its motion for summary disposition because Auto-Owners was not the insurer of Mr. Lee under the language of his father's insurance policy.

MCL 500.3114(1) does not provide that an insurance provider is automatically the "insurer" of a resident relative with respect to third parties when the resident relative is not injured. There was no indication in the language of the Auto-Owners policy that indicated a relative was insured under the policy. The appellate court ruled that merely including a definition of "relative" in the policy was insufficient to demonstrate that Mr. Lee's father and Auto-Owners intended for Mr. Lee to be a contractual "insured" under the policy. Further, the appellate court stated that it may not hold an insurance company liable for a risk that it did not assume, and therefore it could not hold that Mr. Lee was contractually insured under the Auto-Owner's policy.

The appellate court also went on to hold that MCL 500.3114(1) allows for benefits to be collected arising out of accidental bodily injury to the person named in the policy, their spouse, or a resident relative. Therefore, even if Mr. Lee was determined to be an eligible resident relative under his father's insurance policy, the coverage would only apply to accidental bodily injuries that he suffered, not accidental bodily injury that a third party suffered.

The decision of the trail court was reversed and the matter was remanded for entry of an order granting Auto-Owner's motion for summary disposition.

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