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Successful Case Evaluation

Congratulations to Hewson & Van Hellemont associate attorneys, Michael Kon and Daniel McGrath, for their successful case evaluation in the matter of *Sylvia Lino v. State Farm Mutual Auto Ins. Co*. The panel unanimously agreed that the action was frivolous and no cause for action existed. Mr. Kon wrote the case evaluation and Mr. McGrath argued the matter.

Inside This Issue

Plaintiff alleged injuries from a motor vehicle accident that occurred in 2012. At the time, Plaintiff had a severe history of pre-existing medical problems, specifically, past knee pain, and chronic low back pain starting in 2009 and culminating with back surgery in October 2011. Approximately 3-4 weeks before the accident, Plaintiff was still complaining of constant low back and right leg pain which medical records revealed she characterized as a chronic problem, with essentially constant pain. Plaintiff undoubtedly had severe back issues before the accident (which required surgery), and also testified that she had migraines before the accident. At the time of the accident, Plaintiff worked at a hospital and was already treating with a primary care doctor for her migraines and back issues. Yet after the accident she began traveling from Lansing to Flint to treat with new providers and also traveled from Lansing all the way to Royal Oak to have MRIs taken.

At case evaluation each side had approximately 15 minutes to present their case. After oral argument the panel determined that Plaintiff's case was not only frivolous, but also deserved a case evaluation award of "No cause for action."

Wounded Warrior Project Fundraiser

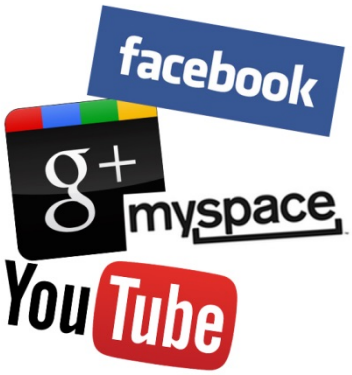
Hewson & Van Hellemont, P.C. is happy to announce that our first Community Connections fundraising event for the year raised $395.00 to support the Wounded Warrior Project. As part of the event, Hewson & Van Hellemont employees were allowed to dress casually on designated days in exchange for a $5.00 donation.

The Wounded Warrior Project dedicates support to our wounded armed forces who are coming home and are adapting to a new way of life. The program offers many types of support to our soliders as they undergo a rehabilitative and transitional process of coming home. We would like to thank all of our employees who helped make this fundraiser a success. For more information on the WWP, please visit www.woundedwarriorproject.org.

WOUNDED WARRIOR PROJECT

Social Media Discovery

The courts remain divided regarding standards for discovery of an individual's "private" social media content but narrowly tailoring such discovery requests will likely increase chances of a successful request.



The use of social media content in litigation is rapidly growing in significance. Social media profiles are stockpiles of useful information, including electronic messages, pictures, videos, mood indicators, and locations visited. Currently, case law has not kept pace with the rapid adoption of social media into everyday life and the rules for discovery of social media content remain undefined.

Generally, social media users do not have a reasonable expectation of privacy for information published on social media sites. See *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430 (S.D. Ind. 2010) and *Romano v. Steelcase*, Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). Privacy objections the plaintiffs raised in both these cases were rejected because it was reasoned that the very purpose of social media is to share information with others and the privacy policy of Facebook and other similar services expressly say even a user's "private" content may become publicly available. As such, a user could not have a reasonable expectation of privacy when using a social media platform.

Despite that, some courts have been reluctant to allow discovery of an individual's entire social media account, including posts they intentionally kept "private". As often cited, the United States District Court for the Eastern District of Michigan held in *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich 2012) that a defendant does not have a right to conduct a fishing expedition through all of the private content of a plaintiff's Facebook account. Rather, the *Tompkins* Court held that a party must make a threshold showing that information requested from a social media account is reasonably calculated to lead to the discovery of admissible evidence. In other words, there must be relevant information on the individual's public profile that suggests the possibility of further relevant information being discovered in the private portion of their profile.

Other courts, however, have rejected the *Tompkins* approach. Last year in a case before the Eastern District of New York, the court held that "[t]he Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it." *Giachetto v. Patchogue-Medford Union Free Sch. Dist.*, 2013 WL 2897054, at 4-5 n.1 (E.D.N.Y. May 6, 2013). Additionally, in *Holter v. Wells Fargo & Co.* 281 F.R.D. 340 (D Minn. 2011), where a plaintiff sought damages for emotional distress stemming from her termination, the court held the defendant did not need to make a threshold showing of relevance to be entitled to discovery of a limited portion of plaintiff's social media postings that described the plaintiff's mental and emotional state during the time she allegedly suffered from emotional distress.

Even if the court does not impose a threshold showing, litigants should be aware that overly broad discovery requests of any sort will typically be denied. Reducing the scope of a discovery request for social media content by narrowly tailoring the criteria of the request will increase the likelihood of success. Even if the court does not require a threshold showing of relevance, discovery requests regarding social media still must be narrowly tailored or else they will be construed as mere conjecture and an attempt to conduct a fishing expedition. For instance, in defense of a personal injury suit, rather than asking for full access to the plaintiff's Facebook profile, the defendant would be better off requesting only photographs or posts from dates relevant to the suit. The request could be further narrowed down by specifying it only pertained to photographs depicting physical activity or posts conveying the plaintiff's mental state during that time.

It is unlikely that a party will have enough information to narrowly tailor a discovery request in this manner during the initial stages of a case. With that in mind, other avenues of discovery should be pursued first, including interrogatories, depositions, and analysis of public social media content. By conducting thorough discovery before requesting access to private social media information, litigants should acquire sufficient information to make a narrowly tailored, specific request that they can demonstrate to the court is reasonably calculated to lead to discovery of admissible evidence.

In sum, regardless of any relevancy threshold a court may have in place, overly broad demands that are served at the onset of discovery will almost always be rejected by the courts. Litigants are best off conducting some initial research to uniquely tailor social media discovery requests to the specifics of their case.

Additions at Hewson & Van Hellemont P.C.

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

Amber Cervantez

Amber Cervantez graduated Magna Cum Laude from Mercyhurst College in 2009 with a degree in Criminal Justice. In 2012, Ms. Cervantez graduated from Thomas M. Cooley Law School (Auburn Hills) and was admitted to the State Bar of Michigan. In law school, Ms. Cervantez served as the law clerk for Williams, Williams, Rattner and Plunket and also interned for the Honorable Mark Switalski, the Honorable James Alexander, and attorney Michael Lee.

Ms. Cervantez is the Secretary of the Hispanic Bar Association of Michigan and a member of the Oakland County Bar Association and its Inns of Court program, the Detroit Metropolitan Bar Association and its Inns of Court program and the Macomb County Bar Association. Prior to joining Hewson & Van Hellemont P.C., Ms. Cervantez gained experience working on medical malpractice, personal injury, criminal and divorce cases.

Paul Gipson

Paul Gipson graduated from Michigan State University with a B.S. in Biochemistry & Molecular Biology/Biotechnology in 2006. He then attended Ave Maria School of Law on the Dean's Scholarship and graduated with a J.D. in 2009. While at Ave Maria School of Law, he competed in the Giles Sutherland Rich Memorial Moot Court Competition and held the Academic Standards Committee Chair. Mr. Gipson was admitted to the State of Michigan Bar in 2009.

Prior to joining Hewson & Van Hellemont, P.C. in 2014, Mr. Gipson worked for a personal injury firm and an insurance defense firm. Mr. Gipson is admitted to practice in the U.S. District Courts for the Eastern and Western Districts of Michigan and in the Sixth Circuit Court of Appeals. Mr. Gipson is also a member of the International Association of Privacy Professionals.

Darren Legato

Darren Legato graduated from Michigan State University with a Bachelor's Degree in Business Administration – Pre Law, and a secondary major in Political Science – Pre Law, in 2009. He attended Florida International University College of Law and graduated with his J.D. in 2012 and subsequently gained his admittance to The Florida Bar in September 2012.

During law school, Mr. Legato worked as a Certified Legal Intern for the Miami-Dade Office of the Public Defender, gaining first hand court room experience in criminal defense. Prior to joining Hewson & Van Hellemont, Mr. Legato successfully litigated and negotiated Plaintiff claims for First and Third – Party benefits under the Michigan No-Fault Act after his admittance to the State Bar of Michigan in 2013.

Christopher Ricotta

Christopher Ricotta earned his Bachelor of Arts in Criminal Justice and Bachelor of Science in Psychology from Michigan State University in May 2010, and received his Juris Doctorate from Michigan State University College of Law in May 2013.

While in law school, Mr. Ricotta served as Managing Editor of the Michigan State Law Review. While a student clinician with the MSU Immigration Law Clinic, Mr. Ricotta zealously represented children and families through challenging immigration matters, as well as immigrant workers subject to economic and physical crimes by employers. Upon licensure, Mr. Ricotta practiced corporate transactional law as an associate attorney for James F. Dunn, P.L.L.C. in Lansing, where he served public transportation businesses throughout Michigan.

Recent Opinions

Shawn Collins v. Farm Bureau General Ins. Co., et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 314522

June 10, 2014

Affirming trial court's summary disposition ruling in favor of Farm Bureau and insurance agent after they denied homeowner's insurance claim because Plaintiff did not reside at the home at the time of the loss.

Plaintiff purchased a Farm Bureau homeowner's insurance policy through the Schoeberlein Agency in 2008. The policy covered him for losses incurred while he was residing at the home. Over the next few years, Plaintiff began renting out the house, and by June of 2010 had moved all of his belongings out of the main house and was no longer staying overnight there. Plaintiff still visited the home several times a week for routine maintenance needs and to grab tools he stored in the detached garage. Plaintiff asserted he reserved the right to sleep in the family room when he wished to, but he not slept at the home in several months.

In July of 2010 a fire occurred at the home and Plaintiff filed an insurance claim for losses incurred as a result of the fire. Farm Bureau denied the claim after determining Plaintiff was not covered by the homeowner's insurance policy because he did not reside at the home at the time of the loss, and that he misrepresented and concealed material facts and circumstances relating to his residency before and after the time of the loss.

Plaintiff filed suit against Farm Bureau and the Schoeberlein Agency, alleging breach of contract, failure to settle the insurance claim, and agent negligence. Both Farm Bureau and Schoeberlein moved for summary disposition and the trial court subsequently granted their motions. From those decisions Plaintiff appealed.

The Court of Appeals affirmed the trial court's ruling, stating the Plaintiff's own deposition testimony left no genuine issue of material fact that the Plaintiff did not reside at the residence at the time of the loss. Additionally, the Court held there is a "general no-duty-to-advise rule" with respect to adequacy of coverage. Plaintiff's request for insurance was unambiguously a request for coverage of an individual who resided at the home. Plaintiff and Schoeberlein were not in a special relationship that created a duty to advise the Plaintiff. Absent such a duty, Plaintiff could not bring a claim for agent negligence.

Albert Patricio Valdez v. Home Owners Ins. Co., et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 315524

June 10, 2014

Trial court abused its discretion by granting defendants' motion to dismiss without providing any reasoning or analysis for its decision on the record.

Plaintiff was allegedly struck by David Spaulding's vehicle while he was walking down the street. Plaintiff brought suit against Spaulding for alleged negligence and against Spaulding's insurer, Home Owners Insurance Company, for failure to pay PIP benefits.

Plaintiff failed to provide responses to both Spaulding and Home Owners interrogatories and requests for production of documents. Plaintiff then failed to respond after the court entered an order compelling Plaintiff to provide responses within 28 days.

Both defendants moved to dismiss the complaint and a hearing was scheduled to hear the motion. On the day of the hearing, Plaintiff and their counsel failed to appear and the court granted the defendants' motions and dismissed the Plaintiff's claim with prejudice "for reasons stated on the record." The record reflected, however, that the court noted the absence of the Plaintiff, but otherwise did not state any reasons for dismissal on the record.

On appeal, Plaintiff argued the trial court abused its discretion by granting the motion to dismiss without articulating its reasoning on the record, including whether it considered any alternative to discovery sanctions. Past decisions have said a trial court should carefully consider the specific circumstances of a case when implementing a drastic sanction, such as a dismissal. In fact, the Court of Appeals had already held that the record should reflect the trial court's careful consideration of the factors involved in their sanction determination and a "failure to consider alternative sanctions on the record can constitute an abuse of discretion." *Thorne v. Bell*, 206 Mich App 625, at 635.

In the instant case, the trial court did not discuss the common factors for dismissal or discuss why alternative sanctions were inadequate. There was not any determination as to whether or not the failure to comply was willful or merely accidental. The ruling, rather, appeared to be premised solely on the fact that Plaintiff's counsel failed to appear for the motion hearing. By failing to engage in any analysis at the time of defendants' motion to dismiss, "the trial court avoided its own initial responsibilities to evaluate on the record the pertinent factors and to consider available alternatives." Opinion at 5. For those reasons, the Court of Appeals held that the trial court abused its discretion. The matter was remanded to the trial court for consideration, on the record, of the appropriateness of lesser sanctions as well as the relevant factors to be considered when imposing sanctions for discovery violations.

Darren Findling, et al. v. Auto Club Ins. Association

Michigan Court of Appeals

Unpublished Opinion - Docket No. 314189

May 29, 2014

Ordinary household services or services that are neither causally connected to nor necessitated by injuries sustained in motor vehicle accident are not "allowable expenses" under MCL 500.3017(1)(a).

Respondent, Auto Club Insurance Association, appealed an order granting the petitioner's request to compel payment of conservator fees. Petitioner, Darren Findling, rendered services on behalf of his ward, Carol Kowalski, who was seriously injured in an automobile accident in 1989. Findling filed a petition to compel payment of his conservator fees as PIP benefits and to award attorney fees, costs, and interest. Petitioner sought an award of $11,352.42 for fees associated with the care, recovery, and rehabilitation of Kowalski. Auto Club opposed the petition, arguing that most of the fee Findling was claiming arose from actions that were not reasonably related to Kowalski's care as required by MCL 500.3017(1)(a), or were not causally connected to Kowalski's automobile accident injuries as required by MCL 500.3105(1). The probate court entered an opinion granting a portion of the petition, approximately $8,000. The probate court then stayed enforcement of the order pending appeal.

Auto Club argued on appeal that the probate court erred in holding the conservator's fees for services rendered were necessarily "allowable expenses" under §3107(1)(a) of the no-fault act. Allowable expenses, as opposed to replacement services, must not "be of a type that was required both before and after the injure, i.e. it must not be for something that the injured person would have performed for herself had she not been injured."

Findling's services he sought payment for fell into four distinct categories: (1) maintaining Kowalski's household; (2) settling matters related to Kowalski's slip and fall at a Kroger store; (3) maintaining the conservatorship; and (4) pursuing PIP benefits as Kowalski's guardian ad litem.

The appellate court determined the first two categories did not fall under allowable expenses for §3107(1)(a). There is clear case law that ordinary household services are not allowable expenses, and the slip and fall was neither causally connected to, nor necessitated by, injuries Kowalski sustained in the motor vehicle accident.

Auto Club conceded that the third category, fees related to maintaining the conservatorship, were causally connected and necessitated by the motor vehicle accident and are therefore allowable expenses.

The record, however, was unclear regarding the fourth category relating to recovery of PIP benefits. As such, the matter was remanded for further proceedings to determine if the services related to attempting to recover PIP benefits were related to Kowalski's motor vehicle accident injuries.

Steven P. Gividen v. Bristol West Ins. Co, et al.

Michigan Court of Appeals

Docket No. 312082

June 17, 2014

An extensively modified Jeep was rendered to be an off-road vehicle and was no longer a "motor vehicle" for purposes of no-fault coverage.

Plaintiff was seriously and permanently injured when the off-road vehicle (ORV) he was operating collided with a modified 1976 Jeep driven by Brandon Northrup. At the time of the accident, Plaintiff was not covered by a no-fault insurance policy and did not reside with a relative with no-fault coverage.

Plaintiff appealed the trial court's ruling that pursuant to MCL 500.3101(2)(e), the 1976 Jeep driven by Northrup was not a "motor vehicle." The appellate court agreed with the trial court's determination, stating the "undisputed evidence regarding the modification made to the Jeep make it apparent that the Jeep had been rendered an ORV."

Of the many modifications made to the Jeep, the court mentioned several including that the head lights, tail lights, turn signals, speedometer, and odometer on the Jeep were not "hooked up" at the time of the accident. Further, the original shell of the vehicle had been replaced with a fiberglass shell and roll bar, and the Jeep did not have any doors or a rearview mirror. Lastly, the Jeep had expensive tires that created a bumpy ride that was impractical for paved roads. The appellate court held the evidence established that the Jeep had been modified to the extent that it was no longer "designed for operation upon a public highway," and thus did not qualify as a "motor vehicle" for no-fault purposes.

Bruce Wolford v. First National Ins. Co, et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 315176

June 12, 2014

Affirming the granting of an IME doctor's motion for summary disposition because an IME doctor is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports.

Plaintiff appealed the trial court's dismissal of his claim against First National Insurance Company and Dr. Mitchell Z. Pollak, who conducted an IME of Plaintiff on behalf of First National.

On appeal, neither party alleged that Dr. Pollak directly caused physical harm to Plaintiff by negligently conducting the examination. Plaintiff, however, relied on *Dyer v. Trachtman*, 470 Mich 45; 679 NW2d 311 (2004), arguing the *Dyer* Court's ruling did not preclude an examinee from pursing a negligence claim against an IME physician if the IME physician was negligent in the "process" he used to reach his conclusions and opinions. The Court of Appeals, however, held that the Plaintiff's reliance on *Dyer* was misplaced.

In *Dyer*, the court held "an IME physician has a limited physician-patient relationship with the examinee that gives rise to the limited duties to exercise professional care." *Id.* at 49. Further, it added "[t]he IME physician acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports." *Id*. at 50. The *Dyer* Court noted in a footnote that a physician could be liable for ordinary negligence if they overturned a medicine cabinet onto an examinee for instance, or in other words, caused an injury through an action that was not directly part of their professional services. Unlike that hypothetical situation, the Plaintiff in the instant case did not allege or establish that Dr. Pollak committed ordinary negligence during the course of the IME and therefore the trial court properly granted the doctor's motion for summary disposition.

William Cody v. Progressive Michigan Ins. Co.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 309328

July 1, 2014

Affirming trial court's denial of Defendant's Motion for Summary Disposition because there was a genuine issue of material fact as to whether Plaintiff was "on" the vehicle for purposes of recovering PIP benefits.

Defendant appealed the trial court's denial of their motion for summary disposition.

Plaintiff worked as an independent contractor for Ajas Trucking, Inc., which was insured under a commercial automobile insurance policy by Defendant. Plaintiff alleged he injured his back on two separate occasions while attaching his truck to his trailer in Indiana. Plaintiff filed an action for PIP benefits from Defendant under their insurance policy with Ajas. Defendant moved for summary disposition.

Defendant first argued that Plaintiff was not entitled to recovery of PIP benefits under MCL 500.3111 because the accident did not occur in Michigan. The appellate court agreed the Plaintiff was not entitled to PIP benefits but disagreed that the trial court erred by not dismissing the claim regarding benefits under the commercial insurance policy because an insurance policy may provide broader coverage than that mandated by the no-fault act.

The relevant insurance policy stated that in the instance of an out of state accident, Defendant will pay PIP benefits to a "person who sustains a bodily injury while occupying an insured auto." "Occupying" was defined as "in, on, entering, or exiting." Defendant argued Plaintiff was not occupying the vehicle at the time he sustained his injury because he was outside of the vehicle adjusting the landing gear. Plaintiff stated his foot was on the base of the landing gear as he lowered it and he would remove it as he used the hand crank to stabilize himself. Plaintiff acknowledged that he removed his foot from the landing gear as it began to rise but he stated his foot was still on the landing gear at the time of both injuries.

With this testimony in mind, the Court of Appeals ruled that the record when viewed in the light most favorable to Plaintiff, presented a genuine issue of material fact whether Plaintiff was on the trailer at the time of his injuries. Therefore summary disposition was not proper and the trial court's decision to deny defendant's motion for summary disposition was affirmed.

Fadi Abdul-Arim Markabani v. Hussain Jaliel Al-Rekabi

Michigan Court of Appeals

Unpublished Opinion - Docket No. 313741

May 29, 2014

Trial court properly dismissed complaint after Plaintiff caused Defendant substantial prejudice by wilfully ignoring multiple discovery requests and subsequent court orders to compel answers to those inquires.

Plaintiff filed a complaint against defendant in 2012 alleging they sustained injuries in a motor vehicle accident that occurred in 2009. Plaintiff alleged Defendant was negligent in causing the injuries but did not specify how they were injured. Defendant served Plaintiff with interrogatories, requests for production of documents, and authorizations for the release of medical records, all of which went unanswered. Defendant then filed a motion for sanctions for Plaintiff's failure to provide discovery answers. The trial court entered a stipulated order for Plaintiff to answer all discovery requests within 21 days. Again, the requests went unanswered and Defendant filed a motion to dismiss and the trial court subsequently dismissed the complaint without prejudice.

Three weeks after the dismissal, Plaintiff filed a motion for reconsideration. Plaintiff's counsel had failed to mention at the motion hearing that dismissal would completely bar the claim because the statute of limitations had run. Plaintiff also attached to the motion partial answers to defendant's interrogatories. The court denied the motion for reconsideration pursuant to MCR 2.119(F)(3) and Plaintiff's appeal ensued.

On appeal, Plaintiff argued the trial court abused its discretion by failing to consider other sanction options in evaluating whether to dismiss the case. In *Vicencio v. Ramirez*, 211 Mich App 501, the court ruled a trial court should consider several factors when deciding whether to impose the sanction of dismissal, including whether the violation was wilful, the party's history of complying with previous court orders, the prejudice to the opposing party, and attempts to cure the defect.

In *Vicencio*, the court held that the trial court's dismissal of the plaintiff's claim for failure to attend a settlement conference constituted an abuse of discretion, specifically because there was no evidence the conduct was wilful or prejudiced the defendant. The court in this case, however, ruled the plaintiff's actions were willful, as he ignored numerous communications from his own attorney regarding discovery. Further, the defendant was substantially prejudiced in his ability to defend the case against him because

he was not provided with even the most basic knowledge of what injuries Plaintiff claimed to have incurred. For those reasons, the appellate court affirmed the trial court's dismissal of Plaintiff's complaint.

Michigan Millers Mutual Ins. Co., et al. v. Lancer Ins. Co.

United States District Court Eastern District of Michigan Southern Division

Case No. 13-12892

May 30, 2014

Limousine fire caused damage to building it was being stored in. Auto no-fault insurer was found liable for damages caused to building.

Michigan Millers Mutual Insurance Company issued a commercial insurance policy to Avon Star/59 Avon LLC for property and liability coverage of an entire structure owned by Avon. The structure contained several tenants, including Pete's Limousine.

On December 29, 2012, a fire broke out in the garage area of the structure. The fire was determined to have originated in the engine compartment of a Lincoln Towncar limousine owned by Pete's Limousine and insured through Lancer Insurance Company.

Although the fire was mostly confined to the limousine, the rest of the building sustained smoke and water damage. Michigan Millers paid out over $200,000 to its insured, Avon, for the losses that resulted from the fire. Michigan Miller subsequently brought the instant subrogation action against the insurer of the limousine, Lancer, to recover the amount of benefits they paid out.

The case was removed to federal district court based on diversity jurisdiction and both parties moved for summary judgment. Lancer argued in opposition to Michigan Millers motion that there was a genuine issue of material fact concerning the cause of the fire because neither the local fire lieutenant nor the special investigator could determine why or how the fire started. The Court, however, believed Lancer's argument was misplaced because a material fact is genuine if, and only if, the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Opinion at 9. While it was true that investigators could not determine the exact cause of the fire, there was undisputed evidence in the form of eye witness testimony, physical evidence, and video surveillance that showed the fire originated in the engine compartment of the limousine insured by Lancer.

Lancer also argued the damage caused by the vehicle fire did not arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle as required by the Michigan No-Fault Act. Lancer argued the vehicle was parked at the time the fire occurred and had been parked in the same spot for several days. Lancer relied on *McKenzie v. Auto Club Ins. Ass'n*, 458 Mich. 214, 580 N.W.2d 424 (1998), and argued that for an injury to arise out of the use of a motor vehicle as a motor vehicle, the injury must be closely related to the transportational function of automobiles. The *McKenzie* Court held that in rare situations, vehicles that were used for housing, or were on display at a museum for example, were not being used for transportational purposes and were therefore not being used as motor vehicles for purposes of the No-Fault Act.

The Court in the instant action did not find the situation to be analogous to those rare situations described in *McKenzie*. Rather, the Court held that parking is closely related to the transportational function of a vehicle. "While a vehicle need not be in motion at the time of an injury in order for the injury to 'arise out of the use of a motor vehicle as a motor vehicle' the phrase 'as a motor vehicle' does require a general determination of whether the vehicle in question was being used, maintained, or operated for transportational purposes." Opinion at 14-15 quoting *Drake v. Citizens Ins. Co. of Am.*, 270 Mich. App. 22, 715 N.W.2d 387 (Mich Ct. App. 2006). Deposition testimony revealed the limousine had been used three days earlier and was scheduled to be used again two days after the fire. Thus, while the vehicle was being temporally stored, there remained clear intent to continue using the limousine as a form of transportation.

The Court held Michigan Millers was entitled to summary judgment on the issue of liability. However, Michigan Millers was not entitled to summary judgment regarding damages because a dispute of material facts remained over the amount of damages and a hearing would be required to determine the proper damages award.

JULY 2014

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