HEWSON & VAN HELLEMONT, P.C.

Newsletter

June 2015

News & Announcements

Hewson & Van Hellemont, P.C. Wellness Initiative

June 2015 is the kick-off month for our HVH Wellness Raising the Bar Initiative. A group of employees from each office have volunteered to help facilitate ideas and programs to ensure that we bring wellness into our firm. This committee was formed "to promote the mind, body and spirit of our employees to help them achieve a balanced healthy lifestyle, personally and professionally." On June 18th, Anne Klauke will present a lunch and learn on behalf of our Raising the Bar Initiative. Ms. Klauke will speak about proper nutrition and healthy ways to eat and plan meals. The HVH Wellness Committee is looking forward to planning and hosting similar programs for the firm in the upcoming months.

New Shareholders

We are happy to congratulate Patrick Anthony, Kelli Bennett, Shawn Lewis, and Michael Kon (pictured from left to right) on becoming shareholders at Hewson & Van Hellemont, P.C.




Welcome to Our New Attorneys

David Byrne

David Byrne graduated from the University of Michigan with Bachelor's Degrees in History and Political Science in May of 2011 and received his Juris Doctorate from Wayne State University Law School in 2014. During his time in Law School, Mr. Byrne worked as a law clerk at an Oakland County Title Agency where he cleared title to various commercial and residential properties, and worked as a closing agent for real property transactions. Mr. Byrne also worked at a Plaintiff's Commercial Litigation Firm where he gained a strong knowledge of civil litigation and corporate representation. Mr. Byrne was also an active member of Wayne State's Moot Court team, and was the highest scoring oralist in the winter 2013 in-school competition. Mr. Byrne was admitted to the State Bar of Michigan in 2014. Prior to joining Hewson & Van Hellemont, P.C. in 2015, Mr. Byrne worked as an associate attorney with a focus on Real Estate and Corporate Representation at Wegner Vollmer, P.C. in St. Clair Shores.

David Palmiere

David Palmiere graduated magna cum laude from the University of Michigan in Economics and Philosophy in 1972. He received his Juris Doctor degree from the University of Michigan Law School in 1975. He has dedicated his practice to trial work; trying cases in Michigan, Ohio, New York, Florida, Illinois, Arizona and Nevada.

Mr. Palmiere has also served as a guest lecturer at the Wayne State University Law School, and has been an adjunct professor in the Oakland University Paralegal Program for 35 years. He is the author of several published short pieces on topics in litigation, and has appeared as a featured speaker at the LAAM Annual Convention and at seminars on pre-suit investigation. Mr. Palmiere has also appeared many times before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals in Cincinnati, and he regularly volunteers as a judge at the annual Michigan Law School Campbell Competition for appellate advocacy.

Mr. Palmiere has been a general practitioner with experience in a broad variety of transactional matters in which he has represented local cities and townships, real estate developers, and a variety of small businesses and their owners. However, his most consistent practice has been in commercial and personal injury litigation. In the latter, he has spent approximately equal amounts of time during his 39 years of practice representing plaintiffs and defendants and has successfully tried many cases in which the amount in controversy exceeded $1M.

Recent Opinions

Matthew Shelson v Secura Ins. Co., et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 318762

May 19, 2015

Trucking company's insurer was not responsible for PIP payments to independent contractor because his extended use of a company truck did not equate to constructive ownership of the truck.

Plaintiff was a driver for Sam Forrest & Sons, a trucking company. Plaintiff testified that although he worked exclusively for Sam Forrest & Sons, he was an independent contractor. Sam Forrest & Sons supplied trucks to Plaintiff to use on his jobs but there was no particular truck Plaintiff drove at all times.

Plaintiff was involved in a motor vehicle accident while on the job and operating one of these trucks. Plaintiff subsequently brought a suit for PIP benefits against both Secura Insurance, the insurer of his personal vehicles, and Great West Casualty Company, the insurer of Sam Forrest & Sons' trucks.

Prior to the accident, Plaintiff was operating the same Sam Forrest & Sons truck for approximately three months. Secura argued that since Plaintiff used the truck for greater than 30 days, he should be considered a constructive owner and therefore Great West was responsible for payment of his PIP benefits.

The trial court, however, did not agree with Secura's argument. Testimony noted that although Plaintiff took the truck home with him "[e]very once in a while," he usually returned the truck to Sam Forrest & Sons so it could be serviced. Plaintiff also testified that Sam Forrest & Sons generally paid for gas. Further, Plaintiff testified that he was not allowed to use the truck for personal use.

Given these facts, the appellate court agreed with the trial court and held that although Plaintiff used the truck for more than 30 days, his use of the vehicle did not comport with concepts of ownership. Therefore the determination of the trial court was upheld.

Lucas Nbunh, et al. v Ruth Kerman Pitkin

Michigan Court of Appeals

Published Opinion - Docket No. 320426

May 21, 2015

Plaintiff failed to prove he suffered a serious bodily impairment after he testified that he continued to work and go to school without any restrictions.

On appeal, Plaintiffs argued that the trial court improperly granted summary disposition because a question of fact remained as to whether Lucas Nbunh (hereinafter "Lucas") suffered a serious impairment of a bodily function.

Lucas was involved in two separate motor vehicle accidents occurring in 2007 and 2010. Lucas testified that he had fully recovered prior to the second accident. Following the second accident, Lucas complained of left shoulder pain and chest pain. Eventually, Lucas was diagnosed with chronic pain and was told he would require continued palliative treatment.

Lucas brought a negligence suit against Ruth Kerman Pitkin, the driver of the vehicle that caused the 2010 accident, alleging that he had suffered a serious impairment of a bodily function as a result of the accident. At trial, however, Lucas testified that he only missed three days of work due to the accident and that he has continued to work since that time without any work restrictions. While on the job, he lifts and stocks shelves and has never requested any special work accommodations. Additionally, he continued his schooling and eventually graduated with his bachelor's degree in 2013.

The appellate court held that the record before the trial court sufficiently established that Lucas's injuries did not affect his ability to pursue his education or his ability to work two jobs. Lucas failed to meet his burden to establish that there was a genuine issue of material fact regarding whether he sustained a serious bodily impairment. As such, the appellate court affirmed the trial court's decision to grant Ms. Pitkin's motion for summary disposition.

State Farm Mutual Automobile Ins. Co. v Farm Bureau General Ins. Co. of Michigan

Michigan Court of Appeals

Unpublished Opinion - Docket No. 321539

May 19, 2015

Victim's testimony claiming he had fully exited his vehicle prior to an accident was sufficient to allow a jury to conclude he had completed the process of alighting from his vehicle.

This case arose out of a motor vehicle accident which caused physical injury to Elbert Petree. The accident occurred in the parking lot of Mr. Petree's doctor's office. Mr. Petree was exiting a parked vehicle, which was owned by Anthony Bolton. As Mr. Petree exited the vehicle, it was struck from behind by a vehicle driven by Margo App. Mr. Petree sustained injuries as a result of this accident. It was undisputed that Mr. Petree was uninsured and did not reside with an insured relative. Further, Mr. Bolton's vehicle was not insured, therefore Mr. Petree's claim was assigned to Plaintiff State Farm through the Assigned Claims Facility.

State Farm paid PIP benefits on behalf of Mr. Petree, but subsequently brought suit against the insurer of Ms. App's vehicle, Farm Bureau Insurance. State Farm argued that Mr. Petree had

completed the process of alighting from this vehicle at the time of the accident, and therefore was not an occupant of the vehicle, thereby meaning Farm Bureau was responsible for Mr. Petree's PIP payments. State Farm moved for summary disposition on the issue, but the trial court ruled that a genuine issue of material fact remained as to whether Mr. Petree was still alighting form Mr. Bolton's vehicle at the time of the accident, and therefore a jury trial was scheduled to decide the issue. The jury returned a verdict in favor of State Farm. The trial court denied Farm Bureau's motion for judgment notwithstanding the verdict and an appeal followed.

On appeal, Farm Bureau argued that a reasonable jury could not have concluded that Mr. Petree had completed the process of alighting. To support this argument, Farm Bureau focused on testimony from Anthony Bolton and a nearby eyewitness. Both of these individuals testified that Mr. Petree was in the process of standing up and was still moving out of the vehicle when the collision happened. Farm Bureau argued that this testimony clearly established that Mr. Petree was still in the process of alighting when the accident occurred.

The appellate court, however, noted that Farm Bureau ignored the testimony of Mr. Petree himself, who stated that at the time of the collision he had fully stood up outside of the vehicle, placed both hands on his walker, transferred his weight to the walker, and was prepared to take a step away from the vehicle. This testimony from the victim himself, according to the appellate court, was sufficient to allow the jury to conclude that he had completed the process of alighting. As such, the appellate court held that the trial court did not err in denying Farm Bureau's motion for judgment notwithstanding the verdict.

Robert Campbell v Home-Owners Ins. Co.

Michigan Court of Appeals

Published Opinion - Docket No. 320775

May 19, 2015

Fungal meningitis contracted from a contaminated epidural steroid injection, and subsequent treatment, did not arise out of the use of a motor vehicle and was therefore not eligible for PIP benefit coverage.

On interlocutory appeal from a first-party no-fault action to recover PIP benefits, Home-Owners argued the trial court erred in denying its motion for partial summary disposition.

Plaintiff was involved in a motor vehicle accident in 2009 and sustained injury to his back. Home-Owners paid Plaintiff's allowable expenses through February of 2010. In 2012, Plainitff brought suit against Home-Owners due to a dispute over his continued entitlement to PIP benefits. The parties settled the suit and it was agreed that Home-Owners was to be released from all claims for PIP benefits through February of 2012.

In August 2012, Plaintiff was undergoing pain management treatment and received an epidural steroid injection in his back. The steroid was contaminated and caused Plaintiff to contract fungal meningitis. As a result, Plaintiff had to undergo an emergency laminectomy for an epidural abscess. He also was required to receive additional long-term therapy related to the episode following his operation.

Auto-Owners moved for summary disposition on the ground that the infection and subsequent treatment did not "arise out of" the use of a motor vehicle and, therefore were not covered under §500.3105(1) of the Michigan No-Fault Act.

The appellate court agreed with Auto-Owners argument, holding that the infection was a direct result of intervening negligence of the steroid manufacturer. The injury would not have occurred had the steroid not been contaminated. Simply put, the infection was too remote and too attenuated from the use of a motor vehicle to permit a finding of a causal connection between the accident and the infection. Therefore, the appellate court reversed the trial court's order and remanded the matter for entry of an order granting Home-Owner's motion for partial summary disposition.

Daniel Kemp v Farm Bureau General Ins. Co.

Michigan Court of Appeals

Published Opinion - Docket No. 319796

May 5, 2015

Plaintiff was not entitled to no-fault benefits because the injury he sustained while removing items from his parked car was insufficiently related to the use of the motor vehicle as a motor vehicle.

Plaintiff sustained injuries after he fell on his driveway. At the time, Plaintiff was removing personal effects from the backseat floorboard of his parked motor vehicle. While doing this, he allegedly sustained an injury to his calf muscle and required treatment from urgent care and a physician.

Plaintiff filed a lawsuit against Farm Bureau, demanding payment of no-fault benefits related to his injury. Farm Bureau moved for summary disposition, arguing that Plaintiff was not entitled to no-fault benefits because he was not using the vehicle as a motor vehicle at the time of the injury and the parked vehicle only had an incidental causal relationship to the injury. The trial court agreed and granted Farm Bureau's motion.

On appeal, Plaintiff was once again unsuccessful. The appellate court stated that the nexus between the injury and the use of the vehicle as a motor vehicle must be sufficiently close to justify

recovery of benefits. However, in this case, the injury had nothing to do with the transportational function of the vehicle. Plaintiff's truck was merely the site where the injury occurred and any causal relationship between the injury and the parked vehicle was incidental. Therefore, the decision of the trial court to grant Farm Bureau's motion for summary disposition was affirmed.

Jane Bate v State Farm Mutual Automobile Insurance Company, et al.

Michigan Court of Appeals

Published Opinion - Docket No. 320577

May 12, 2015

Plaintiff was not owed duty of protection from slipping and falling on unobservable ice on a dry winter day because Defendant could not have reasonably had knowledge of the dangerous condition.

Plaintiff stopped at a gas station on a December afternoon. The weather was nice and Plaintiff did not anticipate any icy conditions at the station. However, as she exited her vehicle she stepped on black ice and fell, suffering an injury to her wrist. Plaintiff stated that she could not see the ice and could only confirm its existence by feeling it with her hand after she fell.

Plaintiff returned to the site serval months later and noticed water dripping from the flat roof and gathering into a puddle in the approximate location where she slipped and fell. Based on this observation, Plaintiff concluded that water must have been dripping from the same spot on the roof on the date that she fell. Plaintiff subsequently filed a premise-liability action alleging that Defendant knew, or should have known about the icy condition.

Defendant moved for summary disposition, arguing in part that it did not have actual or constructive notice of the alleged ice accumulation and that any accumulation of ice in mid-December constituted an open and obvious danger. The circuit court granted the motion and Plaintiff filed a timely appeal.

The appellate court noted that it did not believe the ice was an open an obvious danger because it was a clear and dry afternoon. However the court noted that for a landowner to be liable in such a case, the landowner must have known of, or by the exercise of reasonable diligence should have known, of the dangerous condition on the property. Plaintiff's fall took place on a dry day without any precipitation or snow on the ground. With no snow, slush, or visible ice on the pavement, the appellate court held that Defendant could not have owed a duty to protect Plaintiff from a dangerous condition of which it neither knew nor should have known of. Therefore, the ruling of the trial court was affirmed.

Littrell Williams-Inner v Liberty Mutual Ins. Co.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 319217

May 12, 2015

Trial court did not err when it ordered a discovery sanction preventing Plaintiff from presenting expert testimony after Plaintiff repeatedly failed to identify potential expert witnesses on her witness list.

Plaintiff appealed two orders of the trial court. Discussed here, is the appellate court's analysis of Plaintiff's appeal of the trial court's discovery sanction ordering that she could not present expert testimony at trial.

In April of 2011, Liberty Mutual served a discovery request on Plaintiff asking her to state the names, addresses, qualifications, and subject matter of testimony of any and all proposed expert witnesses. Plaintiff failed to respond to interrogatories and Liberty Mutual filed a motion to compel her responses and the trial court issued such an order. Plaintiff failed to respond to the court order in timely fashion and when she did respond she only stated that she would file a witness list in accordance with the court's scheduling order.

On the day the witness list was due, Plaintiff filed a witness list which named over 20 treating physicians but did not identify any witnesses as an expert witness. During a motion hearing a month before trial, Liberty Mutual asked the court to preclude Plaintiff from presenting expert testimony due to her failure to timely file her witness list. Plaintiff stated that she had not retained any "outside independent experts" but argued that the treating physicians she identified could be presented as experts. The trial court ruled that Plaintiff had failed to identify any expert witness and therefore could not present expert opinion testimony at trial.

Plaintiff appealed the ruling but the appellate court affirmed the decision. The court held that the trial court's sanction was not an abuse of discretion because Plaintiff's failure to present appropriate responses to Liberty Mutual's interrogatories was not accidental. The willful actions prevented Liberty Mutual from deposing, investigating, or otherwise preparing to defend against the witnesses. Further, the imposed sanction was narrow in scope and only barred Plaintiff from calling her treating physicians as experts. She was still free to call them to testify regarding her specific injuries and the treatment they provided.

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