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HVH Newsletter

October 2014

Recent Decisions and Successes

Nasma Aziz, et al. v State Farm Mutual Automobile Ins. Co., et al.

Macomb County Circuit Court, Judge James M. Biernat, Jr., Case No. 12-3459-NI

Plaintiff brought a first-party no-fault action against State Farm for benefits arising out of an alleged motor vehicle accident which occurred in November of 2011. It was undisputed at the time of the accident that Plaintiff's daughter, then 2 years old, was struck by a vehicle driven by the co-defendant, while she was unattended in the parking lot of a doctor's office. Plaintiff's daughter sustained a fractured leg and emergency personnel were called to the scene. Immediately following the accident, Plaintiff received emergency room treatment for a bruised knee, but reported to the ER that she was injured due to a fall. Several weeks after the accident, however, Plaintiff began to claim that she was also struck by the vehicle and sustained injuries. Shortly thereafter, she began treatment for alleged injuries to her right wrist, left knee, shoulders, back, and neck.

At trial, State Farm argued that Plaintiff was not entitled to PIP benefits because she was not actually involved in the motor vehicle accident. Rather, State Farm argued that Plaintiff injured her knee when she was in the process of removing her daughter from underneath the co-defendant's vehicle. State Farm presented compelling evidence to support its version of events, including testimony from the co-defendant driver of the vehicle who stated he only struck Plaintiff's daughter. Additionally, the responding police officer testified that the police report from the accident only listed Plaintiff's daughter as a victim. The responding EMS personnel also testified that their records made no mention of Plaintiff, despite her claim she sustained her injuries as a result of being struck by the vehicle.

After deliberations, the jury returned a verdict that the Plaintiff did in fact sustain an injury but it was not related to the motor vehicle accident. Accordingly, she was not entitled to any PIP benefits from State Farm.

Verdict: No Cause of Action

Credit: Jeffrey Coleman

Sayf Alshibil v State Farm Mutual Automobile Ins. Co., et al.

Wayne County Circuit Court, Judge Robert Ziolkowski, Case No. 12-014362-NI

Plaintiff sought over \$107,000 in PIP benefits for treatment of injuries he allegedly sustained in a motor vehicle accident. Post-accident surveillance evidence was gathered to significantly discredit the severity of Plaintiff's claimed injuries. In light of the mounting evidence, Plaintiff opted to voluntarily dismiss his case just days before trial.

Credit: Elaine Sawyer and Kelli Bennett

News & Announcements

New Legislation Regarding Physical Therapy Prescriptions



Earlier this year, Senate Bill 690 was passed by the Michigan Legislature and subsequently approved by Governor Rick Snyder. The bill, which becomes effective on January 1, 2015, will allow for direct consumer access to physical therapy services. Under the bill, physical therapists will be able to treat patients directly without a prescription for 21 days or 10 treatments, whichever happens first. A prescription from an appropriate health professional will be required to continue treatment after that period. However, a patient seeking physical therapy solely for injury prevention or to promote fitness will be allowed unlimited access.

Congratulations to Tim Brady

Hewson & Van Hellemont, P.C. attorney, Tim Brady, has been named a *SuperLawyers* Rising Star for 2014. This is a well-earned and prestigious accolade as *SuperLawyers* only selects 2.5% of the licensed active attorneys in the state for this honor. Mr. Brady was previously named a *SuperLawyers* Rising Star by his peers consecutively from 2010 through 2013.

HVH Lectures

This November, Jim Hewson will be featured as a didactic lecturer for doctoral and post-doctoral fellows at the Rehab Institute of Michigan. Additionally, we have several staff members participating in the 2nd Annual ICLE No-Fault Summit taking place in April of 2015 at The Inn at St. John's in Plymouth, Michigan. Both Jim Hewson and Diane Hewson will be giving their own lectures on various no-fault topics. Diane, in addition to giving her lecture, is also a member of the event's planning committee and will serve as a moderator and presenter. Details for the event can be found on the ICLE website.



Welcome to our newest associate attorney:

Alison R. Krempa

Alison Krempa graduated from Saginaw Valley State University with a Bachelor's Degree in English Education. After teaching for several years, Ms. Krempa changed career paths. She attended Thomas M. Cooley Law School and graduated *cum laude* in 2011.

Ms. Krempa was admitted into the Michigan Bar in November 2011. Upon admittance into the Michigan Bar, she practiced in Alpena, Michigan, focusing on civil litigation. She relocated back to Metro Detroit and has been litigating first and third-party no-fault claims since that time. Ms. Krempa primary area of focus is defending claims for first and third-party benefits under the Michigan No-Fault Act.

Recent Opinions



Nazhat Bahri, et al. v. IDS Property Casualty Ins Co. Michigan Court of Appeals

Unpublished Opinion - Docket No. 316869
October 9, 2014

Plaintiff and intervening plaintiffs were barred from recovering PIP benefits after Plaintiff made fraudulent misrepresentations in clear violation of the fraud exclusion found in Plaintiff's insurance policy with Defendant.

Following an alleged motor vehicle accident in October of 2011, Plaintiff sought PIP and uninsured motorist benefits from IDS. Plaintiff submitted "Household Service Statements" which indicated that multiple replacement services were provided to her daily from October of 2011 through February of 2012. However, surveillance video taken of Plaintiff throughout that time captured her bending, lifting, and driving around town.

Plaintiff filed a complaint seeking recovery of benefits from IDS in June of 2012. Additionally, two of her treating doctors joined as intervening plaintiffs seeking to recover PIP benefits payable to Plaintiff for medical services they provided to her for her alleged injuries.

IDS moved for summary disposition, arguing that Plaintiff's fraudulent misrepresentations precluded her from recovery of PIP benefits pursuant to her policy. Further, it argued the intervening

plaintiffs stood in the shoes of Plaintiff and therefore were also precluded from recovering PIP benefits. Lastly, IDS argued Plaintiff was not entitled to uninsured motorist benefits because the never identified third vehicle that allegedly caused the accident never struck Plaintiff's vehicle. The trial court agreed with IDS and granted summary disposition in its favor.

The intervening plaintiff's appealed the trial court's ruling. The appellate court noted that the policy at issue contained a clear exclusion that stated, "[w]e do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy." The appellate court agreed with the trial court's decision to apply the fraud exclusion. In support of its decision, the court noted that Plaintiff attempted to claim replacement services for the entire month of October 2011 despite the fact her accident did not occur until October 20, 2011. Further, Plaintiff was observed on surveillance on numerous occasions performing activities that were inconsistent with the physical limitations she was claiming.

The appellate court ruled there was no genuine issue of material fact that plaintiff made fraudulent representations and was therefore precluded from claiming PIP benefits. Therefore, since the intervening plaintiffs stood in the shoes of Plaintiff, they were also barred from recovering PIP benefits.

Jake Williams, Jr. v. Enjo Transportation Solutions, et al.

Michigan Court of Appeals

Opinion for Publication - Docket No. 312872
October 9, 2014

Insurer to which the claim is assigned is entitled to reimbursement from defaulting insurer for benefits collected under the assigned claims plan pursuant to MCL 500.3172(1).

Plaintiff, a disabled individual with ambulatory difficulties, was commonly

confined to a motorized "scooter" wheelchair. Plaintiff used Enjo Transportation Solutions for transportation to his dialysis appointments multiple times a week. During one trip, Plaintiff fell from his scooter while in the van and sustained injuries. Plaintiff claimed he fell from his scooter because the driver was driving erratically and had not properly secured his scooter. The driver, however, disagreed and said the scooter was properly secured and that Plaintiff could have only fallen out if he intentionally unlatched himself. It was the driver's belief that Plaintiff had intentionally undone his restraints in an attempt to hurt himself.

Plaintiff filed a claim for his injuries with the assigned claims facility of the Michigan Department of State. Farm Bureau was assigned the claim and incurred costs. Farm Bureau subsequently filed a declaratory judgment against Enjo. Farm Bureau later amended the complaint and named American Guarantee as Enjo's insurer. Farm Bureau claimed it was entitled to recovery from American Guarantee for all no-fault benefits it had paid to Plaintiff. Farm Bureau eventually moved for summary disposition and the trial court granted the motion.

American Guarantee appealed the decision, arguing that a genuine issue of material fact existed whether Plaintiff was truly entitled to PIP benefits. The appellate court was not swayed. Under MCL 500.3172(1), unpaid benefits may be collected under the assigned claims plan and the insurer to which the claim is assigned is entitled to reimbursement from the defaulting insurer. The appellate court stated that Farm Bureau was "entitled to repayment for the expense or loss incurred, not subject to other limitations that may apply to a direct suit from a claimant." (Opinion at 4). Because American Guarantee was the insurer for Enjo at the time of the incident, the appellate court upheld the trial court's ruling that American Guarantee was the priority insurer and therefore had to reimburse Farm Bureau for its expenses incurred.

***Alan Jesperson v.
Auto Club Ins. Association***
Michigan Court of Appeals

Opinion for Publication - Docket No. 315942
September 16, 2014

MCL 500.3145(1) allows for a suit to be filed more than one year after the date of the accident only if the insurer received notice within one year of the accident or made a payment of personal protection insurance benefits for the injury within one year of the accident.

On May 12, 2009, Plaintiff was operating a motorcycle when he was struck from behind by another motor vehicle moving at a slow speed. Plaintiff was able to jump off of the motorcycle and land on his feet. Plaintiff reported no injuries and was able to drive his motorcycle away from the scene.

Plaintiff allegedly developed shoulder and back pain that eventually required surgery. On June 2, 2010, more than a year after the accident, Auto Club was notified that Plaintiff had been injured and Auto Club was the highest priority no-fault insurer. Auto Club made its first payment to Plaintiff on July 23, 2010 and in total ended up paying Plaintiff \$21,714.87 in medical expenses.

Auto Club eventually stopped paying benefits to Plaintiff, who then filed a first-party no-fault claim against Auto Club. Shortly thereafter, Auto Club moved for summary disposition, arguing that Plaintiff's claim was barred by the statute of limitations provision of MCL 500.3145(1). The trial court granted the motion and Plaintiff appealed.

On appeal, Plaintiff argued that MCL 500.3145(1) provided an exception to the statute of limitations when an insurer made a payment on the claim at any time. The Court of Appeals concluded from the plain statutory language of the provision that the Legislature intended for only payments made *previously* to the one year cutoff date to provide an exception. The court stated, to hold "that any payment made by an insurer would revive a stale claim, no

matter how much time has elapsed, would render an absurd result by allowing, potentially, even decades-old claims to be asserted." (Opinion at 6). As such, the court affirmed the ruling of the lower court granting summary disposition in favor of Auto Club.

***Tayanishalai Potts v.
Randall Solis., et al.***
Michigan Court of Appeals

Unpublished Opinion - Docket No. 316142
September 16, 2014

Auto Dealership vehicles are meant for display and sale, not for transportation of customers. Therefore, a customer injured while being transported in a dealership vehicle cannot recover against the dealership's insurer under MCL 500.3114(2).

Tayanishalai Potts had an auto insurance policy through Starr Indemnity & Liability Company. Ms. Potts purchased a motor vehicle from New Century Auto Sales, Inc. New Century insured their vehicles through Travelers Indemnity Company.

Within a week of purchasing the vehicle, Ms. Potts began to have trouble starting it. She called New Century to report the issue and they sent one of their employees, Randall Solis, in a dealership vehicle from their lot to take a look at her car. Mr. Solis was unable to start Ms. Pott's vehicle. He ended up taking Ms. Pott's back to the dealership in the dealership vehicle. After some time at the dealership, Mr. Solis drove Ms. Potts to work, once again using the dealership vehicle. While they were en route, the vehicle hit an icy patch and Mr. Solis lost control of the vehicle and Ms. Potts was injured.

A dispute arose between Travelers and Starr as to which company was responsible for Ms. Potts claim for PIP benefits. The trial court granted summary disposition in favor of Travelers, ruling that the dealership vehicles were primarily meant to be sold and not to transport people.

On appeal, Starr argued that Travelers was the highest priority

insurer because Ms. Potts was injured while she was a passenger of a motor vehicle being operated in the business of transporting passengers. Under MCL 500.3114(2), a person who is injured while in a motor vehicle being operated in the business of transporting passengers shall receive PIP benefits from the insurer of the vehicle.

The Court of Appeals, however, reasoned that none of the vehicle at the dealership were designated for transporting customers. The court stated "the transportation use of the vehicle was merely incidental to its primary use of being on display for sale." (Opinion at 4). Only 25% of the dealership's business required transportation services to the dealership and there was not an assigned vehicle for transporting customers. Accordingly, the facts did not establish that transportation was an integral part of the business of the dealership.

Therefore, MCL 500.3114(2) did not apply and Starr was the insurer of highest priority. The ruling of the trial court was affirmed.

***Mansfield Patterson, Jr., v.
Auto Club Ins. Association***
Michigan Court of Appeals

Unpublished Opinion - Docket No. 316100
August 21, 2014

The Court of Appeals held there was sufficient evidence to support the jury's finding that Plaintiff did not live with his uncle and therefore could not receive benefits as a "resident relative" under uncle's insurance policy.

Mansfield Patterson V("Mansfield") was killed in an automobile accident on October 5, 2009. The only issue litigated was whether Mansfield resided with his aunt and uncle, the Hubbards, who had an automobile insurance policy that covered "resident relatives."

At trial, Auto Club argued that Mansfield's mother, who was one of the witnesses that testified that Mansfield lived with the Hubbards, was "not worthy of belief." Auto Club

presented contradictory documents that Mansfield's mother filled out and argued she was completely unreliable and not worthy of belief. The jury returned a verdict that Mansfield did not live with the Hubbards at the time of the accident. The court, however, granted Plaintiff's motion for judgment notwithstanding the verdict.

Upon appeal by Auto Club, the only issue was whether competent evidence existed to support the jury's conclusion that Mansfield did not reside with the Hubbards at the time of the motor vehicle accident. Plaintiff was seeking benefits under Daniel Hubbard's insurance policy that extended coverage to "resident relatives."

Every witness at trial testified that Mansfield resided with the Hubbards on the date of his accident. The testimony was supported by the fact Mansfield maintained a bedroom and kept his belongings at the Hubbards. There was, however, evidence to the contrary, including the fact Mansfield never received mail at the Hubbards.

Auto Club's theory at trial was that Mansfield's family stated that he lived with the Hubbards only after their attorney became involved and they learned that was the only way to recover benefits. Specifically, Auto Club highlighted several documents filled out by Mansfield's mother that contradicted Plaintiff's claim. Firstly, Mansfield's death certificate listed his mother's address as his home address. Additionally, an application for bodily injury benefits after the accident provided that Mansfield lived with his grandparents.

The Court of Appeals held that the trial court was correct in noting that the mother's testimony created serious credibility issues, but that the consideration was for the jury to take into account. The evidence, when viewed in the light most favorable to the nonmoving party, i.e., Auto Club, supported the jury's conclusion that Mansfield did not live with the Hubbards. As such, the trial court improperly granted plaintiff's motion for judgment notwithstanding the verdict because, "with zero corroborating evidence, the jury rationally could have disbelieved the

proffered testimony of the family." (Opinion at 4). Therefore, the decision of the trial court to grant Plaintiff's motion for judgment notwithstanding the verdict was reversed.

***Karen Jordan v.
Insurance Co. of the State of
Pennsylvania***

Michigan Court of Appeals

Unpublished Opinion - Docket No. 316125

August 19, 2014

Plaintiff's claim against insurer of a semi-truck and trailer was properly dismissed after it was determined the semi-truck and trailer were not parked in a way to create unreasonable risk of bodily injury.

On September 11, 2012, Plaintiff's decedent was operating a motorcycle when he collided with a parked semi-truck and trailer insured by Defendant. Prior to the accident, the semi-truck driver was having mechanical issues with the trailer's brakes and was forced to make an emergency stop. The driver parked the semi-truck in the right-hand lane of the road, as close to the curb as possible, and did not block any other lanes of traffic. He activated the vehicle's emergency flashers and placed warning triangles on the road behind the vehicle.

Following the accident, Plaintiff sought to recover no-fault benefits from Defendant as the insurer of the semi-truck and trailer. Defendant moved for summary disposition, arguing that the vehicle was not parked in such a way as to create an unreasonable risk of bodily injury, MCL 500.3106(1)(a). The trial court granted the motion, and stated that the facts of the case were similar to the controlling case of *Stewart v. Michigan*, 471 Mich 692; 692 NW2d 376 (2004).

On appeal, Plaintiff argued that the trial court prematurely granted summary disposition because no discovery had been conducted and a genuine issue of material fact existed regarding whether the semi-truck and trailer was parked in such a way as to cause unreasonable risk of

bodily injury. MCL 500.3106(1) allows for recovery of benefits by a party who was injured due to a vehicle being parked in a way to "cause unreasonable risk of the bodily injury which occurred." However the provision "does not create a rule that whenever a motor vehicle is parked entirely or in part on a traveled portion of a road, the parked vehicle poses and unreasonable risk. *Stewart*, 471 Mich at 697.

The appellate court looked at the totality of the circumstances and determined that the semi-truck in this case did not pose and unreasonable risk. They noted that the portion of the five-lane roadway where the accident occurred was straight and had adequate visibility. The accident occurred during the daytime and during dry conditions. The driver of the semi-truck parked the vehicle as far to the right as possible and placed warning triangles behind the truck. On those facts alone, the appellate court ruled there was nothing in the record to suggest a driver on that road "would not have ample opportunity to observe, react to, and avoid the hazard posed by the parked semi-truck and trailer." (Opinion at 4-5).

The appellate court held that further discovery would not have uncovered facts that would have refuted that finding. As such, the trial court's ruling granting summary disposition in favor of Defendant was affirmed.

***Daniel Button v.
Progressive Michigan Ins. Co.,
et al.***

Michigan Court of Appeals

Unpublished Opinion - Docket No. 314836

September 4, 2014

A subrogation claim by one insurer against another for recovery of PIP benefits is subject to the one-year-back rule, MCL 500.3145(1).

Plaintiff was riding a bicycle in 2007 when he was struck by a motor vehicle operated by Ruben Arreola. Plaintiff was a minor at the time and resided with his father and his girlfriend, Marie Rudzinski. Following

the accident, Rudzinski filed a claim with her insurer, QBE. She claimed that Plaintiff was her step-son and QBE subsequently paid \$240,042 in PIP benefits under the belief he was a resident relative of Rudzinski.

In June of 2010, Plaintiff filed a suit against Arreola and QBE for unpaid PIP benefits and uninsured motorist benefits. During discovery, QBE discovered that Plaintiff was not actually Rudzinski's son. Plaintiff amended his complaint to name Progressive, Arreola's insurer, as the defendant. QBE subsequently filed a cross-claim against Progressive seeking recovery of the \$240,042 in PIP benefits they had paid on behalf of Plaintiff.

At trial, both Progressive and QBE filed motions for summary disposition. Progressive argued that QBE was barred from recovery by the one-year-back rule. QBE argued that the one-year-back rule was not applicable and that the trial court should enter judgment in its favor based on the common-law right to reimbursement of payment made under a mistake of fact. The trial court sided with QBE and granted their motion, ordering Progressive to pay QBE \$240,042.

On appeal, Progressive argued that QBE's cross claim was a subrogation claim and the trial court erred in determining that the one-year-back rule did not apply to it. Pursuant to MCL 500.3145(1), the one-year-back rule limits recovery in an action for PIP benefits to losses incurred within one year preceding the commencement of the action to recover those benefits.

The appellate court agreed that it was a subrogation claim and that the trial court incorrectly determined the one-year-back rule did not apply. The court relied on its earlier decision in *Titan Ins v North Pointe Ins*, 270 Mich App 339; 715 NW2d 324 (2006). In *Titan*, the court held "the plain and unambiguous terms of MCL 500.3145(1) are not subject to interpretation, and the statute does not provide, as it could have, for a separate limitations period in the event of mistake. *Titan* at 347.

Since QBE's claim against Progressive was for recovery of PIP benefits, "the claim for recovery would fall within the purview of MCL 500.3145(1), and the one-year-back rule would apply." (Opinion at 6). Accordingly, the ruling of the trial court was reversed.

Dawn Marie Purchase, et al. v. Auto-Owners Ins. Company **Michigan Court of Appeals**

Unpublished Opinion - Docket No. 314836
September 4, 2014

Plaintiff was able to collect PIP benefits under her parent's no-fault policy because they were in possession of the vehicle for over 30 days and therefore deemed to be the "owners" of the vehicle pursuant to MCL 500.3101(2)(h)(i).

Plaintiff was injured in 2007 while riding in a vehicle titled to her niece, who was driving. Plaintiff's niece did not have no-fault insurance on the vehicle, however, Plaintiff's parents, Earl and Mary Morris, previously added the vehicle to their Auto-Owners policy. The vehicle in question was originally owned by Joshua Morris, the grandson of Plaintiff's parents.

Plaintiff filed a claim for no-fault benefits under her parent's Auto-Owners policy and initially received PIP benefits. Auto-Owners, however, conducted an IME in 2008 and decided to suspend and then eventually deny benefits to Plaintiff, who subsequently filed a first-party no-fault claim against Auto-Owners that same year.

In 2009, Auto-Owners received a medical bill from Sparrow Hospital totaling over \$38,000. Auto-Owners denied payment, notifying Sparrow that the case was in litigation. Plaintiff did not receive a copy of the bill from Sparrow and subsequently did not include the \$38,000 Sparrow bill in the total amount of damages she was claiming. The case proceeded to case evaluation and Plaintiff did not include the Sparrow bill in her case evaluation summary. The case evaluation panel awarded Plaintiff \$65,000, which both parties accepted,

and the case was dismissed with prejudice.

In 2010, Sparrow filed suit against both Plaintiff and Auto-Owners for payment of their \$38,000 bill. Plaintiff moved for summary disposition, arguing that Auto-Owners insured the "owner" of the vehicle as a matter of law. The trial court ruled that Plaintiff's parents were the "owners" and granted the motion.

On appeal, Auto-Owners argued that Plaintiff's parents were not the "owners" of the vehicle and therefore they were not entitled to PIP benefits under MCL 500.3114(4). It was undisputed that Plaintiff's parents never held title to the vehicle or had immediate right of possession under an installment sale contract. The court, however ruled that under MCL 500.3101(2)(h)(i), Plaintiff's parents were "owners" of the vehicle because they had the use of the vehicle for over 30 days. The court supported their decision by noting that the vehicle was kept at Plaintiff's parents residence, and they never had to ask for permission to use the vehicle. As such, Auto-Owners argument was deemed to be misplaced and that no genuine issue of material fact remained regarding who the "owners" of the vehicle were. Accordingly, the appellate court affirmed the trial court's decision to grant Plaintiff's motion for summary disposition.

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