HEWSON & VAN HELLEMONT, P.C.

Newsletter
December 2014

Recent Decisions and Successes

Lena M. Dooley v. Liberty Mutual Fire Insurance Company

Wayne County Circuit Court, Judge Maria Oxholm, Case No. 13-004613-CK

A home owned by Plaintiff sustained heavy fire damage. Liberty Mutual denied Plaintiff's insurance claim on the grounds that they believed the loss was the result of an intentional act. The fire was classified by investigators as arson and Liberty Mutual presented evidence to establish that Plaintiff had a wrongful connection to the fire, she made material misrepresentations in the presentation of her claim following the fire, and she failed to cooperate with the claim investigation.

Plaintiff is the owner of a "property preservation" business and owned the subject home which was a rental property. In 2001, she mortgaged the subject property involved in this matter and received a loan written as a "balloon note" for $30,750.00, with the final balloon payment of $27,116.53 due in 2016. Plaintiff began renting the home to Ms. Singleton in 2010. Plaintiff testified that Ms. Singleton quickly fell behind on her rent payments yet remained in the house until May of 2012. At that time, Plaintiff claimed she served Ms. Singleton with a 30-day Notice to Quit and Ms. Singleton agreed to vacate the premises. Plaintiff testified that the home was in great condition and the sole reason for the eviction was Ms. Singleton's delinquent rent payments. A week after Ms. Singleton vacated the premises, the home burned down.

Plaintiff was less than cooperative in providing Liberty with contact information and the whereabouts of Ms. Singleton. Near the end of discovery we were able to locate Ms. Singleton in Georgia and conducted her deposition. Ms. Singleton's testimony, however, revealed a very different set of events. Ms. Singleton testified she was not evicted, but rather, she informed Plaintiff that she would no longer be paying rent until Plaintiff made necessary repairs to the house. According to Ms. Singleton, the house was essentially uninhabitable. There were bed bugs in the house, the floor was rotting out, the refrigerator did not work, and loose wiring behind the stove caused a previous fire. Further supporting these claims was a letter Plaintiff mistakenly produced to investigators. The letter, which was signed by Plaintiff, indicated she was evicting Ms. Singleton due to "electrical service to the property being terminated." The letter went on to say that the property was uninhabitable because it needed to be "rewired with new service."

In addition to these issues, financial records revealed Plaintiff was behind on many payments. The property taxes on the home were delinquent for 2009, 2010, and 2011 and a Certificate of Forfeiture of Real Property was issued two months before the fire for all three of those years. Plaintiff also owed back taxes to the IRS, had thousands of dollars of credit card debt, was behind on her car payments, and owed money to the State of Michigan. Most notably, Plaintiff was behind on mortgage payments for the subject property and was facing a final balloon payment of over twenty-seven thousand dollars due in 2016.

In light of these facts, Liberty Mutual argued there was a substantial basis upon which to determine Plaintiff had financial motive to want the home destroyed. Liberty Mutual presented evidence to establish that the fire was intentionally set. A senior fire investigator on the case reported the irregular burn patterns in the house were consistent with an ignitable liquid burn pattern, indicative of arson. Further, a neighbor reported seeing Plaintiff's boyfriend at the house a few hours prior to the fire. The neighbor observed Plaintiff's boyfriend removing a hot water tank from the home and loading it into a pickup.

Plaintiff was seeking $147,000.00 in damages. On the day of trial they demanded $100,000.00. Following 2 days of trial, the jury deliberated for 45 minutes and returned a verdict finding no cause of action. Liberty Mutual properly denied Plaintiff's claim on the basis of material misrepresentation of fact in violation of policy provision and was not liable for any payments on Plaintiff's claim.

Verdict: No Cause of Action
Credit: Patrick Anthony

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Adia Blacksher, et al. v. State Farm Mutual Automobile Insurance Company

State of Michigan Court of Appeals, Case No. 312107, Decided December 4, 2014

Plaintiff was involved in a motor vehicle accident in 2007 and required emergency treatment. It was undisputed that Plaintiff sustained injuries to her ankle and hip but it was disputed if Plaintiff injured her head during the collision. Plaintiff claimed a myriad of symptoms related to her alleged head injury including dizziness, headaches, and blurred vision. State Farm, Plaintiff's no-fault automobile insurer, initially covered treatment being provided to Plaintiff. The treatment was provided primarily by McLaren Regional Medical Center. Eventually, State Farm stopped making payments on Plaintiff's medical bills. Plaintiff filed suit in the Genesee Circuit Court claiming she was entitled to $630,000.00 in PIP damages from State Farm. McLaren Regional Medical Center joined the case as an intervening plaintiff soon thereafter.

At trial, State Farm presented evidence to demonstrate that Plaintiff's emergency room physicians on the date of her accident disagreed as to whether or not she hit her head during the accident and sustained an injury. Dr. Tarik Wasfie diagnosed Plaintiff with a concussion despite the fact emergency medical technicians at the scene of the accident evaluated Plaintiff using the "Glasgow Coma Scale" and gave her a perfect score. Additionally, Plaintiff did not complain of any dizziness or head pain upon arrival at the hospital and an unnamed doctor noted no cranial tenderness or swelling when conducting an initial physical examination.

Plaintiff continued to complain of headaches over a week after the accident and Dr. Wasfie prescribed a CT scan and MRI of her head. Neither test revealed any bleeding in the brain yet Dr. Wasfie still did not rule out a head injury and referred Plaintiff to Dr. Nasser Sabbagh. Dr. Sabbagh diagnosed Plaintiff with post-concussion syndrome and reactive depression. At trial, however, Dr. Sabbagh admitted Plaintiff may have had a tendency to amplify her complaints and if the complaints were legitimate, they could have been symptoms of depression and not related to a head injury at all. Additionally, Dr. Sabbagh admitted that Plaintiff withheld information from him and never informed him of prior episodes of depression she had nor bouts of dizziness and headaches she suffered from in the past.

In addition to testimony from Plaintiff's treating doctors, State Farm presented the findings of a number of independent medical evaluations that were conducted on Plaintiff. A common thread found in many of the IME reports was that Plaintiff appeared to be over-reporting or exaggerating her complaints. Several tests, including the MMPI-2 came back with contradictory findings. In the words of one of the IME doctors, it appeared Plaintiff was "not even trying" or was purposely trying to skew the results.

Based on the evidence, the jury determined that Plaintiff suffered an accidental injury out of operation of a motor vehicle and incurred allowable expenses arising out of the injury. However, State Farm had already paid $53,000 in expenses and the jury concluded that constituted full payment of Plaintiff's allowable expenses. The jury determined that no amounts were due and owing to Plaintiff from State Farm. The jury, however, did award additional payments to McLaren, but only in the amount of $8,012.80.

Both Plaintiff and McLaren appealed, arguing the verdict was inconsistent and against the great weight of the evidence and that the trial court should have entered a judgment notwithstanding the verdict or ordered a new trial. The appellate court held that while the evidence established that Plaintiff did in fact sustain an injury in her motor vehicle accident, State Farm presented compelling evidence that Plaintiff's injuries were not as severe or long lasting as she claimed. Plaintiff argued she was prejudiced by the court's decision not to grant her request for an adjournment after a State Farm claims adjuster fell ill and was unable to testify at trial. Plaintiff asserted that the claims adjuster was a material witness who could establish that State Farm unreasonably delayed in making payments. The appellate court, however, ruled that the central issue at trial revolved around conflicting medical testimony and the actions of the claims adjuster were minor in comparison. Further, another claims adjuster was disposed and allowed to testify. It was the opinion of the Court that this particular claims adjuster played a more important role in Plaintiff's case than the claims adjuster that was unable to testify. Therefore, the Court was not convinced that the trial court's failure to adjourn the trial constituted an abuse of discretion.

McLaren challenged the trial court's denial of its motion to admit medical bills at trial. The appellate court noted McLaren's failure to meet the time requirements specified in the scheduling order. McLaren never exchanged the proposed bills with State Farm prior to trial. The appellate court found that admitting the bills would have left defense counsel with no opportunity to review the exhibits before trial. Additionally, approximately one-half of McLaren's records were admitted into evidence as part of State Farm's claim file along with an accounting spreadsheet from McLaren. The appellate court held that the availability of these other exhibits significantly mitigated any prejudice arising from the decision to exclude McLaren's medical bills exhibit. Therefore, McLaren could not support its request for relief.

Having reviewed the record, the appellate court did not find any errors in the trial court's reasoning or proceedings to warrant a reversal of the decision. Accordingly, the decision of the trial court was affirmed.

Demand: $630,000.00 in PIP Damages
Verdict: No Cause of Action for Insured
Credit: Jim Hewson

Georgelyn Lantz v. State Farm Mutual Automobile Insurance Company

United States District Court Eastern District of Michigan, Case No. 312107,
Discovery objection decided on December 9, 2014

Plaintiff sought PIP benefits under a no-fault policy issued by State Farm. Plaintiff made several far-reaching discovery requests, to which State Farm objected. Among the discovery requests State Farm objected to, Plaintiff sought information pertaining to State Farm's training of claims personnel, its Advancing Claims Excellence (ACE) review, and its Auto Claim Manual. Additionally, the discovery request sought information from MES Solutions, State Farm's independent medical examination vendor.

State Farm referred Plaintiff for an IME with Dr. David Carr through MES. Dr. Carr subsequently opined that certain charges incurred by Plaintiff were not reasonable. Plaintiff, through its discovery request sought to identify how many times State Farm hired Dr. Carr to conduct IMEs and how much he was paid for his services. The court denied State Farm's objections related to information regarding Dr. Carr's work specifically with State Farm. The court, however, did not find information relating to Dr. Carr's overall relationship and work with MES to be relevant to Plaintiff's claim and sustained State Farm's objections regarding all such requests.

Plaintiff also requested State Farm's vendor lists and contracts between MES and State Farm. Plaintiff sought to discover the number of times State Farm utilized MES in the last five years and the financial gain made by MES on those contracts. The court, as it indicated earlier, only allowed for the discovery of materials that related specifically to Plaintiff. What State Farm conveyed to MES regarding Plaintiff's claim was discoverable, but all other requested documents that were not specifically related to Plaintiff's claim were not relevant, and State Farm's objection to those requests was sustained.

Lastly, the court addressed Plaintiff's discovery request for State Farm's training manuals, ACE documents, and information regarding State Farm's alleged bad faith handling of insurance claims. The court ruled that State Farm's training manuals and ACE documents were not relevant to Plaintiff's claim and sustained State Farm's objection. The court held that information pertaining to bad faith claims could be relevant if Plaintiff prevailed and sought attorney fees under MCL 500.3148. A decision on attorney fees, however, would be decided in a post-judgment proceeding and Plaintiff could seek the requested discovery at that time, but not any earlier. Therefore, State Farm's objection to this discovery request was also sustained.

Credit: Stacy Heinonen

Affiliated Diagnostics of Oakland (Aretha Robinson) v. Farmers Insurance Exchange

Wayne County Circuit Court, Judge Lita M. Popke, Case No. 14-007445-AV

Farmers Insurance Exchange appealed a Stipulated Order for Judgment issued by the 20th District Court of Michigan following a jury trial in which Plaintiff was awarded over $10,000 in claimed MRI expenses and interest. Additionally, Farmers appealed the trial court's order granting sanctions, attorney fees, and costs in favor of Plaintiff and the trial court's order denying Farmers' motion for judgment notwithstanding the verdict.

Appellate oral arguments were conducted on December 11, 2014 in Wayne County Circuit Court before the Honorable Lita M. Popke. Farmers argued that the jury's verdict was the product of multiple errors committed by the trial court and that the judgment would have been entered in Farmers' favor if not for these errors. The first error committed by the trial court was allowing the jury to consider the testimony from Dr. Tete Oniang'o, a doctor who allegedly treated Plaintiff. Both parties had previously agreed that the testimony of Dr. Oniang'o would be for discovery purposes only and would not be used at trial, which was reflected in the deposition notice and deposition transcript. It was undisputed that counsel for Affiliated did not object to this limitation on the testimony. Nevertheless, Affiliated presented testimony to the jury directly from Dr. Oniang'o's deposition transcript. Farmers argued that use of the deposition transcript at trial was improper and the trial court committed a clear abuse of discretion by allowing the transcript to be presented to the jury. Without this deposition testimony, Affiliated could not meet the burden of proof on their claim.

Further, Affiliated should not have been allowed to rely on Dr. Oniang'o as expert on the necessity of MRIs because he did not meet the basic qualifications in order to testify as a witness. Dr. Oniang'o was reprimanded, placed on probation, and fined in connection with his pharmacological license in 2012. He is not board certified, maintains no hospital privileges, and did not complete any residency whatsoever. Despite holding a medical license, Dr. Oniang'o's credentials fail to establish that he possesses the necessary knowledge, skills, or practical experience to competently testify as an expert regarding the necessity of MRIs.

In light of these facts, Farmer's argued that the trial court committed reversible error in failing to grant its motion for judgment notwithstanding the verdict. Judge Popke agreed and ordered the district court's judgment to be vacated and the matter remanded with instructions for entry of a new judgment of $0.00 in favor of Affiliated. Additionally, the order granting no-fault sanctions, attorney fees, and costs and denying Farmers' motion for judgment notwithstanding the verdict was vacated in its entirety.

Original Award: Over $10,000.00 in claimed MRI expenses to Plaintiff plus sanctions, attorney fees, and costs.
Result on Appeal: Judgment of $0.00 in favor of Plaintiff**,** no sanctions, attorney fees, or costs.
Credit: Timothy Brady (Trial Attorney) and Stacey Heinonen (Appellate Attorney)

Mendelson Orthopedics, P.C., et al. v. Farmers Insurance Exchange

Wayne County Circuit Court, Judge Patricia Fresard, Case No. 13-011118-NF

Nelson Rhodes was involved in a high speed police chase in January of 2013. The chase came to an end when Mr. Rhodes crashed his vehicle into a parked car, causing him to sustain significant injuries that required medical treatment. Mr. Rhodes did not have any insurance coverage and the matter was submitted to the assigned claims facility. Ultimately, Farmers Insurance Exchange was assigned the claim for payment of medical bills and PIP benefits. Farmers subsequently denied payment on the claim and a suit was filed by Plaintiffs.

Farmers' investigation revealed that Mr. Rhodes made several false statements related to his claim. Farmers moved for summary disposition under the argument that Mr. Rhodes knowingly misrepresented several material facts related to his no-fault claim and therefore was ineligible for benefits under an assigned claims plan pursuant to MCL 500.3173a. Among several false statements Mr. Rhodes made in relation to his claim, two specific statements were most important. First, Mr. Rhodes stated on his no-fault application that he never used any aliases. His prison records, however, listed at least six known aliases. During a deposition, Mr. Rhodes testified that he indeed had used numerous aliases in the past and had even used an alias to avoid a felony charge.

The second critical misrepresentation made by Mr. Rhodes revolved around his reporting of who else resided in the same house as he did at the time of the accident. Mr. Rhodes was required to list on his no-fault application all persons that lived with him at the time of the accident. Mr. Rhodes only listed his mother on this portion of the application. Several weeks later, Mr. Rhodes produced an affidavit that contradicted his application. The affidavit stated that Mr. Rhodes lived with his mother, father, brother, and sister at the time of the accident. This affidavit, however, was still factually incorrect. Mr. Rhodes testified nearly two years following the accident that Simone Copeland, the owner of the vehicle driven by Mr. Rhodes during the accident, also resided at the house at the time of the accident.

Pursuant to MCL 500.3173a(2), a claim that is paid through the assigned claims plan will become ineligible for payment or benefits if it contains or is supported by a fraudulent insurance act. Farmers argued that Mr. Rhodes' numerous false statements were material to his claim and he was therefore barred from recovery of any benefits. Judge Fresard ruled that reasonable mistakes by Mr. Rhodes, such as the failure to disclose certain medications and past medical conditions, were not sufficient to warrant a dismissal. Contrarily, Judge Fresard ruled that failure to list known aliases or individuals you live with could not be viewed in the same light. Mr. Rhodes could not have reasonably forgotten to list any of his six known aliases on his no-fault applications. Similarly, Mr. Rhodes could not have merely made a reasonable mistake when he listed only one other person as residing in his house with him when in fact 5 additional people also lived there. These omissions proved Mr. Rhodes knowingly misrepresented several material facts related to his no-fault claim. Therefore, Mr. Rhodes was barred from recovery of any benefits pursuant to MCL 500.3173a(2) and Farmers' motion for summary disposition pursuant to MCR 2.116(C)(10) was granted.

Result: Dismissal with prejudice and without costs
Credit: Miles Hammond

Orthokinect v. State Farm Mutual Automobile Insurance Company

Wayne County Circuit Court, Judge Edward Ewell, Case No. 14-011545-NF

Orthokinect LLC provides durable medical equipment to medical offices, including Mendelson Kornblum Orthopedics. A number of inferential spine stimulators were supplied to Mendelson Kornblum by Orthokinect. These stimulators were given directly to patients treating at Mendelson Kornblum. Orthokinect, in turn, billed the insurers of these patients for the stimulators. State Farm denied payment on bills submitted by Orthokinect in relation to nine different patients. Orthokinect subsequently filed a lawsuit in Wayne County Circuit Court seeking payment of PIP benefits on behalf of nine different claimants. The claimants, however, were each involved in separate motor vehicle accidents and each individual claim by Orthokinect was for less than $7,000.

State Farm filed a motion for summary disposition, arguing that Orthokinect's claim was not one conglomerate claim, but was actually nine separate claims. Since all of the individual claims were for less than $7,000, the amount in controversy for each claim did not exceed $25,000 and the circuit court therefore lacked subject matter jurisdiction. Citing *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774, 777; 348 NW2d 25 (1984) and *Moody v Home Owners Ins Co*, 304 Mich App 415; 849 NW2d 31 (2014), State Farm argued that Orthokinect was not bringing its own claim, but the claims of the nine injured individuals, and Orthokinect could not combine or "stack" those nine claims to meet the amount-in-controversy jurisdictional threshold of the circuit court. The circuit court agreed, finding that it lacked subject matter jurisdiction to hear the individual cases separately and Orthokinect could not save the jurisdictional error by stacking the claims together. Accordingly, the circuit court granted State Farm's motion for summary disposition for lack of subject matter jurisdiction. Orthokinect's claims were dismissed without prejudice and sanctions of $150.00 per claim were issued to be assessed in the event any of the claims are refiled in a court of competent jurisdiction.

Result: Dismissal without prejudice
Credit: Jim Hewson, Elaine Sawyer, and Jordan Wiener

Mario Garmoo & Lamonica Burley v. Farmers Insurance Exchange

Wayne County Circuit Court, Judge David J. Allen, Case No. 13-014162-NF

Plaintiffs initiated a lawsuit against Farmers Insurance Exchange in an effort to recover allegedly overdue expenses under the No-Fault Act in relation to a motor vehicle accident that occurred in December of 2012. Garden City Rehab, LLC and Summit Physicians Group, PLLC, both subsequently filed as intervening plaintiffs seeking no-fault benefits on behalf of Plaintiffs Garmoo and Burley.

Farmers argued Intervening Plaintiffs' were not entitled to no-fault benefits and filed a motion for partial summary disposition. First, Farmers argued that Summit Physicians Group submitted misleading, if not fraudulent, service forms that allegedly documented medical expenses for the treatment of Plaintiffs Garmoo and Burley. The forms listed Dr. Jankowski as the physician rendering care to these plaintiffs. During their depositions, however, Plaintiffs Garmoo and Burley stated they never treated with Dr. Jankowski. Rather, they only treated with Emmitt Spradlin, a nurse practitioner who worked at Summit. Additionally, even Dr. Jankowski intimated that Mr. Spradlin signed several of the submitted forms, prescribed physical therapy, wrote disability certificates, and ordered MRIs for Plaintiffs Garmoo and Burley. Farmers cited *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 159; 388 NW2d 216 (1986) in which the court held an insurer is not obligated to pay any allowable expenses "except upon submission of evidence *that services were actually rendered* and of the actual cost expended." (emphasis added). Summit erroneously submitted claim forms that listed Dr. Jankowski as the rendering physician despite clear evidence that Dr. Jankowski never treated Plaintiffs Garmoo or Burley at all. Therefore, Farmers argued it could not be liable for the claimed services that were never actually performed by Dr. Jankowski.

Additionally, Famers argued that a portion of Garden City Rehab's claim should be dismissed for lack of valid prescriptions for the services. MCL 333.17820(1) clearly states that physical therapy must be rendered based on a prescription from an appropriately licensed individual. A licensed doctor issued prescriptions for Plaintiff Garmoo and Burley to treat at Garden City Rehab. These prescriptions, however, expired on January 16, 2013. All subsequent prescriptions were issued by Mr. Spradlin at Summit Physicians Group. Mr. Spradlin, as a nurse practitioner, could not lawfully prescribe physical therapy. As a result, Farmers argued that all of the expenses incurred by Garden City Rehab after January 16, 2013 must be dismissed as a matter of law because they were not lawfully rendered.

The Court agreed with Farmers and granted its motion. All of the claims made by Summit Medical Group and all the Garden City Rehab claims based on prescriptions from Mr. Spradlin were dismissed with prejudice.

Result: Dismissal of two provider claims with prejudice
Credit: Timothy Brady and Grant Jaskulski

Petronius Woodberry v. State Farm Mutual Automobile Insurance Company, et al.

Wayne County Circuit Court, Judge Sheila Ann Gibson, Case No. 13-013987-NF

Plaintiff was involved in a motor vehicle accident and filed a lawsuit against State Farm seeking payment of PIP benefits. Among the claims of the action, Plaintiff sought benefits related to physical therapy and chiropractic massage therapy. State Farm filed a motion for summary disposition under the theory that Plaintiff's physical therapy was not lawfully rendered and the massage therapy rendered to Plaintiff was not reasonably necessary for his care and rehabilitation.

Regarding benefits related to physical therapy, Plaintiff treated with physical therapist Leonidas Yaun at the Michigan Center for Physical Therapy. During his deposition, Mr. Yaun claimed Plaintiff was referred to his clinic by Dr. Noel Upfall. Mr. Yaun claimed to have received a prescription from Dr. Upfall but was unable to find a copy in his records. Upon being furnished with a copy of the prescription from Dr. Upfall's office during the deposition, Mr. Yaun testified that the prescription did not contain a doctor's signature and was therefore invalid.

Plaintiff also sought benefits for massage therapy provided by Elite Chiropractic. Elite billed $50.00 per ten-minute massage that Plaintiff allegedly received during each visit to Elite. Farmers deposed Elite's massage therapist, who stated she was pressured by Elite to perform 50 "sample" massages per day. She said she was told to force patients into massages even if they did not want them and that a $50.00 charge for the ten-minute "sample" massage was unreasonable.

Based on the aforementioned reasons, the Court agreed with State Farm's argument that the Michigan Center for Physical Therapy provided physical therapy to Plaintiff without a valid prescription. Additionally, the Court agreed that Plaintiff's massage therapy conducted by Elite Chiropractic was unreasonable and unnecessary. Therefore, the Court granted State Farm's motion for summary disposition and dismissed both of these claims.

Result: Dismissal of physical therapy and massage therapy claims
Credit: Timothy Brady and Nicholas Ayoub

Welcome to Our New Associate Attorneys

Devin Bone

Devin Bone graduated from Michigan State University with a Bachelor of Arts in International Relations in May 2011. He attended Michigan State University College of Law, earning his Juris Doctor *Cum Laude* in May 2014.

While at Michigan State University College of Law, Mr. Bone served as Executive Editor of the Michigan State Law Review, participated in the Geoffrey Fieger Trial Practice Institute, and was selected as a member of the Michigan State ABA Negotiation Team after winning the 2013 Intraschool Negotiation Competition. Mr. Bone also served as a student clinician in the Investor Advocacy Clinic, representing investors in arbitration cases against negligent broker-dealers and financial advisors. Mr. Bone rounded out his legal education with numerous appearances in district and circuit court, as well as numerous ADR proceedings.

Kimberly Carmack

Since 1999, Kimberly Carmack has defended the interests of insurance companies and their insureds with respect to all aspects of No-Fault Automobile Litigation. Ms. Carmack's expertise includes the handling of claims under special investigation as well as catastrophic claims and claims administered through the Michigan Assigned Claims Facility. She has successfully tried No-Fault and Auto Theft cases to jury verdict. Additionally, her accomplishments include a judgment in favor of her self-insured client in excess of $1.2 million as reimbursement arising out of a No-Fault priority dispute.

Ms. Carmack received her J.D., *Cum Laude* from Michigan State University College of Law in 1999. While attending law school, Ms. Carmack was an active member of the Moot Court Board where she received awards and earned a scholarship for participating in national Moot Court competitions, including the Starr Insurance Law Competition at the University of Connecticut. She was formally inducted into the Order of Barristers in 1999. Kimberly received her B.A. degree from Michigan State University, James Madison College in 1996. She was admitted to practice law before the State Bar of Michigan in 1999 and the State Bar of Connecticut in 2000.

Prior to joining Hewson & Van Hellemont, P.C. in 2014, Ms. Carmack effectively litigated claims on behalf of multiple insurance carriers and their insureds in the areas of First Party and Third Party No-Fault litigation, real and personal property litigation, premises liability litigation, products liability litigation, and mold litigation. Additionally, Ms. Carmack has served as in-house counsel to a major, national, Fortune 500 Insurance Company. Ms. Carmack has authored multiple publications and has conducted presentations that have been instructive in the area of No-Fault litigation. Kimberly is an active member of the State Bar of Michigan Negligence Section as well as the Macomb County Bar Association.

Meagan Drewyor

Meagan Drewyor joined Hewson & Van Hellemont, P.C. in 2014 as a Law Clerk. Ms. Drewyor attended the University of Michigan where she graduated with honors and received a Bachelor's Degree in History and Sociology in 2010. She attended Wayne State University Law School and received her Juris Doctorate in 2014.

During Law School, Ms. Drewyor clerked at a Plaintiff's firm doing first and third party No-Fault work. While attending Wayne State, she also worked at the Free Legal Aid Clinic, Inc. as both a Student Attorney and member of the Board of Directors. She also interned at the Michigan Unemployment Insurance Project, a non-profit organization that specializes in Unemployment Benefit advocacy.

Dustin Hess

Dustin Hess graduated from Albion College in 2011 with a Liberal Arts degree in Economics and Management with an Emphasis in Accounting. He was also a four year letter winner in football.

After Albion College, Mr. Hess attended the University of Detroit Mercy Law School and graduated in 2014. During law school, Mr. Hess worked as an intern for Judge Michael Riordan of the Michigan Court of Appeals in 2013 and also worked as a legal clerk for Stevenson and Bullock PC in 2013.

In February of 2014, Mr. Hess joined Hewson & Van Hellemont, P.C. as a law clerk. His primary focus is No-Fault Insurance Defense. Mr. Hess was admitted into the State Bar of Michigan in the fall of 2014.

Jason Labelle

Jason LaBelle joined Hewson & Van Hellemont, P.C. in 2014 after graduating from law school. Prior to graduation, he worked for an intellectual property law firm. He also held an internship at the Wayne County Circuit Court.

Mr. LaBelle graduated from the University of Michigan with a Bachelor's Degree in Political Science and English. He earned his Juris Doctorate from Michigan State University College of Law with honors. He is certified as a Civil Mediator. Mr. LaBelle was admitted into the State Bar of Michigan in 2014.

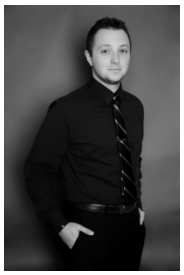
Andrea Mannino

Andrea Mannino graduated *Cum Laude* from Grand Valley State University in 2010 where she received a Bachelor's in Business Administration with a double major in International Business and Economics, and a minor in Spanish, She also studied abroad at the University of Deusto in Bilbao, Spain.

Ms. Mannino then attended Michigan State University College of Law, where she graduated *Cum Laude* in 2014. While attending law school, Andrea was awarded a scholarship by the Italian American Bar Association of Michigan for academic excellence. She was a member of the Trial Practice Institute, a highly competitive certificate litigation program. She was also a member of the Moot Court Trial Advocacy Board, where she participated in national competitions and served as the Board's Recruitment Chair.

In 2013, Ms. Mannino was selected as a Summer Fellow at the Harvard Legal Aid Bureau, where she worked at the Bureau's Family Law Clinic. She provided legal assistance to low-income individuals in the greater Boston area. She prepared and argued cases before judges in the Probate and Family Court as a certified student attorney. Ms. Mannino is committed to charity work. In the past years, she has organized teams for the Leukemia & Lymphoma Society's "Light the Night Walk" and she has participated in several international mission trips to aid underprivileged communities.

Michael Marx



Michael Marx received his Bachelor's Degree in Journalism from Michigan State University. During his undergraduate education, Mr. Marx wrote for the Lansing State Journal and interned at the Michigan House of Representatives.

Mr. Marx went on to earn his Juris Doctorate from the University of Detroit Mercy – School of Law. Mr. Marx attended law school on a Dean's Scholarship and graduated *Cum Laude* in 2014. While in law school, he competed on the National Moot Court team and participated in Detroit Mercy's Criminal Law Clinic. Mr. Marx gained legal experience while interning at the Michigan Court of Appeals and during his time as a law clerk in the Office of General Counsel for Blue Cross Blue Shield of Michigan.

Sam Mate, Jr.

Sam Mate, Jr. received his Bachelor's Degree in Political Theory and Constitutional Democracy from the James Madison College at Michigan State University. He went on to earn his Juris Doctorate from the University of Detroit Mercy – School of Law.

During his time at law school Mr. Mate participated in the Criminal Trial Clinic. The Clinic allowed him to assist the Court-Appointed Attorneys at the 52-4 District Court in Troy. While in the clinic, he defended clients charged with OWI offenses, DWLS, drug possession, retail fraud, and a variety of other offenses. Mr. Mate was also a member of the University of Detroit Mercy School of Law Moot Court team.

Sam has previously clerked at a personal injury firm where he gained invaluable experience with No-Fault and Personal Injury matters from start to finish. Mr. Mate has also worked at a Detroit Insurance Defense firm where he was exposed to a variety of legal fields including insurance defense/subrogation, worker's compensation, employment, and landlord/tenant matters.

Selena Stanski

Selena Stanski graduated *summa cum laude* from the University of Detroit Mercy in 2011 where she received a Bachelor's Degree in History and Secondary Education. She was also a full-ride scholarship athlete on the university's soccer team.

Ms. Stanski then attended Wayne State University Law School and received her Juris Doctorate in 2014. During law school, Selena served as a board member for the Student Trial Advocacy Program, where she participated in and judged mock trial competitions. While attending Wayne State, Ms. Stanski was also a law clerk at several legal offices, including the Office of the General Counsel for the University of Michigan.

Joshua Trombley

Joshua Trombley received his Bachelor's Degree in Political Science/Pre Law and Criminal Justice from Michigan State University in 2011. He attended Michigan State College of Law on a full-tuition faculty scholarship and graduated *Summa Cum Laude* in 2014. He was a member and associate editor of the Michigan State Law Review.

During his undergraduate education, Mr. Trombley worked for the Student Body Government as a Student Defender. As a Student Defender, Mr. Trombley interviewed, prepared, and acted as counsel for students during university hearings for violations of ordinances and regulations. While in law school, Mr. Trombley worked as a law clerk for a Mid-Michigan law firm specializing in education and municipal law.

News & Announcements

Toys for Tots Participation

We participated in the Association of Legal Administrators Community Connections winter project, Toys for Tots, from November 1st through November 30th. We teamed up with the United States Marine Reserves together with ABC Harley Davidson of Waterford, Michigan. The project was a huge success and our employees graciously donated toys for children of all ages.

News & Announcements Continued

1st Chili Cook-Off

Congratulations to Brenda Jenkins, Mike Phillips, and Jim Hewson, the three top finishers in Hewson & Van Hellemont's 1st ever chili cook-off. The event was held along with a firm-wide potluck lunch to celebrate the annual football game between the University of Michigan and Michigan State University. Many types of chili were brought, along with many other dishes and desserts. Thank you to all who participated and helped make this a fun and successful event.

No-Fault Summit

We are happy to announce that 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.

Recent Opinions

Wyoming Chiropractic Health Clinic v. Auto-Owners Ins. Company

Michigan Court of Appeals

Published Opinion - Docket No. 317876

December 9, 2014

Healthcare provider had standing to sue for PIP benefits on behalf of insured patients under the no-fault act.

Auto-Owners Insurance Company appealed an order entering judgment in favor of Wyoming Chiropractic Health Clinic. Auto-Owners argued that the trial court erred in denying its motion for summary disposition. In the motion, Auto-Owners argued that Wyoming Chiropractic was not a real party to the suit and was improperly asserting the rights of insured individuals. Auto-Owners contended that a healthcare provider, such as Wyoming Chiropractic, did not have standing to bring an action for the purpose of obtaining PIP benefits under the no-fault act.

The appellate court cited several cases in laying out its decision on the matter. As decided in *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich All 377, 554 NW2d 59 (1996), a healthcare provider has the right to be paid for a patient's no-fault medical expenses. The court stated "[t]he fact a healthcare provider submits a claim on behalf of an insured individual allows a healthcare provider to sue to enforce the penalty provisions of the no-fault act." (Opinion at 6). The court also cited *Lakeland Neurocare v State Farm Mut Auto Ins Co*., 250 Mich App 35; 645 NE2d 59 (2002). Auto-Owners argued that the *Lakeland Neurocare* opinion only discussed a provider's right to penalty interest or attorneys' fees under the No-Fault Act, and did not discuss whether a provider was entitled to sue for PIP benefits. The appellate court, however, did not find Auto-Owners' argument to be persuasive. The court held that the reasoning in *Lakeland Neurocare* also applied to healthcare provider claims for PIP benefits. Therefore, *Lakeland Neurocare* held that a healthcare provider has a direct cause of action to sue an insurer for PIP benefits under the no-fault act.

Additionally, the court stated public policy reasons supported the rulings in these past cases. Allowing healthcare providers to bring a cause of action serves to expedite the payment process to the healthcare provider when payment is in dispute. It also prevents inequity by providing a remedy to a healthcare provider when an insured individual does not sue an insurer for unpaid PIP benefits.

In light of these past decisions and public policy considerations, the appellate court held that Wyoming Chiropractic had standing to sue Auto-Owners for PIP benefits under the no-fault act. Therefore, the decision of the trial court to deny Auto-Owners motion for summary disposition was affirmed.

Estate of William Hankins v. Fremont Insurance Company

Michigan Court of Appeals

Unpublished Opinion - Docket No. 317358
December 4, 2014

Plaintiff's five month delay to file claim with insurer for personal property damage constituted failure to provide prompt notice and barred Plaintiff from recovery.

Plaintiff alleged that his home sustained significant water damage after a pipe in burst in his basement. It was undisputed that Plaintiff failed to notify his insurer, Fremont Insurance Company, of his claim for over five months. During that time, however, Plaintiff hired a workman to repair the pipe and to make extensive repairs and remodeling on the house. All of the physical evidence of the alleged water damage was disposed of by the workman before Plaintiff filed his claim with Fremont. Upon filing of the claim, Fremont denied coverage due to failure to meet the "prompt notice" requirement of the policy.

Plaintiff filed suit against Fremont to recover benefits under his claim. Fremont filed for summary disposition arguing Plaintiff's failure to provide prompt notice barred them from recovery. The trial court denied Fremont's motion and the decision was appealed.

The appellate court noted that "prejudice to the insurer is a material element in determining whether notice is reasonably given and the burden is on the insurer to demonstrate such prejudice." (Opinion at 3.) The court recognized that an insurer suffers a prejudice when an insurered fails to provide prompt notice and subsequently impair the insurer's ability to conduct an investigation to contest liability. In this particular matter, Plaintiff's actions prevented Fremont from conducting its own investigation of the incident and the resulting damage. Because of Plaintiff's delay, Fremont was unable to protect its interests to settle, or contest its liability with Plaintiff.

The appellate court held that the failure to provide prompt notice caused Fremont significant prejudice and therefore summary disposition in favor of Fremont was warranted. The matter was remanded to the trial court for entry granting Fremont's motion for summary disposition.

Estate of Ronnie Hubbert v. Auto Club Ins. Association

Michigan Court of Appeals

Unpublished Opinion - Docket No. 314670
December 4, 2014

Trial court's decision to strike testimony of a non-party for failure to obey a subpoena duces tecum unduly prejudiced defendant and warranted a reversal and new trial.

Defendant, Auto Club Insurance Association, appealed a first-party no-fault judgment in favor of Plaintiff following a jury trial. Auto Club argued on appeal that the trial court abused its discretion in striking the testimony of their medical expert witness, Dr. Phillip Friedman, as a sanction for Dr. Freidman's failure to comply with a subpoena duces tecum.

The appellate court disagreed with the trial court's reasoning that it was appropriate to sanction a party for a nonparty witness's failure to comply with a subpoena duces tecum. As the court stated, Dr. Friedman was not a party in the matter nor was he a designated representative of Auto Club. The court found no basis in the court rules to support the sanctioning of a party for a nonparty's failure to obey a subpoena. The appropriate sanction would have been to hold Dr. Friedman in contempt.

The appellate court, however, took its analysis one step further. It held that even *if* such a sanction could have been imposed on Auto Club, the trial court's was incorrect in its application of established factors for determining appropriate sanctions. *Dean v. Tucker*, 182 Mich App 27, 32-33, specifies seven factors to consider when determining the appropriate sanction. The court relied on these factors and incorrectly applied them to the facts of this case. Conversely, the appellate court examined the actions of Dr. Friedman under the light of these factors and reached a different conclusion. The appellate court did not find any evidence to establish Dr. Friedman willfully refused to obey the subpoena or had a history of doing so. Further, Plaintiff was not prejudiced by Dr. Friedman's inadvertent failure to obey the subpoena. Lastly, and most importantly, the appellate court held that a lesser sanction would have better served the interests of justice. Striking Dr. Friedman's testimony deprived Auto Club of its only expert witness who could dispute Plaintiff's theory of causation.

In light of these facts, the ruling of the trial court was reversed and the matter was remanded for a new trial.

Estate of India Arne Thomas v. Citizens Insurance Company of America, et al.

Michigan Court of Appeals

Published Opinion - Docket No. 312702
November 13, 2014

The No-Fault Act's one-year statute of limitations can be tolled pursuant to the minority and insanity provisions of MCL 600.5851(1), but the one-year-back-rule is not similarly subject to MCL 600.5851(1).

India Thomas was a minor when she suffered a catastrophic brain injury in a 2001 motor vehicle accident. It was undisputed that no identifiable coverage applied to India's injury and written notice of her claim for PIP benefits was given to the Michigan Assignment Claims Facility in 2010. The claim was assigned to Citizens Insurance Company of America. Citizens subsequently denied payment of PIP benefits on the basis that Plaintiff's claim was time-barred under MCL 500.3145(1) and MCL 500.3174.

Plaintiff filed suit against Citizens in 2010. Following a hearing, the trial court granted partial summary disposition in favor of Plaintiff. The trial court ruled that the one-year statute of limitations under MCL 500.3145(1) was tolled pursuant to the minority/insanity tolling provisions of MCL 600.5851(1). Additionally, the trail court ruled that MCL 500.3174 did not contain a one-year back rule and therefore MCL 500.3145(1) did not apply to Plaintiff's claim.

On appeal, Citizens argued that the trial court erred by not dismissing Plaintiff's claim for failure to provide timely notice. Citizens argued that Plaintiff could not invoke a minority or insanity claim under MCL 600.5851(1) to toll the statute of limitations because the statute was limited to actions arising under the Revised Judicature Act and actions under the No-Fault Act are not under the Revised Judicature Act. The appellate court, however, cited *Klida v Braman*, 278 Mich App 60; 748 NW2d 244 (2008), in which it was held that all civil actions are brought under the Revised Judicature Act whether based on statute, common law, or contract. Since Plaintiff's action was a civil action, the minority/insanity tolling provisions of MCL 600.5851(1) were applicable to the claim and the decision of the trial court on this issue was affirmed.

The Court did rule, however, that the minority/insanity tolling provisions did not apply to the one-year-back rule. The Court cited *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App. 219;779 NW2d 304 (2009), which held that claims filed through the MACF remained subject to one-year-back-rule of MCL 500.3145(1). The Court noted that the Legislature omitted any language from MCL 500.3174 that would have extended the recovery limitation. Thus, recovery of benefits under MCL 500.3174 remained subject to the one-year-back-rule. The trial court therefore erred by not enforcing the one-year-back-rule pursuant to MCL 500.3174

Diana L. Lenk v. Frankenmuth Mutual Insurance Company, et al.

Michigan Court of Appeals

Unpublished Opinion - Docket No. 317104
November 25, 2014

Plaintiff was unable to demonstrate she sustained an objectively manifested impairment of body function as required by MCL 500.3135(1) and *McCormick*.

Plaintiff was involved in a motor vehicle accident in October of 2010. While at the scene of the accident, Plaintiff denied any injury. Later that day, however, she sought treatment for neck and back pain. CT scans were taken of her cervical and thoracic spine but revealed no abnormalities. Her alleged back pain persisted and eventually more sophisticated imaging studies were conducted. These tests also failed to reveal any spinal injuries or abnormalities.

Despite the lack of any observable injury, doctors recommended Plaintiff undergo a series of facet injections, followed by thermal radiofrequency treatment. Plaintiff claimed to have only gained temporary relief from these treatments.

In January of 2012, Plaintiff filed a lawsuit against Defendants, who subsequently filed a motion for summary disposition under MCR 2.116(C)(10). Defendants argued that Plaintiff had failed to demonstrate a serious impairment of body function as required by MCL 500.3135(1). The motion was granted and Plaintiff appealed.

MCL 500.3135(5) defines "serious impairment of a body function" as "an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life." (Opinion at 2). The appellate court analyzed Plaintiff's claim to a serious body impairment under the three-prong test from *McCormick v. Carrier*, 487 Mich 180; 795 NW2d 517 (2010). The first prong of the *McCormick* test requires a Plaintiff to demonstrate "an objectively manifested impairment." Plaintiff provided no objective support for her claim that she suffered a threshold injury. Plaintiff's medical records showed no signs of spinal injuries or obvious or measurable neurological deficits. Her claims were wholly supported by subjective complaints such as stiffness and pain with movement. Despite these subjective complaints, Plaintiff only missed five days of work as a mill operator. Other than a restriction from snow shoveling, Plaintiff's post-accident activities remained medically unlimited.

In light of the evidence, the appellate court held that Plaintiff failed to provide any evidence of an objective impairment as required under the first prong of the *McCormick* analysis. Accordingly, the ruling of the trial court was affirmed.

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