Gallagher Sharp LLP

Michigan Law Update

December 2017

Highlights:

Michigan Supreme Court

Notice Must be Injury-Specific Under the One-Year-Back Rule.

Jessica Dillon was involved in a motor vehicle accident and provided timely notice of her injuries involving her left shoulder and lower back. After the statutory one-year period expired, however, the insurer received notice of Dillon's treatment of a left hip injury that had previously been unreported.

Under the statute of limitations to recover personal protection benefits, a claimant must provide "written notice of injury" to the No-Fault insurer within one year of the motor vehicle accident. See, MCL 500.3145(1). The statute further provides: "[t]he notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place, and nature of his injury." *Id*.

The court of appeals interpreted MCL 500.3145(1), and pointed out that "written notice of injury" lacked a definite article, suggesting that notice of a particularized or specific injury was not necessary to constitute notice. The supreme court rejected the court of appeals' interpretation of MCL 500.3145(1), namely its disregard for the requirement that the claimant present notice of the "nature of his injury." In parsing this provision, the court concluded that the legislature intended to instruct the claimant to describe the inherent characteristics of the particular injury with some degree of specificity.

Accordingly, the supreme court held that injury-specific notice is required for purposes of the statute of limitations on the recovery of personal protection benefits. In affirming the court of appeals judgment in the underlying case, however, the court's holding still permits a claimant's belated notice of injury to relate back if there is traceability between the "new" injury and one that is timely reported within one year of the accident. The nature or extent of the traceability required, however, is likely to be explored by the lower courts. *Dillon v State Farm Mut. Auto. Ins. Co.*, ___ Mich ___ (No. 153936, November 9, 2017).

Michigan Court of Appeals

Owner of a Motor Vehicle Must Personally Maintain No-Fault Insurance on That Vehicle to Recover Tort Damages Under MCL 500.3135.

Junior Salmo was involved in a motor vehicle accident and sustained an alleged shoulder injury. He commenced an action to recover tort damages against the other driver, Olivero, the car's owner, Emerick, and UIM benefits from Auto-Owners. Salmo owned, but did not personally insure the Chevy Malibu that was involved in

the accident. Instead, his ex-wife's business had purchased a No-Fault policy issued by Auto-Owners covering the Malibu. Salmo argued that MCL 500.3101 only required him to "maintain" insurance on his vehicle, regardless of whether it was through his ex-wife's business or his own personal policy.

The court of appeals relied on a prior, unpublished decision in *Barnes v Farmers Insurance Exchange* (No. 314621, July 29, 2014). In *Barnes*, the court interpreted MCL 500.3131(1) to require an owner or registrant to maintain security or insurance on the motor vehicle. The facts in *Barnes* differed slightly in that the plaintiff was seeking to recover PIP benefits, rather than tort damages under MCL 500.3135; however, the court still deemed it to be controlling precedent regarding Salmo's third-party claim.

The supreme court pointed out that while the two statutory provisions confer different benefits, both provisions incorporate the language of § 3131(1) as a condition precedent to recover under the No-Fault Act. ("Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by [MCL 500.3101] at the time the injury occurred.") MCL 500.3135(2)(c)).

Consequently, the court concluded that Salmo was disqualified from recovering tort damages under MCL 500.3135 as well as UIM benefits, because as an owner, he failed to personally maintain insurance on the car involved in the accident. *Salmo v Oliverio, Emerick and Auto-Owners Insurance Co.* (No. 333214, October 17, 2017, unpublished opinion).

Court of Appeals Strengthens an Insurer's Ability to Rescind Policy

The court of appeals issued an Order which allowed a defendant insurer to rescind its policy in light of an insured's failure to report a change of address. The court of appeals recognized this omission as an innocent misrepresentation, which if reported, would have resulted in a higher premium. The court instructed, in general, that an affidavit of an underwriter is sufficient to establish a material misrepresentation, and any misrepresentation that exposes the insurer to greater risk or would have resulted in a higher premium, but for the misrepresentation, renders it material. See, e.g. *Titan Ins Co v Hyten*, 491 Mich 547, 556; 817 NW2d 562 (2012; *Montgomery v Fidelity & Guarantee Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005); *Keys v Pace*, 358 Mich 74, 81; 99 NW2d 547 (1959).

Moreover, constructive notice was not imputed onto the insurer as "an insurer does not owe a duty to the insured to investigate or verify [an] individual's representations or to discovery intentional material misrepresentations." *Hammoud v Metropolitan Property and Cas Ins Co*, 222 Mich App 485, 489; 563 NW2d 716 (1997). As one last step of its analysis, the court noted that the defendant insurer properly refunded the plaintiff's premiums paid from their last renewal date, entitling it to rescind the policy on both contractual and common law grounds. The Michigan Supreme Court denied review of the Order. *Romoulo Chateau v Auto Club Group*, 895 NW2d 554 (Mich 2017). *Romoulo Chateau v Auto Club Group*, (No. 336115, March 31, 2017, unpublished opinion).

"Procedural Defect: Healthcare Providers Precluded from Aggregating Claims in an Effort to Meet Amount in Controversy Threshold for Circuit Court"

Plaintiff, Priority Patient Medical Transfer LLC a medical transportation service provider, sued defendant Farmers Insurance Exchange in circuit court to recover PIP benefits for the transportation reimbursement related to 14 separate individuals. Defendant filed for summary disposition, pursuant to MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction. Specifically, plaintiff could not aggregate separate PIP claims in order to meet the amount in controversy threshold set forth by MCL 600.8301(1) (district courts maintain "exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00"). Plaintiff argued that it has the ability to aggregate its claims, solely for the purpose of satisfying the jurisdictional threshold, in excess of $25,000.00.

The court of appeals cited its decision in *Boyd v Nelson Credit Centers*, 132 Mich App 774; 348 NW2d 25 (1984), in evaluating plaintiff's amount in controversy for purposes of subject-matter jurisdiction. In *Boyd*, a breach of contract dispute, the court held that in an action which is not a class action, the individual claims of multiple plaintiffs could not be aggregated to "establish the jurisdictional minimum for circuit court." *Boyd*, 132 Mich App at 780-81.

Accordingly, the court of appeals affirmed the circuit court's decision, dismissing the plaintiff's claims for lack of subject-matter jurisdiction. This ruling is likely to be of great significance as it extends *Boyd's* holding to the context of provider suits under the No-Fault Act, which are vulnerable to the permissible rules of joinder. The Michigan Supreme Court denied review. *Priority Patient Transport, LLC v Farmers Insurance Exchange*, 902 NW2d 863 (2017). *Priority Patient Transport, LLC v Farmers Insurance Exchange* (No. 329420, June 1, 2017, unpublished opinion).

Covenant Update: Court of Appeals Dismisses Plaintiff's Provider Suit on the Basis that the Assignment was Executed after the Filing of the Complaint

A healthcare provider's suit to recover PIP benefits was dismissed in light of its concession that its patients, the insureds, made no assignment of their claims prior to the plaintiff's provider suit being filed.

Interestingly, the procedural history of the underlying case, and the issue up for review, did not relate to the assignment or any standing issues with respect to the provider plaintiff. Instead, the court of appeals granted leave to determine whether reports prepared for non-party independent medical examinations (IMEs) may be obtained for the purpose of establishing bias by the physician retained by the defendant insurer. During the pendency of the application and review process, the supreme court issued *Covenant*. Consequently, the court of appeals opted against deciding the IME issue, and dismissed the plaintiff's suit on the basis that its assignment was executed after the filing of the suit.

The court of appeals' per curiam opinion does not provide any further analysis with regard to the belated timing of the assignment, other than its conclusion that it is

grounds for dismissal of a provider suit. However, it likely signals that more definitive case law from the Court of Appeals is likely to come as the lower courts become increasingly split on the issue of assignment-based provider actions. *Standard Rehab v Grange Insurance Company of Michigan* (No. 331734, October 10, 2017, unpublished opinion)

Court of Appeals Takes on the Serious Impairment Inquiry under MCL 500.3135(1)

The court of appeals recently issued two unpublished opinions related to the serious impairment standard under MCL 500.3135(1), which limits the recovery of noneconomic tort damages to "(1) an objectively manifested impairment of (2) an important body function (3) that affects the person's general ability to lead his or her normal life." *McCormick v Carrier*, 487 Mich 180,195; 795 NW2d 517 (2010).

In *Janice Lee v Daniel Alan Cooley*, the plaintiff was involved in a motor vehicle accident as a passenger and sustained injuries to the neck, upper back and heart. The defendant moved for summary disposition as to the serious impairment issue and the court rendered a split decision, granting defendant's motion with regard to the heart condition and denying it as to the neck and back injury. Although the plaintiff was hospitalized for four days and underwent a heart catheterization procedure, the court highlighted the brevity of these events and concluded that the plaintiff recovered from the heart injury within two to four weeks. More importantly, plaintiff did not present any allegation as to how her life had been affected by the heart condition.

With respect to plaintiff's neck and back injuries, the court concluded that the trial court made an improper credibility determination in elevating a physical therapist's report, indicating that plaintiff's injuries resolved, in favor of a treating physician's continued treatment and recognition of plaintiff's complaints. Lastly, the court concluded that the plaintiff created a question of fact in her testimony as to a change in her normal life with respect to her limited ability to care after her children, perform housekeeping, and sit for a prolonged period without pain. *Janice Lee v Daniel Alan Cooley* (No. 334799, November 21, 2017, unpublished opinion)

Similarly, in *Robert Orwig and Rebecca Orwig v Farm Bureau*, defendant moved for summary disposition as to the serious impairment standard. The underlying facts involve the plaintiff, an on-duty police officer, being struck by a drunk driver who ran a stop sign. The objective manifestation and importance of body function prongs of the analysis were not meaningfully in dispute under these facts, as the plaintiff suffered a litany of injuries, including: posterior left hip dislocation, a left acetabular (hip socket) fracture, a left knee injury, a right ankle sprain, a laceration of his head, a closed head injury, a left rib strain, in addition to a vascular disorder. The Court of Appeals disagreed with the trial court on the issue of a change in his normal life.

Specifically, the court of appeals pointed out the plaintiff's testimony, indicating his limited participation in competitive running, bowling, and motorcycle running since the accident, was sufficient enough to constitute a change in his normal life, creating a question of fact. Accordingly, the court of appeals reversed and remanded the trial court's ruling, which originally granted the defendant's motion for summary disposition. *Robert Orwig and Rebecca Orwig v Farm Bureau General Insurance Company of Michigan* (No. 333603, November 16, 2017, unpublished opinion).

Critical Language Missing in a Trucking Insurance Carrier's Policy

Seven Maroky, a long-haul truck driver, was the sole member of a corporate entity, Envoy Trucking, and owned a 2006 Peterbuilt semi-truck. Envoy Trucking leased the semi-truck to ADM Transit and the parties executed an owner-operator agreement. As part of this agreement, Maroky was to haul loads on behalf of ADM Transit.

ADM Transit maintained a "trucking" policy with OODIA Risk Retention Group, Inc., which covered ADM Transit's fleet of leased vehicles which included Envoy's semi-truck. However, in late 2013, ADM Transit and OODIA executed a policy endorsement, listing the Maroky as an excluded driver. The other policy involved was issued by Hudson Insurance Company, which was a "bobtail" policy. (A "bobtail" policy covers a semi-truck when it is not actively hauling freight.) Maroky also maintained his own personal policy with the Encompass Indemnity. Notably, however, the personal policy excluded coverage of personal injury that results from the person's occupation of a vehicle weighing 10,000 pounds or more or used for "business."

In January, 2014, Maroky was hauling a trailer of freight to New Mexico on behalf of ADM Transit when he was struck by another semi-truck that ran a stop sign. Maroky initiated sued recover PIP benefits from Encompass, and a priority dispute ensued.

The court of appeals decided that OOIDA was highest in priority, as an employer-furnished vehicle under MCL 500.3114(3). OODIA's endorsement, excluding Maroky was ineffective as it did not contain the standard warning language required by MCL 500.3009(2). The court noted that the Hudson "bobtail policy" did not cover a truck actively hauling freight. Further, the court refused to impose a risk of liability on Encompass, Maroky's personal insurance carrier, in light of the explicit language excluding coverage on accidents arising out of the "business" use of a vehicle or involving a truck weighing more than 10,000 pounds. *Sevan Maroky v Encompass Indemnity Company* (No. 333489, October 19, 2017, unpublished opinion).

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Gallagher Sharp Continues to Grow!

We are pleased to welcome to the Michigan Bar our newest associates Chad Duschinsky and Tamara Todorovic.

Chad received his law degree, *cum laude*, from Michigan State University College of Law in 2017. He received his undergraduate degree from Michigan State University James Madison College in 2013.

Tamara received her law degree, *cum laude*, from Michigan State University College of Law in 2017, where she served as Associate Editor of *Michigan State Law Review*, President of the Canadian Legal Association, and received First Place in the International Academy of Dispute Resolution Mediation Competition. She received her undergraduate degree, *With Distinction*, from the University of Windsor in 2014, where she received the Board of Governors Medal and was selected to the Golden Key International Honour Society.

Both Chad and Tamara served as Law Clerks in Gallagher Sharp's Detroit office beginning in January of 2017.

About Gallagher Sharp

For over 100 years Gallagher Sharp LLP has provided aggressive and cost-efficient representation in a wide variety of civil litigation. Our registered service mark -- "Solutions, Not Surprises" -- embodies Gallagher Sharp's core philosophies and illustrates our commitment to partnering with clients by providing prompt and accurate reporting, case evaluations focused on early resolution strategies, thorough knowledge of your industry, client-oriented seminars, publications, and news advisories, rapid and on-site response to accidents, and nurse paralegals to assist in injury and wrongful death issues. We believe our client team structure gives clients the benefits of small firm responsiveness and accountability as well as large firm stability, experience, and resources.