Gallagher Sharp LLP

Michigan Law Update

October 2017

Highlights:

Michigan Supreme Court

Parked-Car Exception to No-Fault Insurance Act

On June 15, 2017, the Michigan Supreme Court broadened the parked-car exception to the Michigan No-Fault Insurance Act. After parking his car at home, Daniel Kemp tore a calf muscle while stretching on his tiptoes to unload a thermos, briefcase, and overnight bag from his truck. Kemp sought PIP benefits under his no-fault policy with Farm Bureau Insurance, but Farm Bureau denied his claim. Kemp admitted that his truck wasn't moving when he was injured, but Kemp's lawyers argued that he should qualify for PIP benefits regardless of this fact, as his injuries were related to the "transportational use" of the truck.

Although a Wayne County judge and the Michigan Court of Appeals held that Kemp was not entitled to PIP benefits from Farm Bureau for the injuries he sustained while his truck was parked, the Michigan Supreme Court disagreed. The Supreme Court concluded that Kemp was using his truck for transportation purposes when he was unloading his possessions from the vehicle while it was parked. The Court stated that although activities involving a parked car do not usually give rise to PIP benefits, MCL 500.3106(1)(b) provides an exception for injuries sustained while property is being loaded into or unloaded from a vehicle.

The Court's decision in *Kemp* overruled *Shellenberger v. Insurance Co. of North America*, 182 Mich. App. 601 (1990), which previously required a claimant's injuries to "result from" the vehicle's transportation function. Kemp, therefore, broadened the "transportational use" requirement under MCL 500.3106 to include the loading and unloading of items from a vehicle. *Daniel Kemp v. Farm Bureau General Insurance Company*, No. 151719.

Michigan Court of Appeals

Covenant Applies Retroactively

On August 31, 2017, the Michigan Court of Appeals held that the Michigan Supreme Court's decision in *Covenant Medical Center, Inc. v. State Farm Mutual Automobile Insurance Co.* applies retroactively in *W.A. Foote Memorial Hospital v. Michigan Assigned Claims Plan*, No. 333360.

In *Covenant*, the Michigan Supreme Court held that healthcare providers do not have a statutory cause of action against insurance companies for PIP benefits under MCL 500.3101 et seq. Prior to the Court's decision in Covenant, healthcare providers were able to claim PIP benefits even after the insurer reached a settlement with the injured party. Covenant stripped providers of this independent cause of action for PIP benefits.

Although *Covenant* established that healthcare providers no longer had an independent cause of action against insurers for PIP benefits, it did not address whether this rule was intended to be applied only prospectively or also to cases pending when the *Covenant* decision was made. As a result, different Michigan courts interpreted the retroactivity of *Covenant* differently prior to the Court of Appeals' ruling in *W.A. Foote*.

In *W.A. Foote*, the Michigan Court of Appeals finally ruled that *Covenant* does apply retroactively to cases that were pending when the *Covenant* decision was made. The Court declined, however, to specify whether "retroactive" meant full retroactivity or limited retroactivity. It invited the Michigan Supreme Court to clarify this. *W.A. Foote Memorial Hospital v. Michigan Assigned Claims Plan*, No. 333360.

Insurer's Motion for Summary Disposition Denied Because Policy did not Unambiguously State that the Insured's Action to Recover Uninsured Motorist Benefits was Time Barred

Wagner was injured on May 17, 2010, when her car was rear-ended by another driver who was delivering a pizza for his job at Pizza Hut. Both drivers involved in the accident were insured by Farm Bureau. Wagner filed a third-party claim against the other driver, and Farm Bureau filed a declaratory action, seeking a declaration that it had no duty to defend or indemnify the other driver because the other driver's policy did not provide coverage "'for liability arising out of the . . . operation of a vehicle while it [was] being used to carry . . . property for a fee.'" On June 23, 2014, the trial court granted Farm Bureau's motion.

On May 12, 2014, Wagner notified Farm Bureau of its potential UM or underinsured motorist claim. Farm Bureau sent Wagner a letter stating that the notice was not timely pursuant to the parties' policy, and, therefore, concluded that plaintiffs would not be eligible for UM coverage. Wagner commenced this suit on August 20, 2014.

Wagner's policy with Farm Bureau stated that Farm Bureau would "pay compensatory damages which the insured is legally entitled to recover from the owner or operator of an uninsured automobile." The policy further stated:

> Any person seeking Uninsured Motorist Coverage must:
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> * * *
>
> b. present to [Farm Bureau] a written notice of the claim for Uninsured Motorist Coverage within three years after the accident occurs."

> A suit against us for Uninsured Motorist Coverage may not be commenced later than three years after the accident that caused the injuries being claimed.

Because the accident occurred on May 17, 2010, the three-year time limit expired on May 17, 2013, before Wagner notified Farm Bureau and before she commenced this suit. Farm Bureau moved for summary disposition, arguing that plaintiffs' UM claims were time barred under the policy's unambiguous, enforceable, notice and filing time limitations.

However, the Court found that Wagner did not have a UM claim and, therefore, could not notify Farm Bureau of this fact within three years of the accident because the other driver's car did not become uninsured until June 23, 2014, when the trial court granted Farm Bureau's motion in Wagner's third party case. As a result, the Court of Appeals denied Farm Bureau's motion for summary disposition because its policy did not unambiguously state that plaintiffs' UM action was time barred. *Wagner v. Farm Bureau Mut. Ins. Co.* (unpublished opinion).

"Open and Obvious" Doctrine Does Not Apply to Negligence Claims

Lemmerhart slipped and fell on ice in the parking lot of a skating rink owned and operated by defendants. She argued that the ice was present because Marciniak failed to install a proper gutter on the building, leading to water discharge into the parking lot, and that Marciniak failed to address the problem of ice in the parking lot despite having been advised of its presence earlier that day by other patrons. Lemmerhart claimed both negligence and premises liability. The trial court found that Lemmerhart's claims were premises liability claims and that the ice was "open and obvious."

The Court of Appeals agreed with the trial court, stating, ". . . if the injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence. . . The distinction is whether the claim is based on 'the overt acts of a premises owner on his or her premises' or 'injury by a condition of the land.'" Further, the Court of Appeals agreed with Marciniak that defendants did not have a duty to exercise reasonable care in protecting against "open and obvious" dangers.

Generally, a premises possessor owes a duty of care to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, that duty does not extend to protect against "open and obvious" dangers unless the danger features "special aspects" making it "unreasonably dangerous" or "effectively unavoidable."

The Court of Appeals in *Lemmerhart* ultimately determined that the ice in the parking lot was open and obvious and that nothing made the ice unreasonably dangerous or effectively unavoidable, and ruled in favor of Marciniak as a result. *Lemmerhart v. Marciniak* (unpublished opinion).

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No Fault News

PIP Work Loss Benefit to Increase October 1st

Beginning on October 1, 2017, the maximum monthly wage loss benefit that a claimant can recover under the No Fault Act will be $5,541. According to the Michigan Department of Insurance and Financial Services (DIFS)'s Bulletin 2017-12-INS, Annual Adjustment of the Maximum Work Loss Benefit and Survivors' Loss Benefits Payable under Policies of Personal Protection Insurance:

> "[T]he new work loss … benefit payable, effective October 1, 2017 through September 30, 2018, shall not exceed $5,541 per single 30-day period. This maximum shall apply pro rata to any lesser period of work loss."

This is an increase of $89 from the 2016-2017 maximum amount of $5,452 per single 30-day period.

Gallagher Sharp is Growing!

Danielle Haberstroh recently joined Paul Galea and Tim Brady as partners in Gallagher Sharp's Detroit office.

Paul Galea's practice primarily involves maritime and admiralty litigation throughout Michigan and Ohio. Other substantive areas of Paul's law practice are professional liability, asbestos and toxic tort, insurance coverage, and ecclesiastical law.

Tim Brady's practice focuses mainly on first and third-party auto negligence and PIP litigation. Tim also has experience in the areas of construction, premises liability, professional malpractice, insurance coverage, product liability, and toxic tort litigation.

Danielle Haberstroh's practice revolves around the insurance industry, including first and third-party auto negligence and PIP claims. Danielle defends insurers in fraud, bad faith, arson and water damage litigation, and counsels on coverage disputes and policy language. Her experience also includes commercial litigation, bankruptcy, and medical malpractice.

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.