RCR

RICH, CAMPBELL & ROEDER, PC

RCR Fall 2020 Newsletter

Recession for Fraud– To Rideshare or Not to Rideshare?

A plaintiff insurance company sought to rescind an automobile policy issued on the basis of the policy's "concealment and fraud" provision. A judge's decision to deny that request should be affirmed despite the insurer's assertion that the owner was using the insured car to "carry persons…for compensation" without the scope of a policy exclusion.

The case of *AAA Member Select Ins. Co. v. Auto Owners Ins. Co.* arose out of a motor vehicle accident in which Defendants, Ms. Williams [Auto Owners] and Ms. Leftwich, were injured while passengers in a car driven by Mr. Parker and owned by Mr. Johnson [AAA]. Johnson's automobile insurer; provided a defense to Parker and Johnson under a reservation-of-rights letter.

AAA filed this lawsuit, seeking to rescind the automobile insurance policy it had issued to Johnson. AAA stated its policy excluded; "bodily injury or property damage while an insured car is used to carry person or property for compensation or a fee" of which they alleged Johnson was being compensated. AAA accused Johnson of concealment and fraud.

Auto Owners filed a countermotion of Summary Disposition arguing that AAA was higher in priority. The Supreme Court ruled in *Bazzi v. Sentinel Ins. Co.;* held in relevant part that the recession of an insurance policy is an equitable decision that falls within a trial court's discretion. The trial court recognized, in this case, that recession was not automatic; rather the decision was a discretionary and required to balance the equities.

AAA, on appeal, asserted to the court that recession was not an equity issue but instead was a contractual issue. The court disagreed. The Court stated, "given that all were innocent, it is difficult to conclude that, even if this Court may have reached a different decision, the one reached by the trial court 'falls outside the range of reasonable and principled outcomes."

Negligence- Walk on the Wild Side

A plaintiff filed a personal injury complaint after he fell while riding a city bus. The bus accelerated, allegedly causing the plaintiff to fall forward. The trial court's decision to deny the defendant's, 'City of Detroit', motion for summary disposition should be upheld, as the court did not error when it found that questions of fact existed regarding whether the bus was operated negligently.

In the case, *Frazier v. City of Detroit*; defendant argued that plaintiff did not create a question of fact concerning the alleged negligence of defendant's bus driver. Also alleging that the trial court erred by concluding that a genuine issue of material fact existed, regarding application of the motor vehicle exception.

Defendant argued that "any movement of the bus that occurred was a normal incident of travel and was insufficient to establish negligence and therefore defendant was entitled to government immunity." This court disagreed, stating that there was a question of material fact existing regarding whether the driver's acceleration was 'unnecessarily violent.'

Testimony was given by the bus driver, about waiting for passengers to sit before driving off in certain cases. This would support the factual questions are indeed relevant to whether a standard of care was breached, and consequently to whether the driver was negligent. Thus, it wasn't error for the trial court to find that plaintiff had a legitimate question of facts.

Employer Status- Can We Fix It

Defendant was awarded summary disposition in a suit brought by the plaintiff estate of a deceased truck driver, the judgement should be affirmed, as the defendant was not an employer as contemplated by federal regulation. Plaintiff, Estate of Altaye, and a defendant, 'A & R Express Trucking Co.', appeal as a right to the trial court's stipulated order dismissing all remaining claims and parties.

On appeal, both parties challenge the courts opinion and order, in which the trial court denied 'A & R's' Motion for Summary disposition regarding its claims for liability and collision coverage against defendant, Canal Insurance Co., as well as plaintiff's claims under MCR 2.116(C)(10).

The court disagreed with plaintiffs' claim that defendants violated the Federal Motor Carrier Safety Regulations and had a duty to inspect, maintain, and repair the truck and trailer. The court agreed with the trial courts ruling. The question was whether 'A & R' 'engaged in a business affecting interstate commerce,'. The court ruled that 'A & R' was not an employer as contemplated by the 'FMCSR'.

Consequently, 'A & R' status as the registered owner of the truck did not render A & R to the regulation. Rather Altaye was 'S A & R Trucking's' employee and they were the employer under 49 CFR 390.5. The court also disagreed that 'A & R' and 'S A & R trucking' were members of a joint venture.

No- Fault Law – Be More Reasonable

In *Spectrum Health Hosp. v. Farm Bureau Mut. Ins. Co. of Michigan*, defendant insurance company refused to pay more than 80 percent of the charges billed by a plaintiff health care provider on the basis that charges exceeding 80% of the total amount were "unreasonable." It was an error for the trial court to exclude evidence pertaining to amounts paid for the same series by health insurers and other.

In this Personal Protection Insurance (PIP) benefits lawsuit under the no fault act, Farm Bureau paid 80% of the charges claiming that the whole charge was 'unreasonabl[e]'. While there may be cases from this court containing language that might be construed as precluding consideration of amount paid by third parties when determining if there was any amount of reasonableness in the amount charged by a healthcare provider.

The question in this case is 'whether amounts paid for the same services by health insurers and others such as Medicaid and Medicare, may be considered by a fact-finder as a point of comparison for determining whether the amount providers charged a no-fault insurer was reasonable.'

Simply put, third-party payments which are accepted by a healthcare provider as payment in full during the pertinent timeframe for products and services are relevant to determining the reasonableness of charges for those very same things in the context of treatment covered by PIP benefits.

The court ruled that among all evidence, the jury may consider the amounts paid by third parties because such evidence "throws some light on the reasonableness of the charges." Nothing in the plain language of §3107(1)(a) or §3157 precludes consideration of third-party payments when determining a no-fault insurer's liability for reasonable charges.

No-Fault – Released

Where a complaint against a defendant insurance company was dismissed, and was properly dismissed based on a PIP release the plaintiffs executed. The plaintiffs argued that the trial court erred by dismissing their fraud claim because the Release did not bar the claim and they contend that *Cooper v. Auto Club Ins. Ass'n*, permitted their claim. The court in this case found no merit in this argument.

The language of the Release plainly required plaintiffs to 'release and forever discharge State Farm from any and all actions, causes of action, claims, devices, expenses and/or compensation in anyway related to the May 9, 1990 accident.'

Accordingly, the Release in this case foreclosed plaintiffs from raising claims against State Farm regardless of the legal theories they invoked or the allegations they made. Thus, the trial courts ruling was affirmed that plaintiffs 'gave up every possible cause of action against State Farm up to the date of the release.' *Clauss v. State Farm Mut. Auto Ins. Co.*

Plaintiff's claim for PIP benefits revived thanks to 2020 decision

In, *Bahnam v. Farm Bureau General Ins. Co. of Michigan*, where a plaintiff argued that the insurer breached the terms of his insurance policy, which included coverage for uninsured or underinsured motorists' benefits, by refusing to provide PIP benefits.

The insurer, however said the plaintiff misrepresented material facts so his PIP benefits should be barred. The trial court granted summary disposition because plaintiff Bahnam's deposition testimony was inconsistent with video evidence showing his post-accident physical activities. But in the 2020 ruling of *Haydaw v. Farm Bureau Ins. Co.*, a Court of Appeals panel voided that argument.

This court ruled, in *Haydew*, that 'fraud provisions in no-fault insurance policies do not provide grounds for recession based upon dales statements made by the insured during first party litigation,' Additionally, the Michigan Supreme Court's *Meemic v. Fortson* holding had bearing. In Meemic, the insurer in this case does not assert a statutory defense to the payment of PIP benefits to the intervening-plaintiff medical providers, but asserts a contractual defense based on the language of its no-fault insurance policy that it sold to plaintiff.

So 'the fraudulent activity at issue here did not relate to the inception of the contract' since at the time of making the contract the insured had not yet made any of the alleged misrepresentations.

In this case, the no-fault insurance policy contained an anti-fraud clause; the entire policy would be void if he 'intentionally concealed or misrepresented any material facts or circumstances, engaged in fraudulent conduct, or made false statements relating to claims' under the policy. If the insurer, by denying a claim, is first to breach the contract, it may not defend on the grounds that a plaintiff later failed to adhere to the contract.

Therefore, 'summary disposition on the basis of false statements would not be warranted unless and until it is determined that the denial of the claim did not breach the contract.' The facts in this case are much like the ones in Haydew. This court stated that the trial court's order was in error and must be vacated.

<u>Deposition Sanctions- No-Fault</u>

Where a claim by two medical providers for no-fault insurance benefits was dismissed as a sanction because the policyholder failed to appear for a court-ordered deposition, the dismissal order should be vacated because the trial court improperly penalized the providers for the failure of a non-party to appear for his deposition.

In the case of *Physiatry & Rehab Assoc. v. Med Care Wellness Inc.*, Plaintiff correctly suggested that the trial court improperly penalized them for the failure of Smock, a non-party, to appear for his disposition. This court had previously held that the sanction in cases like this are on that witness for contempt of court. Stating that 'it is unrealistic to expect plaintiffs to be able to produce an obviously reluctant nonparty witness that even a court order failed to produce.'

Defendant argued that plaintiff was an assignee of Smock and therefore stand in the shoes of Smock. However, the court reasoned that an assignee is in privity with the assignor

only up to the time of the assignment, and as a result assignee *only* has the right possessed by the assignor at the time of the assignment. Thus, an assignee is not bound by the subsequent actions of the assignor.

Smock assigned his rights under the no-fault policy to plaintiffs. Smock's misdeeds during the litigation, occurring after the assignment, do not affect plaintiffs' rights under the assignment. Nor do plaintiffs continue to be in privity with Smock in some sort of partnership after the assignment. In conclusion, you cannot dismiss on account of claimant blowing the deposition.

No-Fault - Stick to the Status Quo

Where a judge entered a preliminary injunction maintaining the status quo of the payment of no-fault personal injury protection benefits pending resolution of the party's dispute over the defendant reducing the amount of the PIP benefits. Under *Bratton v. Detroit Automobile Inter-Ins. Exch.*, the court then stated; that for public policy reasons as well as for the general welfare, the injunction should not be overturned.

In *Melrose v. Nationwide Mutual Ins. Co.,* the court ruled that this case was significantly different that Bratton. Bratton, the plaintiff was denied PIP benefits, sued for the payment of those benefits, and sought a preliminary injunction to require the payment of benefits until the dispute was resolved. But in Bratton that would have altered the status quo by granting the plaintiff, at least on a temporary basis, the relief sought. In contrast the present case, the plaintiff sought to maintain the payment of benefits while the dispute over defendant's attempt to reduce those benefits was litigated, thus maintaining the status quo.

The trial courts finding that plaintiff was likely to succeed on the merits was not clearly erroneous. She had extensive extrinsic evidence on the preservation of her health and well being via the care she was receiving.

This court affirmed that the care plaintiff had received for the last 30 years established a baseline for what care plaintiff needed and it is within the public interest to not deny plaintiff a continuation of those services based upon market surveys.

****

***If you have questions regarding the decisions discussed in this newsletter and how they may affect your claims, please do not hesitate to contact our firm.