



RICH, CAMPBELL & ROEDER, PC

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Fraud During Litigation – Grounds for Policy Rescission?

After finding that a plaintiff in a first-party lawsuit made false statements at his deposition, the Wayne County Circuit Court granted summary disposition to the defendant insurance company based on the insurance policy's fraud provision. However, the decision was reversed by the Court of Appeals.

The case of *Haydaw v. Farm Bureau Insurance Company* arose out of a motor vehicle accident in which Plaintiff claimed injuries to his back, neck and shoulders. Plaintiff filed a complaint against his no-fault insurer, claiming that defendant wrongfully withheld PIP benefits.

After discovery had concluded, defendant moved for summary disposition on the grounds that plaintiff made false statements under examination regarding his medical history. Plaintiff's records showed intermittent complaints of back, neck and shoulder pain and that at times he had been prescribed pain medication in the years before the accident. Given that history, Defendant asserted that Plaintiff testified falsely at his deposition when he said that he saw his primary care physician for "[f]lu, that's it" and was only prescribed flu

medication. The trial court agreed and granted summary disposition against the Plaintiff.

The Court of Appeals, at the outset, noted that this question had not yet been addressed in a public opinion (at least not in the insurance context). The panel disagreed with the trial court, stating that "[f]alse statements made during discovery do not provide grounds to void the policy because, by that time, the claim has been denied and the parties are adversaries in litigation. Once suit is brought, what is truth and what is false is a matter for a jury or a judge acting as factfinder. And if it can be shown that a party intentionally testified falsely, it is up to the court to determine what, if any, sanction is proper."

Falling Off the Exam Table – Malpractice or Negligence?

According to the Michigan Court of Appeals, the trial court erred when it granted summary disposition for a defendant after the plaintiff was injured when she fell off a magnetic resonance imaging exam table in a mobile MRI unit,

because the plaintiff's claims sounded in negligence, *not malpractice*.

In the case of *LaFave v Alliance Healthcare Services, Inc.*, the Marquette County Circuit Court held that because a professional relationship existed between the plaintiff and defendant, and the claims involved questions of medical judgment "outside the common knowledge and experience of lay jurors," the claims were rooted in medical malpractice. Using this reasoning, the court granted summary disposition to the Defendant even though Plaintiff had stated two claims for ordinary negligence along with claims for medical malpractice.

The Court of Appeals disagreed and reversed. Of note is the Panel's discussion on whether a medical malpractice claim could even be recognized in such a situation. The Court wrote that "in sum, neither an MRI technician nor an MRI provider qualifies as a person or entity capable of committing medical malpractice under current law, and defendant has disclaimed any reliance on whether it was an agent of the hospital for purposes of MCL 600.5838a(1)." On this basis, the panel held that Plaintiff's claims were for ordinary negligence, not medical malpractice.

Policy "Unambiguous," Coverage Terminated When Vehicle Gifted

A defendant insurance company was entitled to summary disposition in a suit

brought by a plaintiff who was injured in an accident, because the insurance coverage had automatically terminated on the date the plaintiff was given the vehicle as a gift by her grandfather, who was a policyholder.

Citing *McCormic v Auto Club Ins. Ass'n* (1993), the court stated that "in this case, William's gift terminated the policy and plaintiff's vehicle lacked the security required under MCL 500.3101(1), and therefore, the statutory bar to PIP benefits... applied to plaintiff, precluding her from receiving benefits from [her insurer.]" This decision overruled the trial court's order denying the defendant insurer's motion for summary disposition, despite express language in the policy terminating coverage.

Duty to Defend – 'Accident'

Where a judge ruled that an insurance company had a duty to defend a policyholder that was sued by an employee, that ruling must be reversed because the insurer had no duty to defend the policyholder against the employee's intentional tort claim and breach of contract claim.

Defendant, Accident Fund National Insurance Company, appealed the order denying its motion for summary disposition and granting summary disposition to Plaintiff. The underlying complaint alleged that Plaintiff was injured when his supervisor attempted to hammer a fence

post into the ground, while Plaintiff was holding the post. Plaintiff's amended complaint contained intentional tort and breach of contract claims. Plaintiff claimed that he was "subjected to continuing operative danger that [Defendant] or its representatives knew would cause injury, and that [Defendant] had actual knowledge that an injury to Plaintiff was certain to occur and willfully disregarded that knowledge."

Because of these allegations, the Court held that Plaintiff's claims sounded in intentional tort, and although they may have been accidental, the claims as alleged do not invoke Defendant's insurance coverage, providing coverage for "accidents." Furthermore, even if the injury were accidental, there would be no coverage as any negligence claims would be barred by the exclusive remedy rule of the Worker's Compensation statute.

Discovery – Failure to Attend IMEs

Where a Plaintiff's complaint against a defendant insurance company was dismissed based on the Plaintiff's failure to participate in discovery, the trial court abused its discretion by dismissing the case without conducting the requisite legal analysis or evaluating alternative sanctions on the record.

Plaintiff was involved in an automobile accident in 2016. Defendant was the insurer of the vehicle that injured him. After a personal injury protection

claim was made with Defendant, Defendant notified plaintiff that he was to appear for two orthopedic independent medical examinations. Plaintiff failed to appear for both, without explanation.

The Court of Appeals held that it was not impermissible for the trial court to dismiss the matter for Plaintiff's failure to permit discovery. However, the extreme sanction of dismissal should not be undertaken without careful consideration of the alternatives on the record.

Damage Award Upheld in No-Fault Case

A jury verdict in favor of a motorcyclist who was struck by an SUV should be upheld despite the defendant's assertion that the plaintiff did not have an objectively manifested impairment that affected his ability to lead a normal life, a Michigan Court of Appeals panel ruled.

The Plaintiff argued he was entitled to noneconomic losses because he had suffered a threshold injury under the no-fault insurance act. The COA panel agreed, stating that the trial court's denial of summary disposition was appropriate because a genuine dispute of material fact existed for a jury to resolve.

"The evidence indicates that there was conflicting evidence about whether Plaintiff's accident affected his general ability to lead his normal life..." the panel wrote. "As this Court has held, when there is conflicting evidence, the trial court

should deny a motion for summary disposition.”

In October 2015, Plaintiff was riding a motorcycle when he was struck by defendant, who was driving an SUV. Plaintiff testified that he was unable to avoid being hit, so he drove through the collision, as laying his motorcycle down would have caused him more injuries. Plaintiff testified that he began to experience stiffening of his back and neck muscles later that day even though he initially did not think he was injured. For about seven months, he saw a chiropractor for the back and neck pain, which began to radiate to his right shoulder and arm. About a year later, however, Plaintiff lost his left leg at the knee and sustained other injuries when a car crossed the center line and struck him as he was riding his motorcycle.

After discovery, Defendant moved for summary disposition arguing that Plaintiff did not have a threshold injury, as he did not have an objectively manifested impairment that affected his ability to lead a normal life. The trial court disagreed. At trial, a jury ruled in the Plaintiff’s favor and awarded him damages

Despite Bouncing Tire –
No Negligence Shown

A defendant driver whose wheel and tire broke off his car while driving and struck the plaintiff’s vehicle was properly granted summary disposition in an automobile negligence matter even though

the plaintiff argued there was a genuine dispute of material fact as to whether the defendant was negligent under the doctrine of *res ipsa loquitur*.

In the case of *Estate of Charleston v Carroll*, Plaintiff contended that the trial court erred when it denied his motion for reconsideration because he had presented new evidence to establish that granting summary disposition was premature, and because he had presented a sufficient question to create a dispute of material fact on the issue of negligence.

The Court of Appeals panel, citing the 2018 case of *Pugno v Blue Harvest Farms*, disagreed. “Although a plaintiff must establish that an event was of a kind that ordinarily does not occur in the absence of negligence, plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event. Thus, Plaintiff failed to meet this burden in order to avail himself of the doctrine of *res ipsa loquitur*.”

COA Vacates Trial Court’s Dismissal of
Post-Crash Suit

A Michigan Court of Appeals recently ruled for the plaintiff after a car accident where the defendant was distracted by a dog in the vehicle and claimed foliage prevented him from seeing the stop sign until it was too late.

In the case of *Headworth v Kemp*, the Panel vacated the Montcalm County

Circuit Court’s judgment dismissing the case with prejudice. A jury found the defendant was not negligent after the trial court denied the plaintiff’s motion to preclude a sudden emergency doctrine jury instruction requested by the Defendant.

The trial court also denied the plaintiff’s motion for judgment notwithstanding the verdict (JNOV) or a new trial, while noting that it “disagreed with the jury’s verdict and that, on further reflection, it probably should not have given the sudden emergency instruction.”

The evidence showed that Defendant Kemp was driving on Baker Road near Greenville when he proceeded through a stop sign and collided with Plaintiff’s vehicle. Plaintiff, who was in the front passenger seat, was injured. Defendant testified that as he approached the intersection, his dog, who was unrestrained in the back seat of his vehicle, suddenly jumped over the center console and onto the passenger side floor. Defendant testified that he “automatically looked and reached for the dog to make sure he was unharmed.” He was not sure how long he looked down. He did not recall applying his brakes and did not see Plaintiff until the last second before the accident.

Mother Had ‘Insurable Interest’
in Son’s SUV

Where a judge found that the holder of an auto policy had an insurable interest in a vehicle, an insurance policy should not

be voided on public policy grounds, the Court of Appeals has ruled.

The Plaintiff insurance company argued that the trial court erred when it found that Defendant, the mother of Defendant Fetzer who was involved in a motor vehicle accident, was the principal named insured and, therefore, had an insurable interest in the SUV owned by her son. The COA disagreed, writing that the named insured must have an insurable interest to support a valid automobile policy. The Panel invited the Michigan Supreme Court to take a look and provide clarification.

“In light of *Clevenger v Allstate Ins Co...*, we cannot go so far as to say that the insurable interest requirement does not apply in the automobile liability insurance context; rather we merely hold under the circumstances of this case that [Defendant] had a sufficient insurable interest in Nicholas’s well-being that we should not declare the policy void on public policy grounds,” the Panel wrote.

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.