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The Michigan No-Fault Newsletter

Special points of interest:

- **What is required when making an attendant care claim under the no-fault act?**
- **Is a person entitled to no-fault benefits if injured in a car accident while "joyriding"?**
- **Do I still have time to nominate my client for the Detroit Tigers Tickets Giveaway?**

Inside this issue:

Supreme Court Specifies Requirements For Making Attendant Care Claim

In *Douglas v. Allstate* _____Mich._____(Filed July 30, 2012), the Michigan Supreme Court specified the requirements for receiving attendant care benefits under MCL 500.3107(1)(a) for "allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation."

In 1996, James Douglas sustained a severe closed-head brain injury when a hit-and-run motorist struck the bicycle he was riding. Allstate was assigned to Mr. Douglas' claim through the Michigan Assigned Claims Facility. In the three years after the accident, Allstate paid no-fault benefits for hospitalization, medical expenses, wage loss, attendant care, and replacement services in accordance with the no-fault act. No claims were made between 1999 and 2005.

During this time, Douglas was unable to hold a job for very long and eventually stopped working. He also attempted suicide twice. In 2005, after the second suicide attempt, Douglas's psychiatrist wrote a letter indicating that Douglas "requires further treatment" because he "continues to suffer from ill-effects as a result of his closed-head injury." Based upon his psychiatrist's opinion, Douglas claimed attendant care benefits provided by his wife and filed a lawsuit to recover those benefits. However, there were issues regarding whether Douglas's wife was performing attendant care services or replacement services, what the appropriate rate of pay should have been, and which expenses were actually incurred.

Recovery for replacement services is limited to those services provided in the first three years after the accident, thus, Douglas was not able to recover any benefits for replacement services. As a consequence, the distinction between attendant care, which is recoverable for the rest of plaintiff's life, and replacement services, was at the heart of this case.

The Michigan Supreme Court held that MCL 500.3107(1)(a) imposes four requirements that an insured must prove before recovering no-fault benefits for allowable expenses, including attendant care claims: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable.

The attendant care provided must be related to the person's injury to be considered an allowable expense. The Supreme Court noted a Court of Appeals opinion that explained ordinary household tasks that a family member performs are not allowable expenses, but "serving meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks," and can therefore be considered allowable expenses pursuant to MCL 500.3107.

The Court explained that Mrs. Douglas clearly performed some replacement services which were not recoverable, but that it did not preclude her from the recovery of the allowable expenses that were incurred like: traveling to and communicating with plaintiff's medical providers and managing plaintiff's medications. The Court also indicated that some of Mrs. Douglas's supervision of her husband might be considered an allowable expense if it was necessitated by his injuries in the accident.

The requirement that an allowable expense be reasonably necessary must be assessed using an objective standard. In the present case, Defendant questioned the necessity of the expenses for the time period in which there was no medical prescription for attendant care services. However, the treating psychiatrist provided an affidavit explaining that Mr. Douglas was in need of attendant care services. The Court also concluded that there was a

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Michigan Attorney Robert J. Lantzy

Michigan accident attorney Robert J. Lantzy has devoted his career to representing individuals who have suffered serious injuries in car, truck, bicycle, motorcycle, pedestrian, and all other types of personal injury accidents. He is recognized as an experienced trial attorney throughout the State of Michigan and is a member of the Michigan Association for Justice. Robert has an undergraduate degree from Central Michigan University and a law degree from the Detroit College of Law.

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factual basis in the record to support the psychiatrist's conclusion. The attendant care claim must be incurred, in that the caregiver must have an expectation that she will be compensated. There must be some evidence, even in the absence of a formal bill, that the family member expected compensation for providing services and that the services were actually provided.

Any insured who incurs charges for services must present proof of those charges in order to establish, by a preponderance of the evidence, that he is entitled to the no-fault benefits. This requirement is most easily satisfied when a caregiver gives itemized statements documented contemporaneously with the providing of the services, however, a caregiver's testimony can allow a fact finder to conclude that the expenses have been incurred.

In determining what is a reasonable charge, the fact-finder must determine what is a reasonable charge for an individual's provision of services, not an agency's charges. The Supreme Court stated that the rate that healthcare agencies charge their patients is "too attenuated" from the appropriate hourly rate for a family member's services to be controlling, but it may be used as evidence.

The Supreme Court held that in the present case, Mrs. Douglas was actually receiving $10 an hour for providing attendant care as an employee of Mr. Douglas' psychiatrist. Thus, her claim for $40 per hour was improper.

The Court remanded the case back to the Trial Court to make further determinations in accordance with its decision.

Supreme Court Overrules Family Joyriding Exception

In *Spectrum Health Hospitals* v. *Farm Bureau Mutual* and *Progressive* v. *DeYoung* _____Mich._____(Decided July 31, 2012), the Michigan Supreme Court addressed the question of whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner may receive no-fault benefits under the no-fault act.

MCL 500.3113(a) bars a person from receiving no-fault benefits for injuries suffered while using a vehicle that he or she had "taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." MCL 750.413 states that "[a]ny person who shall, willfully and without authority, take possession of and drive or take away ... any motor vehicle, belonging to another, shall be guilty of a felony." MCL 740.414 states that "[a]ny person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor." The Supreme Court addressed two separate cases involving the unlawfully taking issue.

Chain of Permissive Use

Craig Smith, Jr. was injured in a single-car accident that occurred while he was driving a vehicle owned by his father Craig Smith, Sr. and insured by Farm Bureau Mutual. Craig Sr. had forbidden Craig Jr. from operating his vehicle because he had no license. Craig Sr., however, did entrust the vehicle to Craig Jr.'s girlfriend, Kathleen, so that the two could perform landscaping services. Craig Sr. instructed Kathleen that Craig Jr. was forbidden from driving the vehicle. One night, after Craig Jr. had been drinking, he asked Kathleen for the keys to the vehicle. She initially resisted, but then she relented. Craig Jr. crashed the vehicle into a tree and pleaded no contest to operating while intoxicated causing serious injury.

Farm Bureau refused to pay Spectrum Health Hospitals for services rendered to Craig Jr. because, in its opinion, he had taken the vehicle unlawfully and was not entitled to no-fault benefits. The Circuit Court granted Spectrum Health summary disposition and the Court of Appeals affirmed, applying the chain of permissive use theory.

The Court of Appeals based their decision on *Bronson Methodist Hospital* v. *Forshee*. The chain of permissive use theory arises when a vehicle owner authorizes the vehicle's use by another person (the intermediate user), who in turn authorizes a third person (the end user) to use a vehicle. The Court of Appeals held that, for the purposes of MCL

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500.3113(a), a vehicle owner is presumed to have allowed the end user to take the vehicle, regardless of whether the owner had expressly forbidden the end user from taking the car.

The Michigan Supreme Court overruled *Bronson*'s application of the chain of permissive use theory as inconsistent with MCL 500.3113(a) because it erred by applying a theory developed in the owner-liability case law which did not address whether the end user of the vehicle had taken the vehicle in violation of the Michigan Penal Code.

Family Joyriding Exception

Ryan DeYoung had three drunk-driving convictions by the age of 26. Ryan's wife, Nicole, owned and insured the family's four vehicles with Progressive. Ryan was a named **excluded** driver on the Progressive policy. Nicole expressly prohibited Ryan from driving the vehicles. On September 17, 2008, Ryan came home intoxicated, took the keys to Nicole's Oldsmobile, and took the vehicle, contrary to Nicole's prohibition, and without her permission. That night, he was badly injured in a single-car accident.

Progressive denied the claims for no-fault benefits, arguing that Ryan had unlawfully taken the vehicle and was not entitled to no-fault benefits. Spectrum Health and Mary Free Bed intervened as cross-plaintiffs and Citizens was named as a cross defendant because they were designated by the Michigan Assigned Claims Facility. Citizens also denied benefits.

The family joyriding exception to MCL 500.3113(a), which involves the unauthorized taking of a person's motor vehicle by a family member who did not intend to steal it, allowed the family member taking the motor vehicle for a joyride to still receive no-fault benefits if he or she was injured in a car accident. The exception originated in the Justice Levin's plurality opinion in *Priesman v. Meridian Mutual Insurance Co*.

The Circuit Court granted summary disposition to Progressive and Citizens despite the family joyriding exception, because Ryan was a named excluded driver. The Court of Appeals reversed, concluding that it must follow the binding precedent of prior Court of Appeals decisions recognizing and applying the family joyriding exception.

The Michigan Supreme Court overruled the Court of Appeals and every decision applying the family joyriding exception, reasoning that the exception had no basis in the language of the statute.

Conclusion

The Michigan Supreme Court held that any person who takes a vehicle contrary to a provision of the Michigan Penal Code, including the "joyriding" statutes, has taken the vehicle unlawfully for the purposes of MCL 500.3113(a) and, thus, is not entitled to no-fault benefits under the statute. The Plaintiff's claims for no-fault benefits in both cases were denied by the Supreme Court.

Buckfire Law Attorneys Win Home Modification Expense Lawsuit Against Insurance Company

The Michigan no-fault insurance lawyers at Buckfire & Buckfire, P.C. recently settled a lawsuit for our client who became a quadriplegic in a 2001 Michigan automobile accident. The spinal cord injury survivor was a minor at the time of the accident. As he had gotten older, it became necessary for him to use the master bathroom in the house, however this needed to be modified to accommodate his handicap. A claim was submitted to the no-fault insurance company to pay for the home modification but it was ignored by the adjuster.

Under Michigan law, an insurance company is required to provide home modifications to a car accident injury victim to accommodate the special needs of the injured person for the accident related injuries. This benefit is frequently provided in cases involving spinal cord injuries and amputation injuries. Modifications often include handicapped ramps, bathroom modifications, and even additions to existing homes.

Based upon the insurance company's refusal to pay for the home modifications, we filed a lawsuit in the Wayne County Circuit Court. After engaging in discovery and taking depositions, the insurance company agreed to pay $50,000.00 for the bathroom modifications. This was $7,000.00 more than the actual cost of the bathroom to cover attorney's fees and expenses related to filing of the lawsuit.

Buckfire & Buckfire Detroit Tigers Tickets Giveaway

"We believe that giving back to the community not only enriches our own lives but also makes us better attorneys for our catastrophically injured clients."
Lawrence J. Buckfire

THERE IS STILL TIME LEFT TO NOMINATE YOUR CLIENT FOR THE 2012 BUCKFIRE & BUCKFIRE DETROIT TIGERS TICKETS GIVEAWAY

"I just wanted to let you know that I had a great time at the Tigers game. I really appreciate the tickets. Thank you very much."
~Keith, recipient of the Detroit Tigers Tickets Giveaway

Schedule of Tiger Tickets Still Available for Nomination

***Note: All games start at 1:05 P.M.**

- September 23, Twins
- September 27, Royals

Visit http://bit.ly/buckfireticketsgiveaway to nominate someone today!

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Our No-Fault Service Provider Spotlight

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This month we spotlight Dignitas, Incorporated. Dignitas has several residential homes in the Detroit Metropolitan area that are licensed by the State of Michigan to provide specialty services to persons with traumatic brain injuries and spinal cord injuries. For more than a decade, Dignitas has been in the forefront of working with families after serious automobile accident injuries by providing a team of skilled professionals who are trained to facilitate the rehabilitation process.

Its primary objective in the rehabilitation of persons with traumatic brain injuries is to restore their sense of dignity and independence - making Dignitas not only its name, but also its philosophy.

Dignitas provides 24-hour supervision and structure to individuals, including those suffering physical impairments, interruptions in cognitive functioning, and psychological disturbances. Through its trained staff, Dignitas strives to motivate these individuals to become as self reliant and independent as possible.

One of the five Dignitas, Incorporated residential facilities

Dignitas has five residential facilities, as well as a Semi Independent Living Program. It also has a well-established rapport with health care professionals who are dedicated to addressing the needs of traumatically brain injured patients. Dignitas will continue to focus on enhancing the process by which traumatically brain injured patients can be effectively re-integrated into the community.

To nominate yourself or another no-fault provider for the No-Fault Service Provider Spotlight , please e-mail your nomination to Kathryn@BuckfireLaw.com . Our newsletter is read by 1,000 readers every month!