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# The Michigan No-Fault Newsletter

**Special points of interest:**

- **Are professional agency charges relevant in family attendant care cases?**
- **How can my disabled clients receive free tickets to the 2012 Detroit Tiger season?**

**Inside this issue:**



## Professional Agency *Charges* Are Relevant in Family Provided Attendant Care Rate Case

In *Hardrick v. Auto Club*, _____ Mich App. _____ (decided December 1, 2011), the Court of Appeals issued a 2-1 published decision in a no-fault case involving the proper rate for family provided attendant care. There were also evidentiary issues in the trial which the Court addressed.

In this case, a jury found defendant Auto Club Insurance Association (ACIA) liable to plaintiff William Hardrick for family-provided attendant care services at a rate of $28 per hour. The jury reached this verdict after a trial in which ACIA was barred from presenting any evidence.

The lawsuit arose out of an auto accident in 2007, when a car struck Hardrick, then age 19, as he walked home from work.

Hardrick suffered a traumatic brain injury resulting in cognitive deficits and emotional instability. Extensive hospital-based rehabilitation yielded only minimal therapeutic gains.

In 2008, Hardrick's physician recommended around-the-clock attendant care "for supervision and safety." Hardrick's parents provided the prescribed attendant care.

ACIA classified Hardrick's parents as "home health aides," and paid them a rate of $10.25 to $10.50 an hour for the attendant care they provided.

Hardrick filed a lawsuit seeking a determination that his parents qualified as "behavioral technicians," entitling them to charge a higher hourly rate.

Throughout the litigation, the only dispute was the "reasonable charge" for Hardrick's parents' services.

Prior to trial, the trial court determined that ACIA had violated its discovery orders by providing belated and incomplete responses to discovery requests. Hardrick requested a default judgment, but the court opted to impose a "lesser sanction."

The court precluded ACIA from presenting any witnesses or evidence. As a result, ACIA was limited to cross-examining Hardrick's witnesses and challenging his proffered evidence.

At the trial, Plaintiff's expert Robert Ancell testified that the care provided by Hardrick's parents was more skilled than that of a home health aide, and compared the care to that of behavioral technicians.

Ancell opined that the value of their care ranged between $25 to $45 an hour. The jury awarded the Plaintiffs $28 per hour and ordered ACIA to pay 3148 attorney fees as well.

With respect to the sanctions for the ACIA discovery violation, the Court of Appeals reversed the trial court.

The Court held that the sanction was disproportionate to the violation and affected the entirety of the trial, including damages.

On the evidentiary issues of valuing the family provided attendant care, ACIA argued that the rates charged by health care agencies for attendant care services are not relevant in establishing the reasonable rate for unlicensed, family-provided services.

According to ACIA, the pertinent rate for determining the value of family-provided attendant care is a similar worker's wage, not the hourly fees that a health care agency might charge the insurer to provide such services as that charge would include operating expenses, as well as wages.

The Court of Appeals disagreed, holding that the market rate for agency-provided attendant care services is relevant in establishing a rate for family-provided services.

The Court stated that the jury is entitled to consider a multitude of factors in determining the reasonable charge for

*See PROFESSIONAL, page 2*

**Michigan Attorney Daniel L. Buckfire**

*Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.*

PROFESSIONAL, cont. from Page 1

the family provided attendant care including opportunity cost, overhead, and fringe benefits.

The case was remanded for a new trial to allow ACIA to present its own witnesses and evidence on the appropriate hourly rate for the family provided attendant care services.

## Court Holds That Reimbursement Issue Is Not Ripe For Adjudication

In *Berdel v. Progressive Michigan Insurance Company*, unpublished opinion per curiam of the Court of Appeals decided October 25, 2011, (Docket No. 302954), the Court of Appeals held that Plaintiff's declaratory Judgment action against Progressive was not yet ripe for adjudication.

On October 13, 2009, the plaintiff sustained a serious elbow fracture in an automobile accident. Plaintiff was a passenger in a vehicle that collided with another vehicle when the other vehicle turned in front of the vehicle plaintiff was in without warning.

At the time of the accident, plaintiff carried a health insurance policy with a German company, Central Krankenversicherung AG ("Central"), and a coordinated or excess no-fault insurance policy with the defendant, Progressive Michigan Insurance Company.

Following the accident, Central paid about $75,000 in medical bills and related expenses that were incurred as a result of the accident.

Plaintiff filed a separate tort claim against the driver of the other vehicle involved in the accident, seeking noneconomic damages. Central notified plaintiff that it would seek reimbursement for the medical expenses it paid from any recovery plaintiff received from the other driver pursuant to German law.

On January 8, 2010, plaintiff filed a complaint alleging that defendant breached the excess medical benefits policy when it refused to make payments that plaintiff alleged were required under the policy.

After Central notified plaintiff of its intent to seek reimbursement from any recovery plaintiff obtained from the other driver, plaintiff amended his complaint against defendant to seek reimbursement from defendant in the event that plaintiff had to reimburse Central from his non-economic damages in his pending tort case.

Plaintiff and defendant settled all the issues except the issue regarding whether defendant would have to reimburse plaintiff in the event that plaintiff recovered in tort and was required to reimburse Central from that recovery.

On the issue of reimbursement, the trial court concluded that "in the event plaintiff is required to reimburse his health insurance carrier from his tort recovery for any amounts paid... [defendant] must reimburse plaintiff the same amount."

On Appeal, Defendant Progressive argued that the trial court followed federal law instead of binding Michigan law. Defendant maintained that it should not be required to reimburse plaintiff in the event that plaintiff had to reimburse his medical insurer, Central, from any tort recovery plaintiff may have.

Instead of deciding the case based upon the arguments presented by the parties, the Court went in a different direction. In this regard, although not raised on below or on appeal, the Court decided the case on whether the issue was ripe for adjudication.

The doctrine of ripeness focuses on the timing of an action, and is "designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all."

In this case, the Court held that the trial court decided an indemnification claim that was not ripe because it rested on two contingent future events: (1) that plaintiff would recover from the allegedly negligent driver in tort, and (2) that plaintiff would be required to reimburse the health insurer out of his tort recovery.

The Court noted that there was no indication in the record that plaintiff has or will recover in tort, or that the health insurer

*See COURT HOLDS, page 3*

COURT HOLDS, cont. from Page 2

has or will recover any money obtained by plaintiff as a result of the tort lawsuit.

Thus, the Court stated the claim rested upon two contingent future events that are also contingent upon each other, i.e. plaintiff's health insurer will not attempt to obtain reimbursement if plaintiff does not recover in tort.

In summary, the Court held that the issue could not be decided because there was no actual controversy - the entire claim is premised on the idea that defendant might have to reimburse plaintiff if a future contingent event occurs.

The Court, in our opinion, failed to recognize the one year back rule, and that plaintiff was required to file the lawsuit based on the possible contingent events in order to avoid the application of the one year back rule.

We believe that the lawsuit should have been stayed until the other matters were resolved, and not dismissed by the Court.

### Court Holds That Vehicle Owner Is Not Liable As A Matter of Law in Auto Accident Case

In *Estate of Campanelli v. Hayes*, unpublished opinion per curiam of the Court of Appeals decided September 27, 2011, (Docket No. 298014), Sarah Nicole Campanelli died when the automobile in which she was riding was involved in an accident.

Defendant Deborah Hayes was the owner of the vehicle. Deborah gave the vehicle to her daughter, Jessica Hayes, to drive.

Defendant Kayla Leilani Kuikahi-LaLonde was Jessica's friend and the driver of the vehicle at the time of the accident.

The pertinent issue in the trial court was whether Kuikahi-LaLonde had Deborah's express or implied consent or knowledge to drive the vehicle at the time of the accident, pursuant to the Owner Liability statute, MCL 257.401(1).

The operation of a motor vehicle by one who is not a member of the family of the owner gives rise to a rebuttable common-law presumption that the operator was driving the vehicle with the express or implied consent of the owner.

The presumption can be overcome only with positive, unequivocal, strong and credible evidence.

First, the Court held that the pertinent inquiry was whether Kuikahi-LaLonde was driving the vehicle with the permission of Jessica, who was Deborah's permittee.

Deborah testified that she gave the keys to Jessica to use the vehicle without restriction and Jessica gave the keys to Kuikahi-LaLonde .

However, Jessica and Kuikahi-LaLonde both testified that Jessica told Kuikahi-LaLonde not to drive the vehicle on the day of the accident.

The Court held that this testimony was sufficient to defeat the presumption.

The Court also held that differing versions as to why Jessica told Kuikahi-LaLonde not to use the vehicle did not detract from the fact that both Jessica and Kuikahi-LaLonde testified that Jessica told Kuikahi-LaLonde that she did not have permission to drive the vehicle.

The Court also dismissed the argument that Jessica's failure to report the car stolen, stating that it was not relevant as to whether she gave Kuikahi-LaLonde permission to use the vehicle.

Similarly, the Court held that the fact that Deborah filed a police report only after she learned that it was in her financial interest to do so did not demonstrate that Kuikahi-LaLonde had consent to use the vehicle.

**DETROIT TIGER TICKETS FOR DISABLED INDIVIDUALS**

Buckfire & Buckfire will be donating Detroit Tigers tickets to disabled individuals for the 2012 season! All you have to do is nominate your client! Ticket donations will be chosen randomly and the winner will be able to enjoy a Detroit Tiger's game on us! The donation will include 2 tickets in the handicap section of the lower deck and handicap parking! Look for more information and details about our Detroit Tiger Tickets donations in our upcoming No Fault newsletters!

# The Michigan No-Fault Newsletter

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## Our No-Fault Service Provider Spotlight

***Acclaimed Family of Companies***
***Mid and Southeastern Michigan***
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**Roberta Schaber, RN, BSN, CCM**

This month we spotlight the Acclaimed Family of Companies: Acclaimed Home Care (Private Duty), Acclaimed Visiting Nurses (Medicare Certified), and Acclaimed Residential Care (The Drake House). The Acclaimed Family of Companies has worked with the Auto No-Fault Insurance Market since the inception of their companies and specializes in traumatic brain injury (TBI), spinal cord injury (SCI), and wound care cases.

Since Acclaimed Home Care has both Private Duty and Medicare Certification, if necessary, they are able to easily transition a patient without any disruption.

Currently, the Acclaimed Family of Companies is in the midst of an expansion. "We have provided quality care in Southeastern Michigan for over fifteen (15) years. With the success that we have experienced, adding the surrounding areas of coverage just made sense," said Karen Katko, VP of Corporate Development.

With this new expansion, Acclaimed Home Care and Visiting Nurses coverage will include the following counties: Oakland, Macomb, Wayne, Tuscola, Huron, Sanilac, Genesee, Lapeer, St. Clair, Saginaw, and Shiawassee. The expansion, called "Acclaimed Care Team (ACT), will be run by new Acclaimed Team member Roberta Schaber, RN, BSN, CCM. Roberta has specialized in Field Case Management of Auto Liability and Worker's Compensation Claims.

The Acclaimed Family of Companies is also a proud community supporter as they hold an annual July charity event called the "Mingle", and an annual holiday event called the "Schmooze." These charitable events raise funds for a variety of needs in the community, including direct care, awareness, and research. For more information on these events, visit www.acclaimedcharity.com or call 248.352.0400.

**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!**