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BUCKFIRE & BUCKFIRE, P.C.

July 2012

The Michigan No-Fault Newsletter

Special points of interest:

- **How does the one year back rule apply to a plaintiff who is a minor or has a TBI?**
- **Do I still have time to nominate my client for the Detroit Tigers Tickets Giveaway?**
- **Can a person injured in a hit and run accident obtain damages for pain and suffering?**

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Supreme Court Finds 30 Day Notice Rule in UM Policy is Enforceable Without Showing of Prejudice

In *DeFrain v. State Farm*, ____ Mich ____ (decided May 30, 2012), the Michigan Supreme Court was presented with the issue of whether a 30 day notice provision in a policy for uninsured-motorist (UM) coverage issued by defendant State Farm Mutual Automobile Insurance Company regarding hit-and-run motor vehicle claims is enforceable without a showing that the insurer had suffered actual prejudice due to the late notice.

On May 31, 2008, a hit-and-run driver ran his vehicle into a pedestrian, William DeFrain (DeFrain), who sustained severe head injuries as a result of the collision. At the time, DeFrain maintained an insurance policy for UM coverage with State Farm.

The policy required a claimant to notify State Farm of a claim for UM benefits and provide "all the details about the death, injury, treatment, and other information that [State Farm] may need *as soon as reasonably possible* after the injured insured is first examined or treated for the injury."

The policy also contained a provision pertaining specifically to hit-and-run accidents, requiring a claimant seeking UM benefits to report the accident "to the police within 24 hours and to [State Farm] within 30 days[.]"

It is undisputed that State Farm did not receive notice that DeFrain had been the victim of a hit-and-run accident until August 25, 2008, which was after the 30-day notice period had lapsed.

It is also undisputed that that Mr. DeFrain underwent brain surgery after the accident and was in intensive care (essentially in a coma) throughout the 30-day notice period. This fact was discussed in the Court of Appeals decision, but never discussed by the majority in the Supreme Court.

DeFrain filed a lawsuit against State Farm seeking UM benefits on October 8, 2008. Tragically, DeFrain died from his injuries on November 11, 2008, at which time plaintiff Nancy DeFrain (plaintiff) became the personal representative of his estate.

State Farm moved to dismiss the case on July 15, 2009, arguing that the failure to comply with the 30-day notice provision applicable to hit-and-run cases required dismissal of plaintiff's complaint.

The trial court denied the motion holding that the provision was ambiguous and that State Farm had not suffered any prejudice by the late notice.

On appeal, the Supreme Court reversed the trial court and the Court of Appeals, holding that an unambiguous notice-of claim provision setting forth a specified time within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer.

The Court stated that in reading a prejudice requirement into the notice provision where none existed, the Court of Appeals disregarded controlling authority and frustrated the parties' right to contract freely.

It is unclear if the Plaintiff in this case ever argued that MCL 600.5851, discussed in the *Joseph* case (summarized in this newsletter) tolled the notice provision.

Maximum Monthly Wage Loss Benefit—10/1/11 to 9/30/12— $5,104.00

MCCA Reimbursement Levels—7/1/11 to 6/30/13—$500,000.00

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.

Supreme Court Holds That No-Fault Claims of Minors and Brain Injured Are Not Protected By Tolling Rule

In *Joseph v. ACIA*, ____ Mich ____ (decided May 15, 2012), the Michigan Supreme Court held that MCL 600.5851 (which was enacted to protect minors and the mentally incapacitated from statute of limitations defenses) does not protect those individuals from the No-Fault Act's one year back rule, thus reversing the Court's 2010 decision in *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010) and reinstating the Court's 2006 decision in *Cameron v. ACIA*, 476 Mich 55 (2006). In *Regents, supra,* the Michigan Supreme Court held that MCL 600.5851 tolls the no-fault claims of minors and mentally incapacitated individuals which reversed *Cameron, supra*.

Procedural History

In the 24 years before *Cameron* was decided, the Courts unanimously held that the one year statute of limitations and one year back rule did not apply to minors and mentally incapacitated individuals pursuant to the minority savings provision set forth in MCL 600.5851. However, in a 4-3 decision, the majority justices in *Cameron* reversed 24 years of precedent and held that the minority/insanity provision in MCL 600.5851(1) did not remove the plaintiff's claim from application of the one-year-back rule under MCL 500.3145. The majority in *Cameron* reasoned that a statute governing when a party may *bring* an action (§ 5851) does not affect the *amount of damages* recoverable under the one-year-back rule.

In *Regents*, the Supreme Court rejected the reasoning set forth in *Cameron*. Writing for the 5-4 majority, Justice Kelly stated that "...the approach in *Cameron* was flawed because it read the statutory language in isolation." In this regard, the Court stated § 5851 and the No-Fault Act must be read together and in "doing so, the statutes grant infants and incompetent persons one year after their disability is removed to 'bring the action' 'for recovery of personal protection insurance benefits . . . for accidental bodily injury . . . .'. In addition, the Court held that on the basis of its language, § 5851(1) supersedes all limitations in §3145 of the No-Fault Act, including the one-year-back rule's limitation on the period of recovery. This decision was a major victory for injured minors and claimants with mentally incapacitating injuries as it protected them from the unfair application of the one year back rule set forth in § 3145, which was clearly what § 5851 was meant to accomplish.

In November 2010, Democrat Justice Alton Davis lost to Republican Mary Beth Kelly. Justice Davis had joined the majority in *Regents*. By the time *Joseph* was heard on appeal, the make-up of the Court was 4-3 in favor of the Republican justices.

Case Facts

In this case, Doreen Joseph suffered a traumatic brain injury and quadriplegia as a result of an automobile accident in 1977 when she was 17 years old. At the time of the accident she was insured with AAA. On February 27, 2009, the plaintiff filed a lawsuit seeking additional PIP benefits from AAA for unpaid case-management services provided by Doreen's family members. The claim dated back to the date of the accident in 1977. Defendant AAA filed a motion to dismiss the claim, arguing that the one-year-back rule in MCL 500.3145(1) barred the plaintiff's claim with respect to benefits sought for any period more than one year before the February 27, 2009 filing date of the lawsuit. Plaintiff responded that her mental incapacity over the past 32 years had operated to toll the one-year-back rule pursuant to the minority/insanity tolling provision of MCL 600.5851 (1).

The trial court denied AAA's motion to dismiss, citing *Regents, supra* for the proposition that the minority/insanity tolling provision tolls the one-year-back rule and, thus, if plaintiff is determined to be "insane," her recovery will not be limited to the year immediately preceding the filing of her complaint. Defendant filed an appeal directly to the Michigan Supreme Court, arguing that the minority/insanity tolling provision does not apply to the one-year-back rule and that *Regents* was wrongly decided.

The Supreme Court's Holding in Joseph

The Court began by reiterating that MCL 500.3145(1) contains two limitations on the time for filing suit *and* one limitation on the period for which benefits may be recovered:

See SUPREME COURT, page 3

SUPREME COURT, cont. from Page 2

"(1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.

(2) If notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.

(3) Recovery is limited to losses incurred during the one year preceding commencement of the action."

The third and final limitation provided in MCL 500.3145(1) is the limitation on damages known as the one-year-back rule.

The Court stated that MCL 600.5851(1) gives minors and insane persons one year after the removal of their disabilities "to make the entry or bring the action." Thus, the Court stated that by its very terms, the minority/insanity tolling provision is a timing mechanism specifying when a minor or insane person may bring his or her claim; it places no limitation on, and makes no reference to, the amount of damages that can be recovered after the action has been brought.

The one-year-back rule in MCL 500.3145(1), on the other hand, forecloses a claimant from recovering "benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." By its very terms, then, the one year-back rule is a damages-limiting provision because it limits a claimant's recovery to those losses incurred during the year before the filing of the action.

Thus, the Court held that *Regents* was wrongly decided because, according to the Court, it failed to recognize the distinction between having the general right to commence an action and the limitation on the right to recover no-fault benefits for losses occurring more than one year before the filing of the action. The Court held that *Regents* impermissibly interpreted the phrase "bring the action" in MCL 600.5851(1) as conferring on a claimant the right to "bring the action and recover an unlimited amount of damages," an interpretation which the Court stated was not allowed from the plain and unambiguous statutory text.

Based on the foregoing, the Court held that § 5851 can be used to toll the limitations provision set forth in § 3145, but cannot toll the one year back rule. The dissenting justices argued that the it defies commons sense that the Legislature would grant a minor or insane person the right to prove his or her damages in a court of law while lacking any opportunity to be awarded them. However, this notion was rejected by the majority because the plain language of the statutes mandated the result. The *Joseph* decision is the Supreme Court's third ruling on the same issue in six years.

ASK DAN - The No-Fault Insurance Expert

Q: *Can a person injured in a hit and run accident obtain damages for pain and suffering?*

Dan: In many instances, the answer is yes. In these cases, the injured person would look to an applicable auto insurance policy that contained uninsured motorist (UM) benefit's coverage. Typically this would be found on the occupied vehicle or even on a policy that covers a vehicle in the person's household. If there are no available policies, then there may be no claim.

Q: Are there different time limits on UM claims?

Dan: Oftentimes yes. The standard statute of limitations in an automobile tort case is 3 years. However, as discussed in the *DeFrain* case (in the article "*Supreme Court Finds 30 Day Notice..")* insurers will often shorten the time limits in which to file a claim or insert very short notice provisions in certain circumstances. Therefore, it is very important to consult with a lawyer immediately after an accident.

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.**

- August 26, Angels
- September 23, Twins
- September 27, Royals

Visit

http://bit.ly/buckfireticketsgiveaway

to nominate someone today!

The Michigan No-Fault Newsletter

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Our No-Fault Service Provider Spotlight

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Jeffrey Fried, Attorney & Partner at Fried Porter PLLC

This month we spotlight Jeffrey Fried, an attorney and partner at Fried Porter PLLC. Fried Porter primarily acts in assisting in the areas of guardianship and conservatorship, working with closed head and traumatic brain injured individuals who have sustained injuries through a motor vehicle accident.

Fried Porter PLLC also handles all probate and estate planning matters as well. Its goal is to ensure the well-being of adults and children with special needs through advocacy and life planning assistance.

Jeffrey Fried began as a practicing lawyer in the areas of personal injury and motor vehicle accidents. As a result, Jeffrey understands the intricacies of representing individuals for not only their third-party benefits, but first party benefits for services required to be paid under the no-fault system.

The focus of Jeffrey's practice is now to provide support in guardian and conservator issues, acting to get and maintain benefits for injured individuals.

Jeffrey is also a public administrator for the court system, a frequent speaker on areas of guardianships and conservatorships for disabled individuals, and involved in many organizations such as the Case Management Society and the Brain Injury Association of Michigan.

His involvement in the area of probate comes with an extreme passion to provide a better life for those who have been involved in an accident and require services to protect their needs and ensure a better life for themselves.

Jeffrey, with his partner, Louis Porter, also provide services relating to business entities, formations and structures, as well as facets of corporate litigation and regulatory and licensing law.

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!