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BUCKFIRE & BUCKFIRE, P.C.

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The Michigan No-Fault Newsletter

Special points of interest:

- **When does a parked vehicle pose an unreasonable risk of harm?**
- **What constitutes an intentional act under the Michigan No-Fault Act?**
- **What is the statute of limitations for a third party auto accident case for pain and suffering damages?**

Inside this issue:

No Entitlement To No-Fault Benefits Under Parked Vehicle Exception

In *Marcoux v. Home Owners*, unpublished per curiam opinion of the Court of Appeals decided November 8, 2011 (Docket No. 299559), the Court of Appeals held that a snowmobile rider was not entitled to no-fault benefits under the unreasonably parked vehicle exception in Section 3106 of the No-Fault Act.

In the early morning hours of February 2, 2009, the Plaintiff Marcoux gave a friend a ride home on a borrowed snowmobile. While travelling across a frozen lake, Marcoux hit a bump, and the snowmobile's headlight assembly fell out of its housing.

Marcoux and his friend looked for the headlight but could not locate it because it was very dark outside. Marcoux and his friend then continued on without it.

Marcoux dropped his friend off at home and then continued on to his own home. While travelling southbound on a residential street, Marcoux collided with the rear of a white van partially parked in the southbound lane of the two-lane street.

As a result of the accident, Marcoux suffered numerous facial fractures, a shattered right femur, and a fractured clavicle.

Home Owners insured the owner of the van. The owner of the van moved the van onto the street after getting stuck in his driveway. After having mechanical difficulties, he left the van parked along the street for fear of it becoming stuck in the driveway again.

The van blocked approximately one-half of the southbound lane.

Marcoux filed suit seeking recovery of personal injury protection (PIP) insurance benefits under the No-Fault Act.

Marcoux alleged that the owner of the van parked it in a manner that posed an unreasonable risk of bodily harm under MCL 500.3106.

Home Owners moved to dismiss, arguing that the van was not unreasonably parked on the road.

The trial court agreed, stating: "So I think it appears that had he [Marcoux] been acting as a reasonably prudent person, he would have had ample opportunity to observe, react to, and avoid the hazard posed by the van.

So, therefore, the Court finds that the van did not pose an unreasonable risk within the meaning of MCL 500.3106(1)(a)."

Marcoux argued that the trial court erred in granting Home Owners summary disposition because the owner of the van parked it in such a way as to pose an unreasonable risk of bodily harm.

Marcoux also argued that the trial court erred by considering his fault with regard to the collision when granting Home Owners summary disposition.

The Court noted that the Michigan Supreme Court has held that the language of MCL 600.3106(1)(a) "does not create a rule that whenever a motor vehicle is parked entirely or in part on a traveled portion of a road, the parked vehicle poses an unreasonable risk."

Rather, "factors such as the manner, location, and fashion in which a vehicle is parked are material to determining whether the parked vehicle poses an unreasonable risk."

In this case, the parked van was more than 300 feet from the nearest cross street and impeded only one-half of one lane on a lightly travelled residential road with a speed limit of 25 miles per hour.

The accident occurred in the early hours of the morning and approaching drivers had ample opportunity to observe the van.

This supports a conclusion that drivers could react to and avoid the hazard it posed either by

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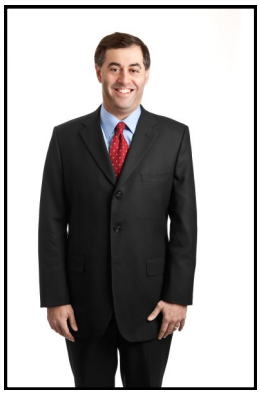

Michigan Attorney Daniel L. Buckfire

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.

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moving partially into the oncoming lane, if it was clear to do so, or by stopping behind the van until oncoming traffic cleared.

Thus, the Court held that the trial court did not err in concluding that the van in this case did not propose an unreasonable risk of the bodily injury. Therefore, the snowmobile driver was not entitled to receive no-fault benefits.

Court Upholds Dismissal of Case Involving Intentional Act Exemption To Tort Immunity

In *Chandanais v. Wilson*, unpublished per curiam opinion of the Court of Appeals decided November 17, 2011 (Docket No. 300933), the Court held that the Plaintiff injuries were not intentionally caused and that the Plaintiff did not sustain a serious impairment of a body function as a matter of law.

In this case, the Plaintiff's claims arose out of a series of events that began at a party. Plaintiff and defendant both consumed alcohol at the party, and defendant had an altercation with the plaintiff's girlfriend.

After plaintiff and his girlfriend left the party, defendant drove to plaintiff's home. The altercation between the defendant and the girlfriend reignited.

Plaintiff attempted to separate the two women and demanded that defendant leave. Defendant got into her car, floored the accelerator with the car in reverse, and backed into plaintiff, catching his leg between her car and a parked car. Plaintiff went to the emergency room and reported significant pain in his lower left leg. Medical personnel found no broken bones and advised plaintiff to use crutches and to follow up with his personal physician.

During the next year, plaintiff continued to have leg pain. On the issue of whether defendant intentionally caused harm to plaintiff under MCL 500.3135(3)(a), the Court noted that the Supreme Court explained that the central factual issue for analysis is whether the defendant intended to cause harm: "[I]n analyzing § 3135(3)(a), the courts are to review only whether the defendant intended to cause the harm that resulted." *Id.* at 32. If the harm is intentionally caused, then there is no threshold requirement in pursuing an auto liability claim.

In this case, the record contained two reports relevant to this determination: the emergency room report and the police report. Both reports present statements in which plaintiff and his girlfriend declared that defendant deliberately struck plaintiff with her car.

However, Plaintiff expressly testified in deposition that he did not know whether the defendant intentionally struck him.

Given plaintiff's sworn deposition testimony, the Court concluded that his prior unsworn statements are insufficient to create a question of fact regarding defendant's intent.

With respect to the Plaintiff's argument that the trial court should have inferred defendant's intent on the basis of defendant's conduct, the Court held that there was no testimony that defendant aimed her car at plaintiff. As such, the Plaintiff's argument was without merit.

Plaintiff next argued that the trial court should not have held that he did not sustain a serious impairment of body function under MCL500.3135(1). The Court disagreed.

Defendant presented medical records demonstrating that prior to the incident at issue, plaintiff had sustained two significant injuries that caused leg and back pain and the medical records indicated that plaintiff's current condition was related to his previous injuries.

Once defendant presented these records, plaintiff was required under MCR 2.116(G)(4) to present evidence to create a question of fact regarding whether defendant's conduct caused plaintiff's alleged serious impairment.

In response, Plaintiff presented no admissible evidence to establish that his current condition resulted from the incident at issue. He offered deposition testimony from a physiatrist, but the physiatrist testified that she did not identify the source of plaintiff's injuries, and that she could not relate plaintiff's condition to any particular incident.

Auto Accident Victim With Broken Foot Has Case Reinstated

In *Smart v. Kowalesky*, unpublished opinion per curiam of the Court of Appeals decided October 25, 2011 (Docket No. 298395), the Court of Appeals reversed a trial court's dismissal of the Plaintiff's third party tort case arising out of an automobile accident.

The case involved the issue of whether the Plaintiff suffered a serious impairment of body function under MCL 500.3135.

In this case, plaintiff sustained injuries in 2007 when the vehicle he was driving collided with a vehicle driven by Frank Kowalesky and owned by Judy Lee Kowalesky. The Plaintiff suffered a broken left foot in the accident.

The Plaintiff was off work for 90 days after the accident. His foot was in a cast for three to four weeks, and then in an orthopedic boot. Although he returned to custodial work without restrictions, his ankle remained stiff and difficult to bend.

He had a permanent numb feeling along his arch and toward the front of the bottom of his foot. The pain in his left foot was "always there."

He took extra-strength Aleve and Tylenol to manage the pain. Fusion surgery was an option if plaintiff's pain became intolerable.

The Plaintiff testified how the injury impacted his life at home. Although he was able to perform many of activities he did prior to the accident, he did them with pain, much greater difficulty, less frequency, and in some case not at all.

Plaintiff's treating physician imposed no restrictions on plaintiff's home or recreational activities as of July 2, 2007.

However, plaintiff thereafter began to develop foot deformities and arthritis.

The Defendants argued that the Plaintiff's injuries did not rise to the level of a serious impairment of body as set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The trial court agreed and dismissed the case.

Three months later, the Michigan Supreme Court decided *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010) which reversed *Kreiner*.

On Appeal, the Court held that the trial court's decision was based on case law that had been overruled.

For that reason, the Court vacated the trial court's order granting summary disposition in favor of defendants and remanded the case to the trial court for further proceedings in light of the *McCormick* decision.

ASK DAN - The No-Fault Insurance Expert

Q: *What is the statute of limitation for a third party auto accident case for pain and suffering damages?*

Dan: In most cases, an injured person has three years to sue the at fault party(ies). However, there are exceptions for minors and in other special cases which may increase or decrease the time limits so it is very important to consult with an attorney as soon as possible following an accident.

Q: *Are there time limits for getting benefits in a first party PIP case?*

Dan: Yes. A written claim must be made to the PIP insurer within one year of the accident. After a claim has been established, there is a one year back rule which means that claim must be made within one year from the date the benefits or expense is incurred. The only way to stop the one year back rule from con-

Book Your Free No-Fault Seminar Today!

Daniel frequently gives educational seminars to groups of 10 or more attendees on Michigan no-fault laws and current court cases. To schedule a free seminar, please email or call Kathryn at **Kathryn@buckfirelaw.com** or

The Michigan No-Fault Newsletter

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Our No-Fault Service Provider Spotlight

The Estates of Rochester Hills/Progressions Supportive Living
Rochester Hills & Macomb Twp., MI
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This month we spotlight the Estates of Rochester Hills/ Progressions Supportive Living, a TBI/SCI post acute rehabilitation and residential living program. The Estates is a division of Attendant Care Companies, a full-service homecare company.

Owner, Paul Semian, started Attendant Care Companies in 2003 after a personal experience with his ailing mother. Attendant Care Companies is a CHAP accredited, private duty and Medicare certified homecare agency.

Semian built the Estates of Rochester Hills because he wanted to offer a smaller, customized option for TBI/SCI clients. In building the Estates, he hoped to build a home that not only provided support but also independence and empowerment.

The Estates of Rochester Hills

The Estates accomplishes this by providing a behavior based program that puts the responsibility of moving forward in the hands of the client. "I believe it all starts with the care the residents receive. I also believe that the residents see that we help them move to the next step in their recovery process. This is evidenced by successfully discharging 7 people to supportive living over the past year!" says Semian on what makes the residents of the Estates want to stay there.

The Estates is proud to announce the opening of the Estates of Macomb, in Macomb Twp., MI for the New Year! It is a state of the art facility with six private suites and an ADL room for OT.

For a tour of The Estates of Rochester Hills or Macomb, please contact Kristina at 248.881.2959.

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!