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BUCKFIRE & BUCKFIRE, P.C.

August 2010

The Michigan No-Fault Newsletter

Special points of interest:

- **Are there exceptions to the one year statute of limitations?**
- **When is the insurer not liable for PIP benefits?**
- **The benefits of joining the No-Fault Network**
- **FREE No-Fault Resource Binder offer**

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Court Upholds Order For New Trial In Auto Negligence Case

In *Wilfong v. Mickalich & Associates, Inc.*, unpublished opinion per curiam of the Court of Appeals decided July 1, 2010, (Docket No. 290949) the Court of Appeals upheld the trial's court's order for a new trial in an automobile negligence case.

This case involved claims for non-economic damages and work-loss damages arising from an automobile accident.

The plaintiff underwent spinal fusion surgery a few months before the accident. After the accident, the plaintiff had low-back pain and her increased pain since the fusion surgery was causally connected to the accident by her doctors.

However, during the trial, a visiting judge held as a matter of law that the Plaintiff had failed to establish that she had sustained a serious impairment of body function.

Specifically, the trial judge held that the plaintiff failed to prove that her impairment was objective.

After the trial, the judge originally assigned to the case granted the plaintiff's motion for a new trial, essentially reversing the visiting judge's decision.

The Court of Appeals held in favor of the Plaintiff on this issue.

However, the Court ruled that the visiting judge's decision to dismiss the Plaintiff's claim for excess economic damages (i.e. lost income) was correct because the Plaintiff failed to prove her damages with reasonable certainty.

No-Fault Insurer's Negligence Is Exception To One Year Notice Rule

In *Albrecht v. State Farm*, unpublished opinion per curiam of the Court of Appeals decided June 22, 2010 (Docket No. 289042) the plaintiff was attempting to load pigs into a trailer that was connected to a pickup truck.

At some point during this process, the trailer's loading ramp fell on the plaintiff and broke her back and arm.

Plaintiff and her husband, Justin, have homeowners, automobile no-fault and hospitalization insurance through defendant State Farm.

Plaintiff's husband telephoned State Farm's sales agent, Gregg Hughes and told him about the accident.

Gregg Hughes then sent plaintiff a claim form, but only for hospitalization insurance rather than no-fault benefits.

This is important because under § 3106 of the No-Fault Act, the Plaintiff is entitled to no-fault benefits because her injury was a result of direct physical contact with the trailer which was attached to the truck.

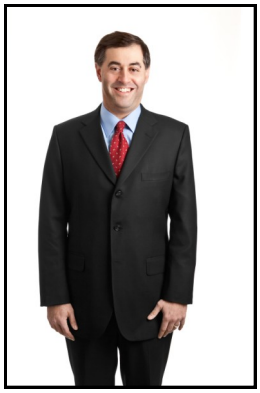
After submitting the claim to State Farm, plaintiff collected the maximum benefit allowed under the policy, which was $1,000.

On January 3, 2008, more than 13 months after her injury, plaintiff filed her complaint against State Farm alleging that she should also have been covered under her automobile no-fault insurance policy.

State Farm field a motion arguing that the case should be dismissed because the action was filed beyond the one year statute of limitations and the trial court granted the motion.

The Court of Appeals however, reversed the trial court, finding that the plaintiff's noncompliance with the one-year statute of limitations may have been affected by Gregg's negligence, and if it were, then State Farm should be stopped from asserting the statute of limitations.

The Court remanded the case back for further factual development of this issue.



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.

Court Holds That Hospital Cannot "Piggy Bank" On Plaintiff's Lawsuit

In *Miller v. Detroit Medical Center*, ___ Mich. App. ___ (decided May 13, 2010) the Michigan Court of Appeals issued an important published opinion in a no-fault case involving attorney fees.

In this case, Ryan Scott was catastrophically injured in a rollover automobile accident. His guardian and conservator, Gail Miller, filed a lawsuit against Citizens Insurance Company for no-fault benefits.

Citizens refused to pay because it claimed that Scott's *business use* of the vehicle violated the terms of its insurance policy. The Detroit Medical Center's (DMC) bill for Scott's care exceeded $150,000.

During litigation of the lawsuit, Scott's lawyer was able to obtain a settlement with Citizens, which included payment of the DMC bill.

Shortly after the settlement was entered into, the DMC intervened in the case. The DMC argued that it was entitled to be reimbursed for its entire bill, and without the deduction for the costs of litigation, including Scott's costs and attorney fees.

The trial court disagreed and ordered that the DMC receive 2/3 of its bill to account for Scott's litigation expenses, including costs and attorney fees.

The Court of Appeals agreed with the trial court and held that under the common-fund doctrine it would be unfair to allow the DMC benefit at the expense of Scott without contribution to the costs incurred in securing the settlement.

Insurer Not Liable For PIP Where Named Insured Is Not Employer Of Injured Claimant

Morris v. Michigan Ins. Co., unpublished opinion per curiam of the Court of Appeals decided May 25, 2010, (Docket No. 290465) is a no-fault first party benefits case.

In this case, the plaintiff was injured while a passenger in a motor vehicle owned and operated by the defendant's insured, Scott Bearup.

This appeal concerns whether the defendant may be liable for first party no-fault benefits as a higher priority insurer under MCL 500.3114(3), which applies where an "employee . . . suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer . . . ."

The terms "employee" and "employer" are not defined by statute for purposes of MCL 500.3114(3).

In this case, the plaintiff testified at his deposition that, at the time of the accident, he was working for one of Bearup's companies, Bear Construction & Development, Inc.

The Court stated that, although his testimony establishes a question of fact whether he was an employee, as opposed to an independent contractor, of one of Bearup's companies, the vehicle in which he was injured was not owned by the companies and defendant's insured is Bearup, not one of the companies.

In some instances, application of the economic reality test may involve piercing the corporate veil to determine the actual employer, but the Plaintiff failed to provide any evidence that Bearup, and not the corporation, was his actual employer.

Accordingly, the Court held that insurer was not liable for Plaintiff's no-fault benefits.

Traumatic Brain Injuries (TBI) & Statistics

A traumatic brain injury (TBI) is defined as a blow or jolt to the head or a penetrating head injury that disrupts the function of the brain.

TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue. Not all injuries to the head result in TBI and the severity of the brain injury can range from "mild" to "severe."

According to the Centers for Disease Control and Prevention (CDC), 1.4 million people sustain traumatic brain injuries each year in the United States.

Of these people 50,000 die, 235,000 are hospitalized, and 1.1 million are treated and released from an emergency department.

Males are 1.5 more times likely to sustain a traumatic brain injury than females. 0 to 4 year olds and 15 to 19 year olds are the age groups that are at the highest risk and African Americans have the highest death rate from traumatic brain injuries.

An estimated 20% of service members returning from duty in Iraq and Afghanistan may have sustained a TBI.

The CDC estimates that at least 5.3 million Americans currently have a long term or lifelong need for help to perform activities of daily living as a result of traumatic brain injury.

Traumatic brain injury can cause a wide range of functional changes. These changes affect your thinking, sensation, language, and emotions.

The leading cause of TBI are falls (35.2%), motor vehicle-traffic crashes (17.2%), struck by/against events (16.5%), and assaults (10%).

For an injury as debilitating as TBI, prevention is essential. Luckily, prevention is not difficult. When driving, the best way to avert a TBI is by wearing a seatbelt and not being under the influence of alcohol.

In fact, according to the Brain Injury Association of America more than 50% of people with a brain injury were intoxicated at the time of their injury.

It's also smart to always wear a helmet when riding a bike, thus reducing the risk of a head injury by almost 90%.

If the right precautions are taken, the severity of TBI's can be reduced if not prevented.

Court Reverses Dismissal of Plaintiff's Uninsured Motorist Benefits Case

Sims v. Progressive, unpublished opinion per curiam of the Court of Appeals decided May 18, 2010 (Docket No. 290684) in a Court of Appeals decision involving uninsured motorist benefits.

In *Sims,* Progressive claimed that Sims failed to timely name and serve the alleged uninsured driver in a lawsuit and thereby violated a "do nothing" provision in its insurance policy.

This provision essentially states that the insured shall *do nothing* to prejudice the rights of the insurer.

At the request of Progressive, the trial court dismissed Sims' case. The Court of Appeals reversed, finding that Sims in fact, *did nothing* to prejudice Progressive's rights.

In fact, the Court held that Progressive could have protected its own rights by paying the claim and filing a claim for subrogation against the driver.

The Court stated that Progressive's insistence that plaintiff's inaction prejudiced its right to recover from the driver ignores the availability of an avenue that was open to Progressive to protect its interests.

Accordingly, Progressive did not establish that Sims violated the policy provision requiring that Sims "do nothing to prejudice [the insurer's] rights."

Therefore, the Court held that Progressive was not entitled to a dismissal on this basis.

Maximum Monthly Wage Loss Benefit—10/1/09 to 9/30/10— $4,878.00
MCCA Reimbursement Levels—10/1/09 to 9/30/10—$460,000.00

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Our No-Fault Service Provider Spotlight

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This month we spotlight STAR Rehab (Strength Training & Recovery Corporation), a rehab center that specializes in spinal cord and traumatic brain injuries. They offer physical therapy, occupational therapy, athletic trainers, aquatic therapist, massage and manual therapist, and assistive technology practitioners (ATP certified). Their program is an intense exercise based program that builds up to three hours in length based on individual tolerance and covers Genesse, Shiawasse, Lapeer, Saginaw, and Oakland Counties.

STAR Rehab is a part of the Michigan Care Network and proud developers of the Color Of Care (501C3) non-profit organization. This project is still in the development stage, however its mission is to financially fund those who suffer traumatic brain injuries and spinal cord injuries and have little or no insurance for their therapy needs. The 501C3 will also help sponsor many of their clients competitive wheelchair sports.

Unlike many clinics, STAR Rehab is a home and community based program that will not only set up gyms within your own home for your convenience but also set up memberships within your community to perform therapy at various sport/rehab facilities near you. They also offer free in-services/lunch & learns to case managers and adjuster offices that wish to learn more.

One of STAR Rehab's clients working out at

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!