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FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

# LAW FAX

A Publication for Insurance Providers and Adjusters

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From the Co-Editors  
James L. Borin & Simeon R. Orlowski

## **OPEN AND OBVIOUS DOCTRINE BARS PLAINTIFF'S CLAIMS**

Sarah Walburn<sup>1</sup> – Contributor

On May 29, 2008, the Michigan Court of Appeals once again examined the issue of whether the open and obvious doctrine bars the plaintiff's premises liability claims pursuant to *Lugo v Ameritech Corp*, 464 Mich 512 (2001). In the unpublished case of *Grzesiak v First Broadcasting Investment Partners, LLC*, Docket No. 277996 (2008), the Court of Appeals determined that the plaintiff failed to present enough evidence to overcome the open and obvious doctrine.

While on her way to pick up free movie tickets from the defendant radio station, the plaintiff slipped on a "slippery substance" on the sidewalk and fell, causing injuries. Prior to her fall, the plaintiff noticed whole, half, and smashed apples on the sidewalk from a nearby tree. She testified that she had stepped around some whole apples before falling. Other testimony indicated that the apples virtually covered the sidewalk. The plaintiff could not recall whether she was looking down when she fell.

The Court of Appeals examined whether the defendant owed a duty to the plaintiff. Generally, a landowner owes a "duty to exercise reasonable care to protect an invitee from unreasonable risks of harm caused by dangerous conditions on the land". *Lugo, supra* at 516. On the other hand, landowners "are not required to protect invitees from 'open and obvious dangers' unless 'special aspects' exist that render an open and obvious

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danger effectively unavoidable or give rise to a uniquely high likelihood of harm, rendering the condition unreasonably dangerous". *Lugo, supra* at 516-519.

An open and obvious danger exists if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection". *Corey v Davenport College of Business*, 251 Mich App 1, 5 (2002). As such, the test is objective, i.e., whether a reasonable person in plaintiff's position would have foreseen the danger.

After examining the facts of this case in conjunction with the case law stated above, the Court of Appeals determined that the plaintiff did not meet her burden to establish her premises liability claim. The Court noted that the plaintiff had testified that she was aware of the apples on the sidewalk and that she had already walked around several before falling. Therefore, the Court stated that a person of ordinary intelligence in the plaintiff's position would have foreseen the danger that was posed by the fallen apples and would have attempted to avoid it.

Moreover, the Court rejected the plaintiff's assertion that "special aspects" existed because evidence was not submitted to establish that the apples presented a reasonably foreseeable and high risk of severe harm. Additionally, two other entrances existed that the plaintiff could have utilized, and the plaintiff could have walked on the grass or simply left the area.

Consequently, the Court of Appeals affirmed the trial court's holding that the apples on the sidewalk presented an open and obvious danger.

While this opinion is unpublished, it is yet another indication that the Court of Appeals is requiring more than what the above plaintiff provided to overcome the open and obvious doctrine as originally set forth in the *Lugo* decision. This is true in this particular case even where the defendant testified that it did not employ a service to maintain the sidewalk and that a complaint had been received about the condition of the sidewalk.

**COURT OF APPEALS HOLDS THAT INSURER OF  
VEHICLE OWNER OWES VEHICLE DRIVER A DEFENSE –  
AT LEAST IF THE DRIVER IS A RELATIVE OF THE OWNER**

Megan Cavanagh<sup>2</sup> – Contributor

The Michigan Court of Appeals recently released its published decision in the case of *Citizens Ins Co v Secura Ins*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2008) and addressed whether the duty to defend extends to a potentially permissive driver. The Court held that, at least in the situation where the driver is presumed, pursuant to MCL

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257.401(1), to be driving the vehicle with the vehicle owner's consent, the insurer of the vehicle owes the driver a duty of defense in the tort suit.

*Citizens* was a declaratory judgment action arising out of a fatal automobile accident. The driver, Andrew Gillespie, was operating his mother, Geraldine Irvine's, vehicle while he was under the influence of drugs and alcohol and caused an accident which resulted in the deaths of Alysha Salt and Robert Bolanowski as well as serious injury to Stephen Ancona and Terrance Hall. Ancona, Hall and the estates of Salt and Bolanowski filed negligence actions against Gillespie and also asserted that Irvine was liable under the owner liability statute, MCL 257.401. The plaintiffs alleged that, at the time of the accident, Gillespie was operating Irvine's vehicle with Irvine's permission.

In the tort suits, Irvine moved for summary disposition of the plaintiffs' claims that she could be held liable under MCL 257.401, arguing that no genuine issue of material fact existed that Gillespie did not have her consent to drive her vehicle at the time of the accident. The circuit court denied the motion, finding that disputed questions of fact existed regarding the issue of consent and that a jury should determine the consent issue. Irvine filed an application for leave to appeal to the Michigan Court of Appeals which was denied.

At the time of the accident, Gillespie was insured by Citizens and Irvine was insured by Secura. Citizens took the position that Secura had a duty to defend Gillespie in the tort actions because Citizens' policy provided that it was excess to any other coverage afforded to Gillespie. When Secura refused to assume the defense, Citizens filed a declaratory judgment action seeking a determination that Secura owed Gillespie both a duty of defense as well as a duty of indemnity. Citizens filed a motion for summary disposition and the circuit court granted the motion. The circuit court entered an order stating that Secura possessed the primary duty to defend and indemnify Gillespie in the underlying action and also awarded Citizens the attorney fees it had incurred in defending Gillespie up until the order was entered. Secura filed a claim of appeal.

On appeal, Secura argued that the circuit court's order regarding Secura's duty to indemnify was necessarily premature because the circuit court had previously held that the determinative issue - i.e. whether Gillespie was driving the vehicle with Irvine's consent - was a question to be resolved by the jury. In addition, Secura argued that it did not owe Gillespie a defense unless and until the jury determined that Gillespie was an insured - i.e. that he was driving with the consent of Irvine. Secura argued that the duty to defend, which is entirely contractual, extends only to an "insured" under its policy and Gillespie was not an "insured" unless and until the jury in the tort suits found the requisite consent.

The Court of Appeals disagreed with Secura's position that Gillespie was not an insured until the jury in the tort suits found the requisite consent. The Court noted that MCL 257.401(1) creates a rebuttable presumption that the vehicle was being driven with Irvine's consent because of the familial relationship between Irvine and Gillespie. The Court concluded that the presumption, taken together with the allegations in the underlying tort suits, were significant and sufficient to impose upon Secura a duty to defend Gillespie in the underlying suit. The Court began its analysis by noting that, under well established Michigan case law, the duty to defend is broader than the duty to indemnify and an insurer has a duty to defend its insured if the allegations in the underlying action *arguably* fall within the coverage of the policy. While noting that the duty to defend arises solely from the language of the insurance contract, the Court held that the duty to defend is implicated when a theory of liability is advanced against an insured for which there is arguably coverage. In light of the allegations

of the requisite consent in the underlying tort suits, as well as the statutory presumption that Gillespie was operating the vehicle with Irvine's consent, the Court concluded that Secura's duty to defend Gillespie was triggered.

However, the Court agreed with Secura that the order regarding indemnity was prematurely entered by the circuit court because it did not limit Secura's duty to indemnify Gillespie to a finding of the requisite consent. The Court noted that one or more of the juries in the tort suits could find that Gillespie was negligent and also find that Irvine did not expressly or impliedly consent to Gillespie's use of her vehicle at the time of the accident. Under such a scenario, the circuit court's order would have been broad enough to impose liability on Secura, despite the fact that no coverage was afforded. Accordingly, the Court of Appeals reversed the circuit court's order with respect to Secura's duty to indemnify.

Finally, the Court rejected Citizen's request for sanctions on the basis that Secura's appeal was not frivolous. The Court noted that the duty to defend a putative or potential insured was a novel one (hence the need to publish the opinion). The case law upon which Citizens' relied addressed only the duty to defend and indemnify a party that was unquestionably an insured under the insurance policy. In this case, the question was whether Gillespie was even an insured, and therefore whether the contractual duty to defend had been implicated. The Court noted that no prior case law squarely addressed this issue.

The conclusion to take from the Court's decision in *Citizens v Secura* is that the insurer of a vehicle owner owes the primary duty to defend a vehicle driver when the underlying tort suit alleges that the driver was operating the vehicle with the owner's consent and the driver is the spouse, father, mother, brother, sister, son, daughter or other immediate family member of the owner. However, given that the Court's finding of a duty to defend was based primarily upon the fact that the statutory familial presumption was implicated, there may still be room to argue that no duty to defend arises under facts which do not implicate the presumption. It remains an open question whether an insurer has a duty to defend a putative insured who is merely alleged to have been driving with the requisite consent but that consent is not presumed to exist.

## **GUARDIAN AND CONSERVATOR FEES IN NO FAULT CLAIMS**

Suzanne Fanning<sup>3</sup> – Contributor

A Guardian or Conservator is required when an individual is unable to make informed decisions, whether due to a physical or legal disability. Guardian/Conservator issues can arise in a number of scenarios in a first party claim. An insured may suffer a traumatic brain injury or other mental or physical incapacity from the motor vehicle accident requiring the protection of a Guardian/ Conservator on a temporary or long-term basis. Alternatively, an insured may have already been incapacitated by virtue of a preexisting disability when the accident occurred. In a different situation, a minor may be entitled to first party benefits but may require

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Guardian/Conservator protection for some of those benefits or a settlement of benefits due to the child's minority. Given that these scenarios are not uncommon, it is important for the insurer be aware of the extent to which Guardian/Conservator costs and fees are compensable as first party benefits.

The general rule is that Guardian/Conservator fees are compensable as first party benefits. In *Heinz v ACIA*, 214 Mich App 195 (1995), the Michigan Court of Appeals held that if a person is so seriously injured in a motor vehicle accident that it is necessary to appoint a Guardian or Conservator for that person, the services performed by the Guardian or Conservator are reasonably necessary to provide for the person's care, and therefore, they are allowable expenses under §3107. Since the Michigan Supreme Court declined to hear *Heinz* on appeal, the Michigan Court of Appeals decision is legal precedent on this issue.

However, since *Heinz* was decided, the Court of Appeals has issued a number of decisions, in both published and unpublished opinions, that have narrowed the scope of *Heinz*. In *Houghton, Conservator of Johnson v ACIA*, 2000 WL 33413358, the Court of Appeals limited the class of allowable Guardian/Conservator fees. In *Houghton*, the Guardian/Conservator expenses fell into two categories. The first category included those routine expenses incurred by the Guardian/Conservator related to probate proceedings. The second category included unusual expenses incurred as a result of probate litigation pursued by the ward's husband. The court ruled that the first category of expenses was clearly compensable under *Heinz* and awarded no fault penalty attorney fees against the insurer. However, the court ruled that the second category of expenses was *not* compensable. In doing so, the Court explained its rationale, "We are confident that the Legislature did not envision that family disputes regarding the appointment of guardians would be included as expenses payable by the no fault system. It is unlikely that the Legislature imagines that at a time of crisis, family members would not put aside their personal differences and unite for the benefit of an injured or incapacitated family member."

The Court of Appeals has also limited the insurer's liability for Guardianship/Conservator fees to only those services directly related to the care, recovery or rehabilitation of the ward. In *In re Estate of Berger*, 2000 WL 33533100 (not reported), the ward was incapacitated by a motor vehicle accident resulting in long term physical and mental problems. 15 years after the accident, the ward had a daughter. A custody battle over the ward's daughter ensued with the child's father, which centered on the ward's mental ability to care for the child. The Court of Appeals held that the legal fees involved on behalf of defending the child custody matter were not compensable because they were not reasonably necessary charged incurred for the ward's care, recovery or rehabilitation.

In *In re Estate of Buchanan*, 2003 WL 21920404 (unreported), the Guardian/Conservator submitted expenses to the no fault insurer for legal services provided by an attorney on behalf of the incapacitated ward. The legal fees included pursuit of a possible medical malpractice claim, product liability and tort claims arising as a result of the motor vehicle accident. The fees included telephone conferences with products liability attorneys and a trip to the accident scene. The no fault insurer paid a portion of the fees and the Guardian sought an order from the Wayne County Probate Court requiring the no fault carrier to pay the remainder, which the Court granted. The Court of Appeals reversed, holding that while possibly having the effect of enlarging the estate, the attorney fees were not essential to the care or to the restoration of his good health. Accordingly, the fees were not compensable under the No Fault Act.

*Buchanan* is also noteworthy for holding that attorney fees incurred in connection with an estate's claim for first party benefits are not compensable unless the benefits are overdue or unreasonably denied.

Similarly in *Shields v State Farm*, 254 Mich App 367 (2002), the Court reversed the award of Guardian/Conservator fees, indicating that the Guardian/Conservator appointment was needed because the ward was a minor and unable to oversee her financial affairs and not because of injuries sustained in the accident.

### PRACTICE POINTERS

Based on these post-*Heinz* decisions, you will certainly want to closely scrutinize any Guardian/Conservator fees submitted for payment as part of a first party claim, particularly attorney fees which can be significant.

As an initial matter, you should require that prior to payment, all Guardian/Conservator/Attorney fees be itemized so you can determine what specific services were undertaken on behalf of the ward. Once you have the itemized charges, you may be able to challenge any expense that is not directly related to the care, recovery or rehabilitation of the incapacitated insured. Second, any charges incurred with regard to collateral disputes such as fiduciary fights also appear to be excludable. Third, if you have a claim involving a child, make certain that Guardian/Conservator services are related to the child's injuries and not related to the fact that the child is legally incapacitated as a minor, as these charges may also be excludable.

Even if the Guardian/Conservator fees are directly related to the ward's injuries, you may also be able to challenge the reasonableness of the charges. For example, while a rate of \$150 per hour for attorney fees incurred on behalf of the ward is likely to be deemed a reasonable hourly fee by the Probate Court, the same Court may well balk at approving \$350 per hour. You can likewise contest any perceived "padding" on the part of the attorney for unnecessary or duplicative services.

If you wish to contest Guardian/Conservator fees, you must be aware that the Guardian/Conservator can petition the Probate Court to order that the Guardian/Conservator services are reasonably necessary and should be billed to the insurance company. The Court of Appeals has held that the Probate Court has jurisdiction to hear no fault contract claims per MCL 700.1303(1)(I). *Shields, Supra*. Once the Probate Court issues an order approving the Guardian/Conservator/Attorney fees, that order has res judicata effect and cannot be contested in circuit court.

In order to avoid this outcome, always make sure that you obtain copies of the initial probate forms, including the initial Petition for Guardian/Conservator. You should make certain that the no fault insurer is listed as an interested person in these forms for purposes of notice. If not, you should immediately file a Request For Notice with the Probate Court under MCLA 700.5104. This ensures that you will receive notice of any attempt on the part of the Guardian/Conservator or the attorney acting on behalf of the estate to seek approval of any fees. Once you receive notice that a Petition for Approval of Fees has been filed, an interested party is entitled to a hearing to contest approval of the fees. If necessary, an experienced Guardian or Conservator can act as an expert witness to challenge the necessity and amount of the charges incurred.

In conclusion, when you are faced with a claim involving Guardian/Conservator fees, do not accept the fees at face value. There is certainly authority for the position that these fees can be challenged in several respects.

Suzy Fanning is an associate in the Trusts and Estate Settlement Group. She is happy to answer any questions that you might have about any probate issues that arise. Suzy is also available for free in-house seminars regarding Guardian and Conservatorship issues as well as general probate matters.

### WINDY CITY SEMINAR

Don't miss this opportunity! Register Today! Seating is limited. To register for the Chicago Seminar, hosted by Garan Lucow Miller, P.C., contact Kristi G. Woloszyk at [kwoloszyk@garanlucow.com](mailto:kwoloszyk@garanlucow.com). Please include your name, company, title, address, phone, fax and email address (if registering a colleague). We'll see you on July 24th!

8:30 - 9:00 a.m. CONTINENTAL BREAKFAST / REGISTRATION

9:00 - 9:05 a.m. WELCOME AND INTRODUCTION  
Speaker: **EDWARD M. FREELAND**

9:05 - 10:05 a.m. **MICHIGAN AUTOMOBILE NO FAULT - 1<sup>ST</sup> PARTY UPDATE / YEAR IN REVIEW**  
Speaker: **EDWARD M. FREELAND**

"Constructive Ownership" & Responsibility to Insure (or not) a Motor Vehicle .3101  
\* Equitable Estoppel of 1 year Statute of Limitations .3145 \* No Fault Insurer's Right to IME .3151 & .3159 \* Equitable Estoppel with Denial of Coverage Relative to Failure to Disclose .3163 \* Tort Liability Exposure above PPI \$1 million .3121 \* Business Use Exclusions Enforceable with Auto, B.I. policy, *Bristol West v Butzbach*

10:05 - 10:30 a.m. **WORKERS DISABILITY COMPENSATION ISSUES IN 1<sup>ST</sup> PARTY NO FAULT CLAIMS**  
Speaker: **EDWARD M. FREELAND**

Amount and Type of Set-Off \* Effect of Redemption of Work Comp Claim \* Set-Off for Attendant Care \* No Fault Carrier's Right to Intervene in Work Comp Action \* Payment of No Fault Benefits When Work Comp Carrier Has Denied Claim

10:30 - 10:45 a.m. BREAK

10:45 - 11:45 a.m. **MICHIGAN 3<sup>RD</sup> PARTY AUTO LIABILITY / UNINSURED MOTORIST UPDATES**  
Speaker: **DAVID A. COUCH**

Non-Party At Fault Rule \* Threshold Requirements \* *Kreiner* and its Progeny \* Proposed Legislative Changes \* Uninsured Motorist/Under-Insured Motorist Coverage \* Statute of Limitations

11:45 - 1:00 p.m. LUNCH ON YOUR OWN

1:00 - 2:00 p.m.     **NORTHERN MICHIGAN RECREATIONAL ACCIDENTS**  
Speaker: **PETER B. WORDEN, JR.**

Land-based Accidents – Skiing, Off Road Vehicles, Snowmobiling, Hunting, Fishing, Equine, Bicycling \* Water-based Accidents \* Michigan versus Maritime Law \* Federal Maritime Law

2:00 - 3:00 p.m.     **MARITIME / ADMIRALTY LAW**  
Speaker: **THOMAS W. EMERY**

Overview of Maritime Law \* Maritime Terminology \* Distinctions between State and Federal Law \* First-Party Claims and Coverage Defenses \* Underinsured / Uninsured Boater Coverage \* Theft Claims \* Salvage, Towing and Wreck Removal \* Specialized Investigators \* Subrogation Claims against Marinas / Contractors

3:00 - 4:00 p.m.     QUESTION AND ANSWER SESSION