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MICHIGAN SUPREME COURT CLEARS UP AMBIGUITY IN COURT OF APPEALS DECISIONS REGARDING DESIGNATIONS OF NON-PARTIES AT FAULT

Aaron Belville¹ – Contributor

MCLA 600.2957(1) states that, in actions seeking damages for personal injury, property damage or wrongful death, “the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action”. However, two Court of Appeals decisions, issued in 2002 and 2005, respectively, created some confusion as to what a defendant must prove before fault can be allocated to a non-party. In *Romain v Frankenmuth Mut Ins Co*, ___ Mich ___ (issued July 23, 2008, Docket No. 135546), the Michigan Supreme Court has resolved this question.

In 2002, the Court of Appeals issued a decision, *Jones v Enterel, Inc*, 254 Mich App 432 (2002), which held that “a duty must first be proved before the issue of fault or proximate cause can be considered”, in the context of a designation of non-party at fault. Then, in 2005, the Court of Appeals published an opinion, *Kopp v Zigich*, 268 Mich App 258 (2005), stating “a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated”. Because of these two conflicting decisions, plaintiffs attempted to rely upon the tougher burden announced in *Jones* in attempting to strike non-party at fault designations, while defendants argued that the less stringent *Kopp* standard was controlling.

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The *Romain* Court ultimately determined that proof of a duty is a threshold requirement before a trier of fact can assess fault to a non-party. The Court relied upon the language of the non-party at fault statutes which define "fault" to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, **that is a proximate cause of damage** sustained by a party". The court reasoned that, because an individual's action can not be considered a proximate cause of an injury where the individual had no legal duty, it must first be determined whether such a duty exists.

The Supreme Court's overruling of the above-mentioned statement in *Kopp* and its affirmation of *Jones* clearly establishes that when designating a non-party at fault, a defendant will, at the very least, be required to establish that the non-party owed a legal duty to the plaintiff before the trier of fact may apportion fault to the non-party.

**COURT OF APPEALS AFFIRMS THAT A PLAINTIFF'S
"SPOTTY AND EXCEPTIONAL" USE OF A VEHICLE FAILS TO
ESTABLISH OWNERSHIP OF THE VEHICLE UNDER MCL 500.3101(2)(g)(i)**

Caryn Gordon² – Contributor

Under the Michigan No Fault Act, an owner of a motor vehicle includes a person having the use of the motor vehicle for a period that is greater than thirty days. MCL 500.3101(2)(g)(i). Michigan courts have provided that a spotty and exceptional use of a vehicle fails to establish ownership under this statute, but a regular pattern of unsupervised, nearly exclusive use of a vehicle, for more than thirty days is sufficient to establish ownership. In *Burnett v Farmers Ins Exchange*, No 278647, unpublished (Mich App July 17, 2008), the Court of Appeals concluded that Plaintiff Arthur Burnett's "spotty and exceptional" use of his mother's vehicle failed to establish him as an owner of the vehicle under MCL 500.3101(2)(g)(i).

In *Burnett*, the Plaintiff was involved in a motor vehicle accident while operating his mother's vehicle. There was no dispute that the vehicle Plaintiff operated at the time of the accident was registered to his mother and required to be insured under MCL 500.3101(1), but was not insured. No PIP coverage was applicable to Plaintiff's injury, so he sought benefits through the assigned claims plan. MCL 500.3172(1).

After his claim was apparently denied, he filed this lawsuit to compel Defendant to pay PIP benefits. Defendant argued that Plaintiff was excluded from recovering PIP benefits because he was an owner of the vehicle under MCL 500.3101(2)(g)(i) and, therefore, was required to insure the vehicle. MCL 500.3101. Since Plaintiff failed to insure the vehicle, Defendant argued he was excluded from recovering PIP benefits. MCL 500.3113(1)(b) (excludes an owner of a motor vehicle from PIP benefits if the owner fails to insure the vehicle).

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On appeal, the sole issue was whether the circuit court properly determined that Plaintiff was not an "owner" of the vehicle under MCL 500.3101(2)(g)(i). That statute provides that an owner includes "[a] person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days". In determining ownership, the Court of Appeals recognized that the person "having the use" of the vehicle means using the vehicle in ways that comport with concepts of ownership. *Ardt v Titan Ins Co*, 233 Mich App 685, 690-91; 593 NW2d 215 (1999). The provision does not equate ownership with any and all uses for thirty days. Instead, ownership is established when the person has the right to use the vehicle for thirty days. *Id.*

In *Burnett*, the evidence showed that the Plaintiff did not have the right to use his mother's vehicle for thirty days. Instead, Plaintiff's use of the vehicle was "spotty and exceptional". Plaintiff did not have keys to the car or even access to the two sets of keys. He did not have permission to use the car as needed and when he asked to use the car, his requests were denied. He only used the car five times since it was purchased. Considering these facts, the Court concluded that there was no arrangement between Plaintiff and his mother under which Plaintiff had a continuing right to use the vehicle for more than thirty days and, therefore, he was not an "owner" of the vehicle under MCL 500.3101(2)(g)(i).

This case provides guidance in determining whether an individual is an "owner" of the vehicle under MCL 500.3101(2)(g)(i). If the individual's right to use a vehicle is for a limited time and a limited purpose, then he most likely will not be classified as an owner under this statute. On the other hand, if the person's use is regular and unsupervised for a period of thirty days, he will most likely be considered an "owner" of the vehicle.

BASICS OF NO FAULT

The introductory no fault course will be offered at the Southfield campus of Lawrence Tech University commencing on Monday, September 15, 2008 and running continuously through Monday, November 24, 2008. Please contact Tim Meloche at (248) 204-4055 for registration information.

TROY BREAKFAST SEMINAR

The Firm's annual No Fault Seminar will be held at the Troy Marriott on September 18, 2008. There are many important issues which will be discussed at this seminar, including a presentation by Sharon Filas, CPA, regarding the *Ross* decision from the Michigan Supreme Court. The Supreme Court's recent decision in *Cooper v ACIA*, which opens the door to claims of fraud, will be discussed in depth, inclusive of suggestions on claim handling to avoid litigation. We will also present a review of cases pending in the Supreme Court which will significantly impact no fault claims handling, including *USF&G v MCCA*, *Benefiel v Auto Owners*, *Scott v State Farm* and *Budget Rent-A-Car v City of Detroit*. Please email your registration to Beth Bezenah at bbezenah@garanlucow.com.