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From the Co-Editors
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COURT OF APPEALS HOLDS MCCA IS NOT REQUIRED TO INDEMNIFY INSURER FOR PIP BENEFITS PAID TO RESIDENT RELATIVE OF ITS INSURED WHEN VEHICLE OPERATED BY RESIDENT RELATIVE WAS NOT REQUIRED TO BE REGISTERED IN MICHIGAN

Caryn A. Gordon¹ – Contributor

The Michigan Catastrophic Claims Association (“MCCA”) is a legislatively-created nonprofit organization consisting of all insurance companies which write insurance in Michigan. The MCCA’s principal purpose is to indemnify member insurers for losses sustained as a result of the payment of PIP benefits beyond the ‘catastrophic’ level. In *Allied Property and Casualty Insurance Company v Michigan Catastrophic Claims Association*, No. 277765, 2008 WL 4604062 (Mich App Oct 16, 2008), the Michigan Court of Appeals determined that the MCCA was not required to reimburse Allied for PIP benefits it paid to a resident relative of its insured because the vehicle operated by the resident relative was not required to be registered in Michigan.

Allied’s insured, Troy Hinson, moved from Michigan to Texas with his two children in July, 2004. When he moved to Texas, Troy left a Ford truck in Michigan to sell, and he maintained a Michigan No-Fault policy of insurance on that truck through Allied. On September 9, 2004 Troy’s son, Zachary Hinson, was involved in a motor vehicle accident in Texas. The vehicle involved in the accident was a Buick LeSabre. Troy had purchased that car in Texas two days before the accident, but had not yet obtained insurance coverage for it.

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Allied reviewed Troy's claim for PIP benefits on behalf of Zachary and decided to pay benefits under Troy's Michigan policy.

After the MCCA denied Allied's request for reimbursement, Allied commenced a lawsuit seeking a declaration that the MCCA was obligated to reimburse Allied for the payment of PIP benefits in excess of \$350,000, under MCL 500.3104. The circuit court determined the MCCA was not required to indemnify Allied.

On appeal, in affirming the circuit court's order, the Michigan Court of Appeals determined that the MCCA was not liable to indemnify Allied where the accident occurred in Texas and involved a vehicle that was registered and owned in Texas by a Texas resident:

We find that the MCCA was not required to reimburse plaintiff. Troy was a nonresident, but the Buick was not required to be registered in Michigan, and '§ 3101(1) does not apply to vehicles that are not required to be registered in Michigan.' *Preferred Risk, supra* at 724. The Buick was registered and titled in Texas and was not going to be driven in Michigan and compulsory coverage under MCL 500.3101(1) was likewise not required. The MCCA need only indemnify an insurer under MCL 500.3104(2) where the insurer paid benefits pursuant to a policy written in Michigan that provided for the required security under MCL 500.3101(1) for a vehicle required to be registered in Michigan.

Id. at 3.

The Court's sole focus was whether Zachary Hinson was operating a vehicle covered under a Michigan policy. The Court further explained that the MCCA is only required to provide indemnity where the PIP coverage is compulsory pursuant to MCL 500.3101(1). The court recognized that there are instances where certain individuals who do not live within Michigan will be required to insure their vehicle under §3101(1). The Court, however, determined that since the Buick was not required to be registered in Michigan, compulsory coverage under MCL 500.3101(1) was not required on the Buick, and the MCCA is not required to indemnify Allied.

The Court of Appeals rejected Allied's statutory argument that the plain language of the No-Fault Act required Allied to pay PIP benefits to Zachary and, therefore, the MCCA is obligated to reimburse Allied under MCL 500.3104. Allied argued that Troy Hinson, a non-resident, was required to maintain Michigan compulsory No-Fault insurance on his Ford truck because it was operated on Michigan roadways for more than thirty days. There was no dispute that a valid Michigan No-Fault policy existed on the Ford truck at the time of the accident and that Zachary was a resident relative of Troy. Since this was an out of state accident, Allied argued that § 3111 applied to this case. §3111 sets forth the class of individuals permitted to receive Michigan No-Fault benefits for out of state accidents – "a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household." Zachary Hinson was a resident relative (under §3114) of a named insured under a personal protection insurance policy and was involved in an out of state accident and, therefore, Allied argued he was entitled to PIP benefits under § 3111. Since Allied was obligated to pay PIP benefits to Zachary, Allied argued the MCCA was required to indemnify Allied. The Court, however,

concluded that this argument was misplaced because the focus should be on the vehicle Zachary was operating at the time of the accident.

The Court also rejected Allied's argument that PIP coverage follows the insured and not the vehicle. The Court recognized that there is underlying legislative policy that "persons rather than vehicles be insured against loss," but concluded that this principle is not unlimited. The Court contends that in this case the statutory language dictates that the MCCA is not required to reimburse Allied because the Buick was not required to be insured under MCL 500.3101.

Ultimately, the Court concluded that according to the No-Fault Act, and regardless of how plaintiff treated the situation, the benefits were not paid pursuant to the compulsory insurance requirements set forth in MCL 500.3101(1) because that provision was inapplicable to the Buick. Since Zachary Hinson was not operating a vehicle required to be registered in Michigan at the time of the accident, the MCCA was not obligated to reimburse Allied for PIP benefits it paid to and on behalf of Zachary Hinson.

Garan Lucow Miller handled this appeal for Allied Property and Casualty Insurance Company. It is anticipated that Allied plans to challenge the Court of Appeals decision by filing an application for leave to appeal with the Michigan Supreme Court.

UPDATE - ROMAIN v FRANKENMUTH

M. Sean Fosmire² – Contributor

In our July 28, 2008, edition of this publication, we discussed the case of *Romain v Frankenmuth Mutual Insurance Company*, a Memorandum Opinion issued on July 23, in which the Michigan Supreme Court disapproved and overruled language from an earlier Court of Appeals case to the effect that there is no duty requirement under the non-party at fault statute, MCL 600.6304.

We can now advise that the Supreme Court has granted rehearing on the case. Pending rehearing, it has vacated its decision, thus taking away its precedential effect, and has asked the parties to submit additional briefs. The Michigan Trial Lawyers Association and Michigan Defense Trial Counsel have also been invited to submit amicus briefs on the subject.

This issue is of particular interest because it can affect the right of a defendant to name the plaintiff's employer as a non-party at fault, in order to have the jury determine the extent to which the employer was negligent and to allow the verdict to be reduced to account for that negligence.

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The employer was the named non-party at fault in the case of *Kopp v Zigich*, 268 Mich App 258; 707 NW2d 601 (2005), and the Court of Appeals overturned the trial court's ruling granting plaintiff's motion to strike the designation. In response to an argument by the plaintiff that the designation should not have been allowed because the employer "owed no duty to the plaintiff", the Court noted that the plain language of the statute provided that the jury was to consider the fault of "all persons who contributed to the injury". It then went on to suggest that a duty to the plaintiff was not required under the statute, and that the allocation of fault under the statute was "based on causation rather than duty".

That statement having been made, the *Kopp* court observed that the Workers' Disability Compensation Act (WDCA) "recognizes the employer's responsibility for its employee's work-related injuries", a comment which does not seem consistent with a "no duty" analysis.

In the earlier case of *Jones v Enertel, Inc.*, 254 Mich App 432 (2002), a case involving a non-party who owned the premises on which the plaintiff had been injured, the Court had rejected a designation of the premises owner as a non-party at fault on the basis that it did not owe a duty to the plaintiff under the open and obvious doctrine.

The language from the July memorandum opinion in *Romain* was:

"However, we write briefly to eliminate a conflict between two published Court of Appeals opinions. Specifically, we overrule the statement in *Kopp v Zigich* that 'a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated.' That is an incorrect statement of Michigan law. In *Jones v Enertel, Inc.*, the Court of Appeals held that 'a duty must first be proved before the issue of fault or proximate cause can be considered.' Under the 'first out' rule of MCR 7.215(J)(1), the *Kopp* panel should have followed *Jones* or declared a conflict under MCR 7.215(J)(2). Because the *Kopp* panel did not declare a conflict, *Jones* is the controlling precedent and proof of a duty is required 'before fault can be apportioned and liability allocated' under the comparative fault statutes, MCL 600.2957 and MCL 600.6304."

The Court did not state, however, whether rejecting that language would have led to a different decision in *Kopp*. (The plaintiffs in that case did not appeal the 2005 decision of the Court of Appeals.)

It is this writer's opinion that an employer does indeed owe a number of duties to its employees. It just cannot be sued for a breach of that duty in the negligence context, under both ancient common law principles and the more recent statutory exclusive remedy provision under the WDCA. Although *Kopp* suggested that no duty was required under section 6304, it also went on to recognize that the WDCA does memorialize the existence of a duty owed by an employer to its employees. Thus, we believe, *Romain's* rejection of *Kopp's* "no duty" language (if upheld on rehearing) does not compel a conclusion that employers may not be named as non-parties at fault.

This case, and an employment decision pending before the Court, may suggest that the Court wishes to consider how its rejection of a "no duty" position will affect the ability of a defendant to name the plaintiff's employer as a non-party at fault. The issue involved in *Romain* does not appear to involve an employer, though, so it is still possible that this issue will remain unresolved.

The arguments will be scheduled for January 2009.

**CANCELLATION OF AUTO POLICY FOUND PROPER AND
TIMELY EVEN IF NOTICE DID NOT INDICATE THE VEHICLE
FOR WHICH THE INSURANCE WAS CANCELLED**

Kelly Kluting³ – Contributor

On October 14, 2008, the Michigan Court of Appeals upheld summary disposition in favor of the defendant insurer on the basis that the defendant provided proper and timely notice of cancellation of the insurance policy based upon non-payment of premium. *Putney v QBE Insurance Corp*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2008 (Docket No. 279800).

On August 4, 2004, the defendant insurer, QBE, issued a policy to plaintiff's husband before they were married. Initially, this policy covered only one car, a Chevy Beretta, effective from August 4, 2004 until February 4, 2005. The insured paid a deposit and only one of the four remaining payments. Plaintiff then added a Chevy Malibu to the policy on October 1, 2004. (Notably, at this time, the Plaintiff and the insured were not married and the plaintiff was not listed as a driver or an insured on the policy.) The Malibu was deemed an "add-on" vehicle to the original policy; thus, additional insurance premium money was required.

The insured fell behind on his insurance premium payments on both vehicles. The insurer mailed a reminder notice on October 25, 2004, to the insured about the need to make his insurance policy installment payment. The reminder specifically indicated, in bold type, failure to pay the premium would result in cancellation of the policy effective November 5, 2004. On November 10, 2004, the insurer forwarded a "CONFIRMATION OF CANCELLATION" document, stating insurance coverage with the insurer was cancelled due to non-payment of the premium, citing the policy number. However, the cancellation notice only delineated that the coverage on the Beretta would be cancelled and remained silent as to the Malibu.

On January 25, 2005, while driving the Malibu, the plaintiff was involved in an automobile accident. Plaintiff then sued the insurer for PIP benefits. The insurer moved for summary disposition on the basis it had provided proper and timely notice of cancellation of the policy to the insured; thus, the insurer owed no benefits under its policy.

The plaintiff made several arguments in opposition to this motion. First, the plaintiff argued that the notice was not proper because the plaintiff did not receive this notice. The Court rejected this argument as irrelevant as the plaintiff was not the named insured – the insurer was only required to notify the insured of the cancellation, which it did. Furthermore, plaintiff could not rebut the evidence that the insurer complied with MCL 500.3020(1)(b), when it mailed the notice to the insured, at the correct address, prior to 10 days of cancellation of the policy.

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Second, Plaintiff argued that the October 25, 2004 letter, sent by the insurer, was not proper because it only mentioned cancellation of the Beretta's insurance and not the Malibu's insurance. However, the Court rejected this argument as disingenuous given that the cancellation letter referenced the one policy number under which both the Beretta and the Malibu were insured. Plaintiff's subjective understanding or interpretation is irrelevant as the documents were clear that the entire policy was being cancelled for non-payment.

Accordingly, the Court of Appeals held that the notice of cancellation was proper and effective and the plaintiff was unable to collect no-fault benefits from the insured.

GATEWAY SEMINARS

Garan Lucow Miller is pleased to present its 3rd Annual Gateway Breakfast Seminars being held on December 2, 2008, in Overland Park, Kansas, at the Sheraton Overland Park Hotel and Conference Center (6100 College Blvd. – 913-234-2100), and December 3, 2008, in St. Louis, Missouri, at the Sheraton Clayton Plaza (7730 Bonhomme Ave. – 314-863-0400).

This complimentary seminar is CE APPROVED for 3 RPA Hours!

AGENDA

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| 8:30 - 9:00 a.m. | Continental Breakfast |
| 9:00 - 9:10 a.m. | Welcome and Introduction
Speaker: David A. Couch, Esq. |
| 9:10 - 10:15 a.m. | Michigan First Party No Fault Background and 2008 Updates <ul style="list-style-type: none">• Catastrophic claims/room and board• Duty of the Michigan Catastrophic Claims Association to reimburse insurers for payment of catastrophic claims• Statute of limitations/tolling/notice• Injury must arise out of the use of a motor vehicle• Proof of claim under Section 3107• Definition of "owner" under MCLA 500.3101 and MCLA 500.3113• Compensability of claims for PTSD• Medical providers' right to seek payment of No-Fault benefits out of the usual order of priority• Exception to limit on Property Protection Insurance benefits• Attorney fees and penalty interest• Material misrepresentation on policy application• Medical bill auditing |

- New proposed legislation in Michigan
- 10:15 - 10:30 a.m. Break
- 10:30 - 11:30 a.m. **Michigan Third Party No Fault Background and 2008 Updates**
- Statutory and case law historical review
 - *Kreiner v Fischer* and its progeny
 - Michigan Court of Appeals' treatment of threshold since *Kreiner*
 - Proposed legislative and ballot initiative responses to *Kreiner*
 - Uninsured and Underinsured Motorist claims
 - Michigan Insurance Commissioner's Order of Prohibition regarding statute of limitations
 - Tort reform elimination of joint and several liability
 - The "nonparty fault" rule
- 11:30 - 11:45 a.m. **Michigan Premises Liability Law and 2008 Updates**
- The abolition of most claims - *Lugo v Ameritech*
 - The future of premises liability law in Michigan
- 11:45 a.m. - 12:00 Question and Answer Session

Each day will begin with a continental breakfast followed by a half day seminar. Comprehensive written materials on all topics will be distributed to program attendees. To register, contact Kristi Cummings at kcummings@garanlucow.com. Please include your name, company, title, address, phone, fax and email address (if registering a colleague). Don't miss this opportunity! Register today!