

LEGAL ALERT

May 22, 2008

MICHIGAN LIABILITY LAW UPDATE

Third-Party No-Fault – Two Recent Cases Addressing Serious Impairment

By: Matt L. Meyer, Attorney

The Michigan Courts continue to grapple with the “serious impairment” threshold requirement in third-party no-fault cases. There have been two recent cases which have addressed the serious impairment issue.

In the first case, decided on April 22, 2008, the plaintiff was a mail carrier who was hit by a dump truck. The plaintiff suffered shoulder, cervical and wrist injuries. The Court ruled as follows:

An objective comparison of Plaintiff’s lifestyle before and after the accident suggests a significant change in her life. Plaintiff’s deposition testimony reveals, in short, that Plaintiff had a torn rotator cuff that required several months of therapy, prescription pain medication, and surgery, and that she continues to suffer from neck pain that is currently being treated with steroid injections and is being further investigated. While Plaintiff’s ability to engage in her household and leisure activities has been impacted in only a minor way, her ability to engage in the 30 hour per week employment position she held for the previous 10 years was severely impacted. The evidence establishes that Plaintiff has been (and remains) restricted from driving for over two years, which likely impacts many facets of her life, from basic grocery shopping to attending all of her medical appointments. As of the date of the trial

court’s opinion, Plaintiff had also been restricted from any employment at the post office for seven months after the surgery and remained so restricted. Plaintiff also has bulging cervical discs, continues to experience pain in her neck and shoulders, and appears to still be under treatment for these conditions. Considering that plaintiff’s injuries continue to impair her some 2 ½ years after the accident and that she remains completely restricted from engaging in her primary employment and driving, and lacking any concrete evidence concerning Plaintiff’s prognosis for eventual recovery, we cannot definitively say that Plaintiff’s impairment has not affected her general ability to lead her normal life.

Accordingly, the court found that the plaintiff created a sufficient fact question regarding whether she suffered a serious impairment and the court allowed Plaintiff’s case to proceed. (*Ransom v Utility Contracting*).

In contrast, the Michigan Court of Appeals decided a case on May 1, 2008, wherein the Court held that the plaintiff did not establish a serious impairment. In that case, the plaintiff had longstanding pre-existing back pain which included work and lifting restrictions. Even though the plaintiff was unable to return to her previous job in a factory, the deposition testimony revealed that she could pursue a clerical position

within her restrictions. The Court also found that the plaintiff was able to continue most of her normal recreational activities. Most significantly, the plaintiff failed to produce evidence of any physician-imposed restrictions. The Court ruled: "self-imposed restrictions based on real or perceived pain, as opposed to physician-imposed restrictions, do not establish residual impairment."

Therefore, the court dismissed the plaintiff's case. (*Luther v Stoeckle*).

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MICHIGAN LEGISLATURE UPDATE

Proposed Bill Would Give Drivers a Choice in Medical Coverage

A bill is being considered by the Michigan Legislature that would give drivers a choice in the level of Personal Injury Protection (PIP) coverage they are required to buy. Currently, Michigan is the only state in the country that requires all drivers to purchase unlimited PIP benefits.

Senate Bill 1278, introduced in the State Senate in April 2008, would allow motorists to choose medical coverage between \$50,000 and \$400,000. This would be a choice that policyholders would make proactively. If no lower amount of coverage is chosen, then a policyholder would maintain unlimited coverage. The Republican-led Senate plans to hold hearings on the bill soon.

Mini-Tort Cap May Increase From \$500 to \$1,500

A bill was introduced to the Michigan House recently which would increase the cap on the mini-tort provision from \$500 to \$1,500. The cap was last raised (from \$400 to \$500) in 1996. The proposed mini-tort bill is House Bill 5838. The House Insurance Committee recommended that the bill pass. The House and the Senate are

expected to vote on the bill later this year.

Recent Michigan Verdicts/Settlements

Here are a couple of brief summaries of jury verdicts and settlements in Michigan in 2008:

1. Fatality – Pedestrian struck by tractor-trailer – \$447,614 verdict (economic damages only).

Plaintiff's decedent was on the shoulder of I-96 next to his parked dump truck and trailer (also on the shoulder) at night when he was struck and killed by a passing tractor/trailer. The Court ruled prior to trial that the plaintiff's decedent was more than 50 percent at fault and, therefore, could not recover non-economic damages. The jury awarded the plaintiff \$447,614 for economic damages only.

2. Fatality – Pedestrian killed by city bus – \$1.5 million settlement.

The plaintiff's decedent was on the shoulder of I-94 in front of his disabled sport utility vehicle. A bus owned and operated by the City of Detroit crashed into the sport utility vehicle, which struck the plaintiff's decedent, causing fatal injuries. The plaintiff's decedent allegedly had been drinking prior to the accident. The case settled for \$1.5 million at facilitative mediation.

Meet the Attorney...

Thomas W. Aycock

A Litigator's Journey from the Louisiana Bayou to Western Michigan



Tom Aycock is an attorney in the Grand Rapids office of Smith Haughey. As a litigator, Tom focuses a large portion of his practice on insurance defense, including the representation of insurance companies, insured businesses, and individuals in areas such as coverage

disputes and contract and personal injury disputes.

Raised in Louisiana, the road to the Litigation Department at Smith Haughey for Tom included stops along the way at various U.S. Army bases and corporate law firms in Baton Rouge and New Orleans, Louisiana.

Tom joined the U.S. Army after high school, and based in part on a skills test, was invited to attend the Judge Advocate General's (JAG) Legal Specialist Training School. Upon completion of the training, he became a Legal Specialist for the Army. In this position, he assisted military lawyers in the prosecution of matters that fell under the uniform code of military justice including all types of courts martial proceedings.

It was while serving for five years as a Legal Specialist in the Army, that Tom decided that he ultimately wanted to pursue a career in law. Upon being honorably discharged from the Army, he entered the University of Louisiana Lafayette, where he graduated with a Bachelor of Arts degree in Political Science. He then obtained his Juris Doctor degree from the Southern University Law Center.

Following law school, Tom joined the law firm of Crawford Lewis PLLC where he worked in both the firm's Baton Rouge and New Orleans offices and practiced in the areas of multi-party toxic tort and insurance defense. In this position, he began his career in insurance litigation and garnered extensive experience in civil litigation, having participated in numerous jury trials and hundreds of depositions.

In 2005, Hurricane Katrina struck New Orleans. Following the storm, Tom and his wife, Wendy, a western Michigan native, decided the time was right to leave Louisiana and move to Michigan in order to be closer to Wendy's family.

Tom joined Smith Haughey in early 2006. With his solid experience in insurance defense and devotion to providing quality client service, Tom was a natural fit with the Litigation Department at Smith Haughey. Since joining the firm, he has successfully acquired very favorable case evaluation awards for multiple high damage cases on behalf of the firm's clients; and formulated, drafted, and argued numerous summary disposition motions resulting in the dismissal of numerous cases on behalf of clients in the areas of premises liability, breach of contract, and a wide range of insurance claims. In addition, Tom served as presenter on the topic of premises liability at Smith Haughey's recent insurance litigation seminar.

Tom is licensed to practice in the state and federal courts in both Michigan and Louisiana. In his spare time, he enjoys spending time with his wife, Wendy Lappenga, and their daughter, Olivia, as well as fishing, hiking, and volunteering for community organizations which mentor students and support military veterans.

"Every client has a unique story to tell and a unique challenge that they are faced with. I work with each of my clients to get to the heart of the problem and then work diligently to acquire a cost-effective resolution in their favor."

— Tom Aycock

SHRR News & Success

Rob Tubbs was successful in defending a claim that involved an alleged motor vehicle/pedestrian accident in the parking lot of the now-closed Blockbuster Video store in Petoskey. His client turned into the parking lot as the plaintiff was walking across the lot to her vehicle. His client claimed that he stopped five to six feet short of the plaintiff; the plaintiff claimed that his vehicle struck her and that she injured her wrist, neck and back when her hand became caught in the “bug screen” on the front of his vehicle. The jury deliberated for approximately 40 minutes and found that our client was not negligent.

Gary Rowe and **Tom Aycock** received Summary Disposition based upon the “lack of notice” defense in a slip and fall case in a parking lot of a retail store. The judge ruled that there was no evidence that the defendant store had any notice

as to the formation of “black ice” in the parking lot and that the plaintiff failed to show that the ice existed long enough for the defendant to become aware of it.

Todd Millar and **Andy Blodgett** obtained a dismissal in favor of their client, a water and sewer authority. The plaintiff claimed that his proposed development was unfairly treated when the authority established a new rate structure. Todd and Andy convinced the court that the authority had treated the plaintiff's proposed development the same as all other similarly-situated developments. The client was pleased that this decisive ruling would allow it to continue implementing the rate schedule that it had recently enacted, allowing commercial growth to continue within the authority's jurisdiction.

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