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1. Supreme Court Decisions

a. Government Immunity

Estate of George Nickola v. MIC General Insurance Company, 500 Mich. 115, 894 N.W.2d 552 (2017)
http://publicdocs.courts.mi.gov/opinions/final/sct/152535_61_01.pdf

Insurer's Untimely Payment of UIM Benefits is Subject to Penalty Interest Under the Uniform Trade Practices Act

Plaintiffs brought declaratory judgment action against automobile insurer to compel arbitration of claim for UIM benefits. After a six-year dispute regarding the third arbiter, arbiters issued award to insureds. Representative of insured's estate filed motion for entry of judgment on the arbitration award. Plaintiff also asked the court to assess penalty interest under the Uniform Trade Practices Act (UTPA). The Circuit Court affirmed the arbitration awards but declined to award penalty interest, finding that penalty interest did not apply because the UIM claim was "reasonably in dispute" for purposes of MCL 500.2006(4). The Court of Appeals affirmed. The Supreme Court held that insureds were directly entitled to UIM benefits, and were not "third-party tort claimants." Therefore, insureds could recover penalty interest under the UTPA without showing that insurer's liability was not reasonably in dispute.

Daniel Kemp v. Farm Bureau General Insurance Company of Michigan, 500 Mich. 245 (2017)
http://publicdocs.courts.mi.gov/opinions/final/sct/151719_66_01.pdf

Individual Entitled to PIP Benefits Under the No-Fault Act For Injuries Sustained While Unloading Personal Belongings From His Parked Vehicle

Plaintiff was injured while lifting his personal belongings out of his parked vehicle. Plaintiff filed suit against defendant insurer seeking no-fault benefits under MCL 500.3106(1)(b). Defendant moved for summary disposition, arguing that plaintiff's injury did not arise out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle, his injury did not meet the parked motor vehicle exception under the statute, and his injury did not have a causal relationship to the parked motor vehicle that was more than incidental. The trial court granted defendant's motion. The Court of Appeals concluded that plaintiff's "injury had nothing to do with 'the transportational function' of his truck," and affirmed the motion. The Supreme Court held that plaintiff created an issue of fact regarding whether he satisfied the parked motor vehicle exception under the statute and the corresponding causation requirement. The Supreme Court also held as a matter of law that plaintiff satisfied the transportational function requirement. The Supreme Court reversed the court of appeals decision and remanded the case to the trial court for further proceedings not inconsistent with their opinion.

b. No-Fault/PIP Decision

Covenant Medical Center Inc. v. State Farm Mutual Automobile Ins. Co., 895 N.W.2d 490 (2017)
http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/SCT/152758_73_01.pdf

Healthcare Providers Do Not Have a Direct Cause of Action Against No-Fault Insurers For Services Rendered to Patients

Healthcare provider brought an action against patient's automobile insurer to recover personal protection insurance (PIP) benefits, after patient settled his suit against insurer, releasing insurer from liability. The Circuit Court granted insurer's motion for summary judgment, but the court of appeals reversed in favor of healthcare provider. The Supreme Court, in a landmark decision, held that after a plain reading review of the no-fault act, there is no support for plaintiff's argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer for recover of PIP benefits. Plaintiff therefore has no statutory right to proceed against defendant. In drafting the opinion, the majority noted that this does not leave healthcare providers without recourse, because they can still seek payment directly from an injured person for the reasonable costs of medical services.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

DC Mex Holdings LLC v. Affordable Land LLC, No. 332439 (Mich. Ct. App. July 25, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170725_c332439_38_332439.opn.pdf

Cash Value of Life Insurance Policy Exempt From Garnishment To Any Creditor of Insured

Plaintiff issued a writ of garnishment regarding any property or money insurer held belonging to individual defendant. Insurer filed a disclosure indicating that individual defendant owned an individual life insurance policy with a cash value. The disclosure also indicated the life insurance may be exempt from garnishment under MCL 500.2207. The Court of Appeals analyzed the statute to determine whether the life insurance policy was exempt from garnishment. The statutory language was designed to protect life insurance policies for the beneficiary spouse and children.

Home-Owners Insurance Company v. Dominic F. Andriacchi, No. 331260; 332457; 333695 (Mich. Ct. App. June 8, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170608_C331260(35)_RPTR_58o-331260-FINAL-I.PDF

Earth Movement Exclusion Unambiguously Precludes Coverage For Any Earth Movement

Defendant sought coverage under his policy for damages to his building that occurred after a major street repair had taken place. A licensed structural engineer, retained by plaintiff,

determined that the damage was due to earth movement beneath the interior concrete floor slab. The claim was denied pursuant to an exclusion for "any earth movement." Defendant maintained that the earth movement exclusion in the policy only applied to natural earth movement, not to "man-made" earth movement. The Court of Appeals held the plain language of an insurance contract excluding damage caused by "any earth movement" was unambiguous, and therefore the exclusion applied.

Bartlett Investments Inc. v. Certain Underwriters at Lloyd's London, No. 328922
(Mich. Ct. App. March 2, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170302_c328922(54)_rptr_18o-328922-final-i.pdf

Waiver Doctrine Does Not Apply to Risks Not Agreed Upon by the Parties

Plaintiff is the owner of a vacant building for which it purchased a commercial property insurance policy. Because vacant buildings carry a greater risk for vandalism and damage than do occupied buildings, plaintiff was required to obtain a policy with special certificates for vacant buildings. The policy called for any loss or damage caused by vandalism to be reported within ten days. The policy also required, as a condition of coverage, that plaintiff keep the building fully secured at all times and regularly inspected. Plaintiff's owner discovered extensive damage to the building due to vandalism, and submitted a claim. Following defendant's rejection of claim by letter, plaintiff filed suit. The trial court granted defendant's motion, dismissing the case. On appeal, the court held that certain defenses are waived if they are not stated in the initial denial letter; however, requiring defendant to insure plaintiff for vandalism that occurred as a result of plaintiff's failure to secure and inspect the property would greatly expand the risk undertaken by the defendant in contract. Although defendant did not raise the defense that plaintiff failed to secure and inspect the building in its initial denial letter, the waiver doctrine was inapplicable.

b. UM/UIM Decisions

Michelle Wagner v. Farm Bureau Mutual Insurance Co. of Michigan, No. 332400
(Mich. Ct. App. Sep. 12, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170912_c332400_50_332400.opn.pdf

Under Ambiguous Policy, Vehicle Becomes Uninsured Only Upon a Court's Ruling of No Coverage

Plaintiff was involved in an accident with pizza delivery driver. Delivery driver was insured by defendant insurer. Plaintiff brought a third-party automobile liability claim against pizza delivery driver. Defendant insurer provided a defense under a reservation of rights, citing language that insurer does not provide coverage for liability arising from operation of a vehicle used to carry property for a fee. Defendant later filed a declaratory action that it had no duty to defend pizza delivery driver from plaintiff's third-party claim. The trial court granted defendant insurer's motion. Plaintiff notified defendant insurer, and her own insurer, of her potential UM claim. Insurer sent a letter asserting that notice was not timely met pursuant to the policy. Plaintiff sued. At trial, defendant insurer moved for summary disposition that under the policy the UM claims were time barred. The trial court and court of appeals disagreed, finding that the policy was

ambiguous given that notice must be given within three years, but also required proof of uninsured status of the vehicle. Here, there was no proof of the uninsured status of the vehicle until the declaratory judgment action - which occurred past the policy time limit regarding notice. Therefore, summary disposition was denied.

c. No-Fault/PIP Decisions

Tyann Shelton v. Auto-Owners Insurance Company, No. 328473 (Mich. Ct. App. Feb 14, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170214_c328473(59)_rptr_12o-328473-final-i.pdf

A Question of Fact Prevents Summary Disposition on a PIP Claim Based on an Insurer's Fraud Exclusion

Plaintiff alleged that she was injured while riding as a passenger in a single-car collision. As a result, plaintiff sought PIP benefits because she did not own a vehicle and did not reside with a relative who did. Defendant denied the claim and plaintiff sued. The trial court granted summary disposition as to replacement services, but denied the motion as to payment of medical services. On appeal, the court determined that a question of fact existed regarding whether plaintiff made material misrepresentations and, if so, whether they were made to defraud defendant. Reliance on an exclusionary clause in an insurance policy is an affirmative defense and so defendant has the burden of proof. Thus, to obtain summary disposition, defendant insurer must show there is no question of fact as to any of the elements of its affirmative defense. The judgment was affirmed.

Bergman v. Cotanche and Boyne USA, Inc., No. 330438 (Mich. Ct. App. Feb 23, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170223_C330438(36)_RPTR_16o-330438-FINAL-I.PDF

Front-End Loader Exempt From Registration Requirements Under No-Fault Act

Defendant finished plowing a driveway with a front-end loader. Defendant proceeded to drive the front-end loader on the street to the next driveway for plowing, about a quarter of a mile away. Plaintiff was driving in the opposite direction on the street when the two vehicles collided. At trial, the court ruled against defendant's motion for summary disposition. On appeal, the court determined that a front-end loader that has to travel about a quarter of a mile along a public road between work sites is exempt from the no-fault acts registration and insurance requirements. The front-end loader falls into a statutory exemption for "special mobile equipment." The transportation function must be incidental to meet the exemption.

Grace Transportation Inc. v. Farm Bureau General Insurance Company, No. 329276
(Mich. Ct. App. Jan 31, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170131_c329276_45_329276.opn.pdf

Health Care Provider's Ability to Recover an Injured Party's Medical Expenses Under the No-Fault Act is Dependent on the Injured Party's Eligibility for No-Fault Benefits

Plaintiff provided health care to the injured insured. After the claim was denied, plaintiff sought recovery for services rendered. The court determined that a healthcare provider's eligibility to recover medical expenses is dependent on the injured party's eligibility for no-fault benefits under the insurance policy. Here, injured insured was barred from recovering PIP benefits, and her case was dismissed. Because the plaintiff's claims are derivative and because underlying claim was barred, plaintiff's claims against defendant are likewise barred, and the trial court properly granted defendant's motion for summary disposition.

Hastings Mutual Insurance Company v. Grange Insurance Company of Michigan, No. 33193 (Mich. Ct. App. May 16, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170516_C331612(33)_RPTR_48o-331612-FINAL-I.PDF

Businesses That Peripherally Participate in Repair Service for Motor Vehicles are Not Excluded From Coverage Under MCL 500.3101(1)

Farm employee was repairing his sister's car in a barn when a fire occurred. The fire destroyed the barn, and its contents. The barn was owned by a farm that is an LLC. The farm's primary purpose was to grow crops, but the barn was regularly used for auto repair and maintenance. The farm's insurer paid farm in insurance benefits to cover the loss. The insurer filed a claim as subrogee for property protection benefits against the no-fault insurer of the vehicle lost in the fire. Both parties filed motions for summary disposition. The trial court granted summary disposition in favor of the farm's insurer. Court of Appeals upheld the decision of the trial court, finding that the no-fault act did not relieve auto insurer of liability given that the farm was in the business of farming rather than in the business of auto repair or maintenance.

David Gurski v. Motorists Mutual Insurance Company, No. 332118
(Mich. Ct. App. Oct. 17, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20171017_c332118_54_332118.opn.pdf

Car's Insurer that Provided Liability Coverage was Not an "Insurer" for the Purposes of No-Fault Law

Plaintiff was working outside the vehicle when the vehicle slipped into gear and injured him. Plaintiff attempted to recover PIP benefits under his own business policy, the policy of car's owner, and Michigan Automobile Insurance Placement Facility, but was denied by all three. Plaintiff filed suit. At trial, plaintiff was awarded partial summary disposition. The court found that the insurer of the car's owner of was obligated to cover plaintiff's PIP benefits. On appeal, the court determined that the trial court erred when it ruled that insurer was liable for PIP benefits because the insurer did not provide any PIP coverage to the insured, and therefore was not an "insurer" for the purposes of MCL 500.3115.

d. Employment Decision

Timothy Matouk v. Michigan Municipal League Liability & Prop Pool, No. 332482
(Mich. Ct. App. July 11, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170711_C332482(41)_RPTR_74o-332482-FINAL-I.PDF

An Insurer is Not Obligated to Defend a Lawsuit Against a Police Officer that Alleges Misconduct Outside the Scope of Employment.

An individual disappeared. Her body was discovered months later. The victim's family alleged that it was a murder, and that two different police departments conspired to conceal the crime. They further alleged that plaintiff police officer, the victim's cousin, was either the murderer or participated in the cover up. The victim's family, on behalf of the estate, brought an action against both police departments, plaintiff, and 19 individual officers. Defendant insurer refused to defend plaintiff, claiming his conduct fell outside of coverage. Plaintiff brought a complaint for declaratory judgment seeking to compel defendant to pay for his defense. Defendant filed a motion for summary disposition, arguing coverage under the policy only extends to employees for damages arising from conduct within the scope of their employment. The trial court denied defendant's motion as premature. Less than a month later, plaintiff brought a motion for partial summary disposition, limited to the subject of defendant's duty to defend. The trial court granted the motion, concluding defendant has a contractual obligation to defend. The decision was reversed on appeal. The court determined that plaintiff was asked to not participate in the investigation in any way, so any involvement alleged in the complaint was outside the scope of his employment. Therefore, the insurance company had not duty to provide a defense for the officer.

Linda Escott v. Public School Employees' Retirement Board, No. 333264
(Mich. Ct. App. July 18, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170718_c333264_35_333264.opn.pdf

Public School Employees Required to Be Deemed Totally and Permanently Disabled By Independent Medical Advisor to Receive Disability Benefits

Teacher accepted a voluntary layoff, and then applied for non-duty disability benefits based upon her vision deficit. After filing for non-duty disability benefits, retirement board designated an independent medical advisor. Medical advisor examined teacher, but determined that there were no limitations to prevent teacher from being able to perform job duties. Teacher requested a hearing, but was again denied benefits. On appeal, the court determined that the retirement board has no authority to grant non-duty disability retirement benefits to a public school employee unless an independent medical advisor determined the employee totally and permanently disabled.

e. Premises Liability Decisions

Shirley Metzler v. GSM America Inc., No. 328778 (Mich. Ct. App. Feb 2, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170202_c328778_39_328778.opn.pdf

In a Premises Liability Case, the Inquiry is Whether a Reasonable Person Would Have Noticed an Open and Obvious Hazard

Plaintiff was injured when she tripped and fell on an elevated sidewalk at defendant's store. At trial, summary disposition was ordered in favor of the defendant because the hazard was to be open and obvious. On appeal, plaintiff argued that the trial court erred in concluding there was no genuine issue of fact. Plaintiff argued that she should not have been expected to notice the elevated sidewalk when the property owner stated in his deposition that he had never noticed the elevated sidewalk, despite working there for ten years. The court decided that the question is not whether the property owner saw the hazard, but whether a reasonable person in the plaintiff's position would have seen the hazard upon casual inspection. The court determined that the trial court did not err in determining that a reasonable person would have noticed the elevated sidewalk. The judgment was affirmed.

Susan Blackwell v. Dean Franchi, No. 328929 (Mich. Ct. App. Jan. 31, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170131_c328929(21)_rptr_8o-328929-final-i.pdf

An 8-Inch Drop-Off Inside a Residence Was Not Discoverable Upon Casual Inspection By Guests of Dinner Party

Plaintiff attended a dinner party at defendants' home. After entering the residence of defendant, plaintiff walked down a hallway, and did not observe a step with an eight-inch drop. Trial Court granted summary disposition based on the argument that drop-off was open and obvious. Court of Appeals reversed the decision based upon the testimony of other dinner party guests that said that a lack of lighting did not make the step readily observable upon casual inspection, as well as pictures of the step itself. The Court determined that a genuine issue as to whether defendants' owed plaintiff a duty to warn of the drop-off remained. The decision will have to be determined by a jury's interpretation of conflicting testimony regarding whether the drop-off was open and obvious.

f. Governmental Immunity Decision

Carrie S. Flanagin v. Kalkaska County Road Commission, No. 330887 (Mich. Ct. App. May 23, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170523_c330887(35)_rptr_50o-330887-final-i.pdf

Snowplow Drivers Are Not Shielded by Governmental Immunity From Negligence Claims While Plowing

At trial, snowplow driver's motion for summary disposition was denied because there was a genuine issue of material fact as to whether the snowplow was four to six feet over the centerline at the time of accident. The Court of Appeals determined that while a driver can travel over the centerline without committing a moving violation, the statutory exemptions do not relieve the driver of performing his work in a non-negligent manner. The degree to which the driver traveled over the centerline and whether doing so was proper under variables like weather, could allow a reasonable jury to conclude that that the snowplow was negligently operated at the time of the accident. Therefore, denial of summary disposition was appropriate.

Genesee County Drain Commissioner v. Genesee County, No. 331023 (Mich. Ct. App. Aug. 22, 2017)

http://publicdocs.courts.mi.gov/opinions/final/coa/20170822_c331023_38_331023.opn.pdf

Unjust Enrichment Claim Not Barred By Doctrine of Governmental Immunity

Plaintiff participated in a county health plan through insurer. Based on an estimate of the amount that the claims and administrative costs would be each year, participants and county paid premiums. Unbeknownst to participants, any excess by which the premiums exceeded the amount necessary to pay claims and administrative costs was refunded to county at the end of each year. Participants filed suit for their share of the refund of premiums paid. The court of appeals held that a claim for unjust enrichment is not a tort claim, and thus not barred by the governmental tort liability act. The court concluded that a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability and not tort liability. The case was remanded for further proceedings in accordance with this opinion.

3. Federal Court Decisions

Vitamin Health v. Hartford Casualty Ins., 6th Cir. No. 16-1724 (April 11, 2017)
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0213n-06.pdf

Insurer Has No Duty to Defend Where Underlying False Advertising Action Against Insured Does Not Fall Within Coverage of "Personal and Advertising Injury" Provision

Insured manufacturer of eye health supplements brought action against insurer, asserting a contract claim and seeking declaration that the underlying action by competitor—for false advertising and patent infringement—fell within the policy coverage of "personal and advertising injury." District Court granted defendant's motion for summary judgment, stating that insurer had no duty to defend or indemnify. On appeal, the court stated that under the policy there was no coverage because there was no disparagement. Disparagement cannot occur when policy holder is alleged to have misrepresented the content of its *own* product, and not its competitor's. Judgment was affirmed in favor of insurer.

Orchard, Hiltz & McCliment v. Phoenix Insurance, 6th Cir. No. 16-1176 (Jan. 20, 2017)
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0047n-06.pdf

Policies' Professional Services Exclusions Barred Coverage of Project Engineer That Designed Plans for Every Facet of Wastewater Project

Owner hired contractor for construction for a wastewater treatment plant. Through contract, owner required contractor to maintain liability insurance under which owner's project engineer was protected from claims arising out of contractor's work. After injured workers on the project brought claims against engineer for unsafe conditions, engineer sought protection under contractor's policy. Insurer denied coverage based on the professional services exclusion. In a suit to determine coverage, the court found that even though workers' acts involved unskilled construction, the exclusion still precluded coverage because those non-professional acts - unskilled construction - were reasonably related to engineer's overall provision of professional services - engineering. Therefore, the professional services exclusion applied.

Indian Harbor Ins. v. Clifford Zucker, 6th Cir. No. 16-1695/1697/1698 (March 8, 2017)

http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0128p-06.pdf

Trust's Action Against Officers of Company Excluded From Company's Policy Under "Insured-Versus-Insured" Exclusion

Holding company owned community banks in 17 states. Following the financial crisis, after taking large losses, holding company and subsidiary filed Chapter 11 bankruptcy. To gain creditors support of the bankruptcy plan, holding company assigned all of the company's causes of action to a liquidating trust, which could pursue those claims on behalf of creditors. The liquidating trust agreed not to pursue the officers' personal assets but instead would limit its recover to the company's insurance policy. The liquidation plan also required the officers to sue plaintiff insurer if it denied coverage under the management liability policy. However, the policy contained an insured-versus-insured exclusion. The liquidation trustee brought an action for breach of fiduciary duties against officers. Plaintiff insurer sough a declaratory judgment that it had no obligation to cover any damages from the lawsuit because the trust's claims fell within the insured-versus-insured exclusion. The court held that there was a direct connection between the debtors/insured and the liquidation trust. Therefore, the trust's action against officers was excluded from company's policy under the insured-versus insured exclusion.

B. SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT

Bertin v. Mann, (155266)

What is The Applicable Standard of Care for Being Struck by a Golf Cart?

Plaintiff was injured when he was struck by a golf cart driven by defendant. The trial court determined the standard of care was "reckless misconduct," as parties were co-participants in a recreational activity. The jury entered a verdict in defendant's favor. On appeal, the court determined the standard as ordinary negligence, and reversed. Supreme Court will determine

whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally.

Blackwell v. Franchi, (155413)

Does A Homeowner Owe a Duty to Warn a Guest of a Step in a Dark Room?

Plaintiff was injured, while attending a dinner party at defendant's home, when she went to put her purse in a darkened room and fell off an eight-inch step. Plaintiff did not turn on the light. The trial court granted summary disposition in favor of defendant based on the step being an open and obvious hazard, and that the light switch would have illuminated the hazard. On appeal, the court reversed, holding the open and obvious doctrine does not require guests to turn the lights on to illuminate an impending hazard.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.smithrolfes.com.