THE PASCHOS LAW UPDATE NEWSLETTER

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I. GENERAL LITIGATION

Court Allows Delay Damages on Future Medical Expenses

In *Ross v. Roth*, 2014 PA Super 20; 2014 Pa. Super. LEXIS 32 (February 7, 2014), plaintiff Eileen Roth, following a motor vehicle accident, filed the underlying negligence action against defendant Jenifer Ross. The suit was filed against defendant and her insurer to recover damages for injuries sustained in the accident, including past and future pain and suffering, past and future medical expenses, lost wages, lost earning capacity, mental anguish and emotional distress. A trial on the issue of causation of Roth's injuries led to a verdict awarding her $40,000 for past pain and suffering and $20,000 for future medical expenses.

Plaintiff filed a motion requesting that the trial court mold the jury verdict for the inclusion of delay damages pursuant to Pennsylvania Rule of Civil Procedure 238. The trial court entered an order granting Roth's request for delay damages on the $40,000.00 for past pain and suffering, but denying Roth's request for delay damages on the $20,000.00 for future medical expenses. The trial court's denial of the motion to delay damages for the jury's verdict relating to future medical expenses was based on plaintiff's failure provide appellate case law which specifically addresses the issue of whether or not future medical expenses shall be contained within the definition of 'bodily injury' as intended by Pa.R.C.P. 238.

Plaintiff appealed raising one issue for review: whether the trial court erred in refusing to include the $20,000.00 of the jury's verdict apportioned to future medical expenses when calculating plaintiff's entitlement to delay damages. Roth argued that the plain language of Rule 238(a)(1) contradicts the trial court's conclusion that she was not entitled to delay damages on the $20,000.00 award for future medical expenses.

The appeals court noted that the words of Rule 238(a)(1) are clear and unambiguous: "in all civil cases wherein the plaintiff seeks monetary relief for bodily injury, delay damages shall be added to compensatory damages awarded to the plaintiff against each defendant found to be liable by the jury." The court found the trial court's focus on Roth's failure to provide case law indicating that future medical expenses constituted "bodily injury" was improper. Rather, the court provided that proper inquiry was whether future medical expenses constitute "monetary relief for bodily injury. The court held that future medical expenses that will be incurred as a result of treatment of injuries sustained because of the defendant's negligence are, by definition, monetary relief for bodily injury. Therefore, the trial court's denial of plaintiff's request for delay damages on the $20,000.00 allocated for future medical expenses on this basis was error.

II. INSURANCE LAW

Insurer Found to Have Duty to Defend Based on Four Corners Rule

In *Lanigan v. T.H.E. Ins. Co.*, No. 646 WDA 2013 (Pa. Super., March 14, 2014), plaintiff, William Michael Lanigan filed a declaratory judgment and bad faith action against T.H.E. Insurance Company ("Insurer") seeking a declaration that the Insurer breached its duty to

defend him under a commercial liability policy and acted in bad faith. Insurer filed a motion for summary judgment as to both claims; Mr. Lanigan filed a cross-motion for summary judgment solely on the duty to defend issue. The trial court granted summary judgment in favor of Insurer as to both counts contained in the complaint, and Mr. Lanigan appealed

On March 31, 2007, Plaintiff was driving a race car at the Mercer Raceway Park when the throttle of his race car stuck causing the car to strike the catch fence along the race track. Samuel Ketcham and Steven W. Guthrie, Jr. were standing on the opposite side of the catch fence when Plaintiff lost control of his race car. Mr. Ketcham suffered serious injuries and Mr. Guthrie died as a result of the accident.

Mr. Ketcham and the Estate of Steven W. Guthrie, Jr. filed personal injury lawsuits against Plaintiff and Mercer Raceway Park. Plaintiff contacted Defendant and requested Defendant provide Plaintiff with insurance liability coverage, including a defense against the Estate of Steven Guthrie, Jr., and Mr. Ketcham under insurance policies that Defendant issued to Mercer Raceway Park. Defendant insurer denied plaintiff's request for a defense, citing a portion of the policy that stated that coverage was excluded for "'bodily injury ... to any participant against another participant while practicing for or participating in a racing program, which is sponsored by the insured.'"

At issue was the defendant insurer's duty to defend. In making a determination whether there is a duty to defend in Pennsylvania, a court must compare the four corners of the insurance contract to the four corners of the complaint. An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy.

The main issue was whether Mr. Guthrie and Mr. Ketcham were "participants" at the time of the accident. There was no dispute that plaintiff was a participant. While Mr. Lanigan was an insured the exclusion prevented coverage if the injured party was also a participant. In making the determination as to whether Mr. Guthrie and Mr. Ketcham were 'participants,' the trial court expressly considered facts obtained during the discovery process in the underlying litigation. The court provided that the issue, properly framed, is whether, examining only the underlying complaints and the insurance policy, the claims of negligence against Mr. Lanigan were potentially covered under the policy, giving rise to a duty to defend. The appellate court concluded the trial court erred when it considering the insurer's investigation and discovery in the underlying case in ascertaining whether there was a duty to defend.

The court found that the complaint did not indicate that either Mr. Guthrie or Mr. Ketcham were participants. As such, the court found that the allegations of the underlying complaint could possibly have resulted in coverage under the endorsement. Since any doubt regarding the insurer's duty to defend must be resolved in favor of the insured, insurer was not relieved of its right and duty to tender a defense under the policy and the trial court erred in so finding. The court held that, based on the allegations in the complaints and the policy, the insurer was obligated to defend Mr. Lanigan in the underlying action until it was conclusively determined that the claims asserted were not covered.

Claims that an Insurer Acted Unreasonably Are Alone Insufficient to Supportt a Bad Faith Claim, but CFA Claim Allowed to Proceed

In *Beekman v. Excelsior Ins. Co.*, 2014 U.S. Dist. LEXIS 21864 (February 21, 2014 D.N.J), plaintiff was a homeowner residing in Union Beach, New Jersey whose home was damaged by Superstorm Sandy. In addition to his breach of contract claim, plaintiff also alleged that the defendant insurers improperly adjusted his claim, misrepresented the cause, scope, and cost of repairs to the insured premises, underpaid the claim without any reasonable basis, conducted an inadequate, biased, and result-oriented investigation of Plaintiff's claim, and unreasonably delayed full payment of Plaintiff's claim. Plaintiff further alleged that the insurers violated the New Jersey Consumer Fraud Act ("CFA")

through their deceptive acts during the adjustment. Defendants filed motions to dismiss the claims.

In the second count of the complaint, plaintiff pleaded a breach of the implied covenant of good faith and fair dealing. The court noted that under New Jersey law, a duty of good faith and fair dealing is implicit in every contract of insurance. The party claiming a breach of the covenant of good faith and fair dealing "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." However, here the plaintiff's allegations were couched in terms of what was, or was not, "reasonable" on the part of the Defendant insurers. The court held that claims that insurers acted unreasonably are insufficient alone to support a finding that Defendants breached the covenant of good faith and fair dealing. As such, the court dismissed the claim.

Plaintiff also alleged a violation of the New Jersey Consumer Fraud Act (CFA) against Defendants. Plaintiff alleged that Defendants were deceptive in the adjustment of Plaintiff's claim and that Defendants' deception was part of an ongoing general business practice by the Defendants. Defendants argued that the Consumer Fraud Act does not apply to disputes about insurance benefits coverage. The court noted that in the past, New Jersey Courts have held that the CFA does not apply to insurance benefits coverage. However, the court provided that in *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254 (3d Cir. 2007), the Third Circuit stated that it did not share previous Court decisions with "that the CFA and its treble damages provision are inapplicable to schemes to defraud insureds of their benefits." In Weiss, the plaintiff alleged that his insurance carrier "embarked on a fraudulent scheme to deny insureds their rightful benefits . . . ." Id. The Third Circuit concluded that "while the New Jersey Supreme Court has been silent as to this specific application of CFA, its sweeping statements regarding the application of the CFA to deter and punish deceptive insurance practices makes us question why it would not conclude that the performance in the providing of benefits, not just sales, is covered, so that treble damages would be available for this claim under the CFA." *Id.*

In light of the Third Circuit's holding in Weiss, the Court held that Plaintiff may bring a claim under the CFA and denied Defendants' motion to dismiss the CFA claim.

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