

## **SUMMARY OF APPEAL RESULTS**

Three important published cases handled by the firm include: Rinke v Potrzebowski, 254 Mich App 411 (2002), Monat v State Farm Mutual Automobile Insurance, 469 Mich 679 (2004), and Tevis v. Amex Assurance Company and Geico Indemnity Company, \_\_\_ NW2d \_\_\_ (Mich App, March 19, 2009).

In Rinke, supra, the Defendant was driving his vehicle and attempted to turn left from a gas station. A driver in a white van stopped to create a gap in traffic and waved the Defendant on. The Defendant took this to mean that traffic was clear, so he turned, but he hit the individual's vehicle and caused him injury. The individual filed an action for damages, and the Defendant filed a notice of nonparty fault that indicated his intent to argue to the jury that the unknown driver of the van acted negligently by waiving the Defendant through and thereby caused the accident. The trial court denied the motion, but the court of appeals reversed on appeal.

The Court reasoned that the plain language of MCL §§ 600.2957(1), 600.6304(1)(b) allowed a trier of fact to allocate fault to a nonparty, regardless of whether the person was or could have been named as a party to the action. MCR. 2.112(K) stated that a defendant was not required to specifically identify the nonparty, but only to identify that person as best he could. The Court then held that the statutes and rule permitted a defendant to argue that a nonparty was at fault, even if the nonparty could not be identified. The trial court erred in denying the motion.

In Monat, supra, after the insured was rear-ended by another vehicle, the insurer paid personal injury protection (PIP) benefits, but stopped paying such benefits shortly after the insured filed a third-party negligence action against the driver of the other vehicle. The insured then filed a first-party action against the insurer for PIP benefits. The third party action was tried and the jury found that there was no injury. Therefore, in the first-party, no-fault action, the insurer sought to invoke collateral estoppel to preclude the insured from relitigating the issue of damages since it had already been decided in the insured's third-party negligence action.

The Defendant filed a motion for summary disposition in the trial court. Due only to a lack of mutuality, the appellate court affirmed the trial court's denial of the insurer's motion for summary disposition.

The supreme court held that, where collateral estoppel was being asserted defensively against a party who had already had a full and fair opportunity to litigate the issue, mutuality was not required. The insured had a full and fair opportunity to litigate the issue concerning his alleged injury, and thus, summary disposition in favor of the insurer was warranted.

In Tevis, supra, the Plaintiff was involved in an automobile/motorcycle accident when the Amex insured, who resided out of state, pulled out in front of Plaintiff's motorcycle. Plaintiff resided in Michigan and did not have his own policy of no fault insurance. On the date of the accident, Geico provided no fault insurance for Plaintiff's parents. Amex provided coverage for the out of state driver. The Amex policy of insurance was written in Washington State.

Amex had filed a MCL 500.3163 certificate. A dispute arose as to whether Geico or Amex was the first priority insurer in this case.

Geico filed a Motion for Summary Disposition, arguing that Amex was the insurer of highest priority under MCL 500.3114. Amex contended that 500.3163 was not applicable to this case and that Geico was the first priority insurer. The Trial Court granted Geico's Motion.

The Court of Appeals upheld the Trial Court's decision and ruled that MCL 500.3163 places Amex in the priority position for purposes of PIP benefits to a Michigan resident who was injured in an accident involving an out-of state vehicle insured by the out-of state insurer, Amex. The Court reasoned that MCL 500.3163 unequivocally subjects the out-of-state insurer to the *entire* Michigan personal and property insurance system when *any* accidental bodily injury arising from an out-of-state insured's ownership/use of a motor vehicle occurs.

A sample of other successful appeals in prior years include the following:

**\*Nadiv v. Farm Bureau:** (No. 279302) This matter involved a breach of contract action filed by Plaintiffs regarding water damage to a rental dwelling occurring on May 29, 2004. Defendant denied Plaintiff's claim for damages on the grounds that they had made misrepresentations in the presentation of the claim and on the grounds that the home was vacant for more than 30 days prior to the loss. The matter proceeded to trial before jury in the Oakland County Circuit Court. The jury found that the Plaintiffs had not committed false swearing with the intent to deceive the insurance company. However, the jury found that the home was vacant for more than thirty days prior to the loss.

Counsel for Plaintiff filed a Claim of Appeal arguing that a new trial should be granted since the verdict was against the great weight of the evidence and/or was inconsistent. Moreover, the Plaintiff claimed error with the trial court's decision to grant Defendant's Motion in Limine to preclude evidence, testimony or argument regarding the premises being constructed within the 30 days prior to the loss.

Defendant responded to Plaintiff's Brief on Appeal arguing again that Plaintiff's had failed to properly preserve the issue regarding the sufficiency of the evidence for appellate review. Defendant also argued that the verdicts were not inconsistent since the jury's findings were able to be reconciled. There were logical conclusions that the jury could have reached consistent with their final verdict. Simply due to the fact that Plaintiff testified that she had leased the premises did not automatically qualify that the premises were actually occupied. Plaintiff herself testified at time of trial that she never observed anyone living within the premises. Plaintiff relied solely upon circumstantial evidence regarding the lease of the premises, as well as the presence of some items in the home after the discovery of the damages. Defendant argued that the evidence was not such that required a reversal of the jury's finding since all Plaintiff had was tentative circumstantial evidence in support of their position.

Defendant also argued that the trial court properly granted its Motion in Limine by focusing on the fact that there was no evidence that any renovations in the 30 days prior to the loss. Moreover, the Plaintiff's request for a broad interpretation of the term "being constructed" was improper and well beyond the scope of any definition that the Court should apply.

The Court of Appeals affirmed the trial court's decision on both issues raised by Plaintiff in their appeal. Interestingly, the Court of Appeals focused primarily on Plaintiff's arguments regarding Defendant's Motion in Limine. The Court of Appeals ruled that there was no ambiguity in the contract. Moreover, the Court of Appeals defined the term "being constructed" as a house that is being erected. The Court clearly found that the circumstances in this case would not constitute "being constructed." In the end, the Court of Appeals found that the trial court had focused not on the definition of the terminology but rather properly denied the Motion based upon the lack of evidence that any activity was being undertaken at the home within the thirty days prior to the loss. The Court of Appeals found that Plaintiff had failed to properly preserve for appellate review the request for a new trial based upon the sufficiency of the evidence. In a footnote, the Court of Appeals pointed out that the verdicts were not inconsistent in that there were logical circumstances under which the jury could have found that the Plaintiff had not committed false swearing yet the premises were still unoccupied. (Written and argued by A. Silverstein).

**\*Walters v. Nadell:** This case involved a third party automobile negligence claim against Defendant. The matter was actually the second Complaint filed by Plaintiff regarding the accident in question. Plaintiff previously filed a Complaint which he was unable to serve upon Defendant. At the time, Defendant was an active member of the military. The first matter was eventually dismissed without prejudice. Plaintiff then filed a second action. However, the second action was filed beyond the three year period allowed in MCLA 600.5805(10). Plaintiff was eventually able to serve Defendant with the second Complaint while he was stationed at Fort Benning in Georgia.

Counsel for Defendant immediately filed a motion seeking dismissal with prejudice against Plaintiff on the grounds that the statute of limitations had expired. Plaintiff responded to Defendant's motion claiming that the statute of limitations was tolled pursuant to MCLA 600.5853, which discusses an individual's absence from the state. The trial court granted Defendant's motion and dismissed Plaintiff's Complaint with prejudice.

Plaintiff then filed an appeal with the Court of Appeals arguing again that the statute of limitations was tolled pursuant to MCLA 600.5853. Plaintiff also argued for the first time that the statute of limitations was tolled pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. §526 ("SCRA"). The Court of Appeals affirmed the trial court's decision granting Defendant's motion for summary disposition. The Court of Appeals noted that Plaintiff's arguments regarding the SCRA had not been properly preserved for appellate review since Plaintiff had not raised the argument before the trial court. The Court of Appeals went on further to hold that the application of the SCRA was discretionary and that they chose not to apply same.

Thereafter, Plaintiff filed an Application for Leave to Appeal with the Supreme Court. Plaintiff only sought review regarding the ruling in reference to the SCRA. Defendant once again argued that Plaintiff had failed to properly preserve the issue for appellate review. The Supreme Court, in lieu of granting leave to appeal, affirmed the judgment of the Court of Appeals, but did so for different reasons. The Supreme Court held that the provisions of the SCRA were not discretionary. The Supreme Court went through lengthy analysis to support the determination that the Court of Appeals and trial courts must apply the SCRA if one of the parties is an active member of the military. However, the Supreme Court agreed with the Court of Appeals that Plaintiff had failed to preserve this argument for appellate review. The Supreme Court held that Plaintiff had waived his rights pursuant to the SCRA by failing to raise the argument at the trial court level.

The Supreme Court outlined the clear rule of law that a service member can be found to have waived the protections of the SCRA if they are not properly asserted. Plaintiff argued that the specific language of the SCRA does not allow for a waiver by a non-service member. The Supreme Court disagreed with this argument. The Supreme Court opined that it would be contrary to the purpose of the SCRA to provide more protection to non-service members than to service members. The Supreme Court held that Plaintiff could and did waive his rights pursuant to the SCRA since he failed to raise the tolling provision with the trial court.

**\*Salvati v. Stoica:** (No. 275966) This was a third party automobile negligence action stemming from a September 1, 2003 accident. Plaintiff claimed a serious impairment of bodily function as a result of injuries to her neck, back, and shoulders. Plaintiff appealed the trial court's decision to grant summary disposition to the defendant. The trial court found that the Plaintiff's normal life had not been altered to a significant enough degree to require an award of non-economic damages. Plaintiff argued on appeal that the trial court's decision was erroneous and should be reversed.

Defendant argued in response to Plaintiff's appeal that she failed to establish a threshold injury under Kreiner v. Fischer. Specifically, plaintiff had no alteration in the course and trajectory of her life. She barely treated for her alleged injuries and after a few months her medical records are devoid of any

mention of allegedly accident related injuries. She only missed work for two weeks and was able to return to her employment without medical restrictions. The plaintiff may have switched positions or stopped working, but every time was due to reasons unrelated to the automobile accident. She was able to care for her two young children on her own and participate in many recreational activities. Plaintiff testified at her deposition that she had gotten better and is able to live the same life she was prior to the accident. Counsel for Plaintiff responded that his client has been limited in her performance of several activities. She is unable to carry laundry baskets and has been participating in activities, but has been doing so with pain.

The Court of Appeals agreed with the trial court that there was no change in Plaintiff's life as a result of this accident. The Court noted that Plaintiff in this matter was not out of work for very long and was able to continue with her recreational activities including swimming with her children, managing her household and taking her children for walks. The Court noted that in this matter Plaintiff did not seek any extensive medical treatment nor did she seek consultation with a pain specialist in reference to the pain she allegedly suffers when performing her household activities. The Court altogether found that the course of Plaintiff's normal life was not altered as a result of this accident. (Written and argued by A. Silverstein)