Feb. 18, 2014

CPAN
COALITION PROTECTING AUTO NO-FAULT

To: Michigan Legislators

From: Kevin McKinney, Coalition Protecting Auto No-Fault Legislative Coordinator

Re: Michigan Supreme Court Record in Auto No-Fault Cases

As the Michigan legislature once again prepares to discuss possible changes to Michigan's auto no-fault insurance laws, it is important for lawmakers to consider how case law is impacting the state's insurance system.

The Coalition Protecting Auto No-Fault has conducted an analysis of Michigan Supreme Court cases decided under the Michigan Auto No-Fault Act within the past 10 years. From 2003 through 2013, there have been 25 major auto no-fault insurance cases decided by the Supreme Court. Of those 25 cases, the Supreme Court ruled in favor of the insurance companies and against the patients or health care providers 21 times.

The following pages provide a brief description of each of these 25 Supreme Court decisions and the impact the case is having on the rights of Michigan's auto accident victims.

Michigan insurance companies are actively using these cases to deny treatment or services to accident survivors that had otherwise been provided under the law. The *Admire v. Auto Owners* decision, for example, is being applied retroactively by auto insurers to justify their denial of patients' transportation and other products previously available to them. In addition, as a result of *Spectrum Health v. Farm Bureau and Progressive v. DeYoung*, auto insurance companies are denying lifetime no-fault injury coverage to children who become injured in an auto accident after taking their parents car without permission.

Unfortunately, it would seem logical that the elimination of services and denial of treatments for auto accident survivors that have resulted from these 21 cases would have had a positive impact on the bottom line of insurance companies, yet the rates paid by Michigan policy holders do not reflect these savings.

When reviewing proposed changes to Michigan's auto insurance system, CPAN asks that lawmakers keep these 21 Supreme Court case insurance industry victories clearly in mind. Any additional changes to the Michigan Auto No-Fault Act should focus on improving the efficiency of the system and reducing fraud, not further denying care for the state's most seriously injured people.

CPAN
COALITION PROTECTING AUTO NO-FAULT

A broad-based coalition to preserve the integrity of Michigan's model No-Fault Insurance System

216 N. Chestnut Street, Lansing, MI 48933 (517) 882-1096
www.CPAN.us Facebook.com/ProtectNoFault

MEMORANDUM

TO: Kevin A. McKinney
Legislative Consultant

FROM: John Cornack
President

DATE: January 24, 2014

RE: Michigan Supreme Court and the Auto No-Fault Law in the Last Decade

You have asked that I review CPAN's *amicus curiae* files and its related legal records for the purpose of informing you how the Michigan Supreme Court has ruled, during the last decade, in those cases decided under the Michigan Auto No-Fault Act that involve the claims of patients and/or their providers against auto no-fault insurance companies. I have reviewed our records and have discussed your request with our legal consultants and report to you the information set forth below.

From 2003 through 2013, there have been 25 major cases decided by the Supreme Court under the Auto No-Fault Act involving the claims of patients and/or their providers against no-fault insurance companies where the Supreme Court actually issued a formal written opinion. Of those 25 cases, the Supreme Court ruled in favor of the insurance companies and against the patients/providers 21 times. Of the four decisions in favor of patients and/or providers, one was subsequently reversed by the Court. Many of these cases have had a significant negative impact on the rights of patients and providers and have substantially altered the operation of the Michigan auto no-fault law. CPAN filed an amicus brief in many of these cases to highlight their significance. These 25 cases are listed below, with the Justices who voted with the majority identified in brackets and the author listed first:

A. Decisions in Favor of Insurance Companies

1. *Admire v Auto-Owners; 494 Mich 10 (2013)*
[Zahra, Young, Markman, and M.B. Kelly]

In this decision, the Supreme Court reversed many years of case law and held that no-fault insurance companies were no longer required to pay for the base price of handicapper vans, even though such vehicles were the only method of transportation by which wheelchair-bound catastrophically injured patients could travel. The Court held that insurers only have the responsibility to pay for the special adaptive equipment on these vehicles regardless of whether the patient can afford to pay for the vehicle itself. The decision is being retroactively applied to patients who were injured many years ago, thus resulting in those patients losing transportation and other products previously available to them.

2. *Spectrum Health v Farm Bureau and Progressive v DeYoung; 492 Mich 503 (2012) [Zahra, Young, Markman, and M.B. Kelly]*

In this case, the Supreme Court reversed many years of case law authority and held that children who take their parent's car *"joyriding"* without parental permission can be denied no-fault PIP medical benefits because the child *"unlawfully"* took the vehicle within the meaning of the disqualification provisions of the No-Fault Act. Therefore, children who drive vehicles owned by their parents without parental permission can be denied lifetime coverage for medical expenses incurred by the child.

3. *Douglas v Allstate; 492 Mich 241 (2012)*
[Young, Markman, M.B. Kelly, and Zahra]

In this case, the Supreme Court reversed the Court of Appeals decision in favor of a woman who rendered attendant care services to her catastrophically injured husband. The Court reversed because there was insufficient proof that the wife's services were rendered with the expectation of payment. In addition, the lower court's decision was reversed because it gave too much weight to commercial agency rates that the patient's insurance company would have been obligated to pay if the patient's wife had not been willing to provide the care.

4. ***Johnson v Recca; 492 Mich 169 (2012)***
[Markman, Young, M.B. Kelly, and Zahra]

In this case, the Supreme Court reversed the Court of Appeals and ruled that seriously injured patients can no longer recover compensation from at-fault drivers for household expenses incurred by the patient in excess of those that are payable by the patient's insurance company as *"replacement service expenses"* (i.e. $20 a day for 3 years). Household expenses incurred by patients in excess of that limited amount are no longer the obligation of the at-fault driver.

5. ***Joseph v Auto Club; 491 Mich 200 (2012)***
[M.B. Kelly, Young, Markman, and Zahra]

In this case, the Court overruled its recent decision in *University of Michigan Regents v Titan Ins Co* and reinstated its earlier decision in *Cameron v Auto Club* and held that the PIP benefit one-year-back rule applicable to enforcing payment of medical expenses is a rule that applies to everyone, including mentally incompetent persons and minors. Therefore, insurance companies cannot be made to pay expenses incurred more than one year prior to filing suit.

6. ***Frazier v Allstate; 490 Mich 381 (2011)***
[Young, Markman, M.B. Kelly, and Zahra]

In this case, the Court denied no-fault benefits to a woman who sustained injuries after she slipped and fell on ice while trying to close the door of her parked vehicle. The Court reasoned that the *"parked vehicle exceptions"* for *"alighting"* and *"permanently mounted vehicle equipment"* were not available to the plaintiff even though she was in contact with the vehicle at the time of the fall. The Court found she was not in the process of *"alighting"* from the vehicle, and that the door did not constitute *"equipment"* of the vehicle.

7. ***Krohn v Home-Owners; 490 Mich 145 (2011)***
[Zahra, Young, M.B. Kelly, and Markman]

In this case, the Court held that patients with spinal cord injuries who undergo medical treatment involving experimental procedures cannot compel their no-fault insurance company to pay for that treatment unless the patient can establish by *"objective and verifiable"* evidence that the procedure is capable of having the desired effect. Absent such a showing, the treatment will not be considered to be *"reasonably necessary"* and, thus, not compensable under the No-Fault Act. This ruling will likely limit the accessibility of experimental procedures for many patients because it is unlikely most patients will be able to establish that a new medical procedure has a likelihood of success.

8. ***Moore v Secura Ins; 482 Mich 507 (2008)***
[Corrigan, Taylor, Young, and Markman]

In this case, the Court found that a no-fault insurer no longer has a duty to reconcile the medical opinions of the patient's treating physicians with the opinions of medical examiners hired by the insurance company to cut off benefits. Before this case was decided, no-fault insurance companies who had not attempted to reconcile conflicting medical opinions could be liable for attorney fee penalty sanctions.

9. ***Community Resource Consultants, Inc v Progressive; 480 Mich 1097 (2008)***
[Per Order joined by Taylor, Corrigan, Young, and Markman]

In this case, the Court held that medical providers may not protect themselves from the PIP benefit one-year-back rule by applying payments received from the insurance company to the oldest unpaid invoices, rather than applying those payments exactly as the insurance company designated. The ruling forces providers to file suit within one year of the date that the oldest unpaid service was rendered.

10. ***Burris v Allstate; 480 Mich 1081 (2008)***
[Per Order joined by Corrigan, Taylor, Young, and Markman]

In this case, the Court allowed insurance companies to deny attendant care benefits to seriously injured patients cared for at home by their families if the insurer could show that the family care givers rendered the care without the expectation of being paid, even though the insurance company would have been responsible to pay for such attendant care if it had been provided by commercial agencies.

11. ***Muci v State Farm; 478 Mich 178 (2007)***
[Taylor, Corrigan, Young, and Markman]

In this case, the Court significantly diminished the power of trial court judges to place limitations on the ability of insurance companies to hire and use *"independent medical examiners"* to examine patients for purposes of cutting off no-fault benefits.

12. ***Cameron v Auto Club; 476 Mich 55 (2006)***
[Taylor, Corrigan, Young, and Markman]

In this case, the Supreme Court overruled nearly 20 years of case law and held that the PIP benefit one-year-back rule, is a rule that applies to everyone, including mentally incompetent patients and minors. Prior law had protected this class of patients and their providers by allowing them to recover medical expenses that were older than one year.

13. ***MCC v Farmers; 475 Mich 363 (2006)***
[Young, Taylor, Corrigan, and Marilyn Kelly]

In this case, the Court overruled the Court of Appeals, thereby clearing the way for the implementation of an earlier ruling by the Michigan Insurance Commissioner authorizing no-fault insurance companies to sell *"managed care endorsements."* These endorsements would have the effect of converting the current *"fee for services"* no-fault system into a *"managed care"* system for any

consumer who purchased such a policy, even though the Legislature never authorized such endorsements.

14. ***Devillers v Auto Club; 473 Mich 562 (2005)***
[Young, Taylor, Corrigan, and Markman]

In this case, the Court overruled nearly 20 years of case law and held that the PIP benefit one-year-back rule is not suspended from the date a medical provider submits a bill for payment until payment is formally denied, as had been the rule for many years. This *"time suspension"* principle had been routinely relied upon by most medical providers. As a result of this decision, many unpaid medical expenses became uncollectible because the Court also applied its decision retroactively.

15. ***Griffith v State Farm; 472 Mich 521 (2005)***
[Corrigan, Taylor, Young, and Markman]

In this case, the Court overturned many years of prior law and held that catastrophically injured patients who would otherwise require institutionalization but for the willingness of family members to provide care at home could no longer recover the cost of non-special dietary food provided at home, even though the cost of this identical food would be recoverable if the injured person was institutionalized.

16. ***Jarrad v Integon; 472 Mich 207 (2005)***
[Corrigan, Weaver, Young, Markman, and Taylor]

In this case, the Court overturned approximately 20 years of law, and held that workers who purchased coordinated no-fault policies can have their no-fault wage loss benefits reduced by wage continuation benefits paid to the workers under collective bargaining agreements. As a result of this ruling, hundreds of dollars in wage loss benefits that had been previously payable to disabled workers will be lost.

17. ***AOPP v Auto Club; 472 Mich 91 (2005)***
[Taylor, Corrigan, and Markman]

In this Memorandum Opinion, the Court gave blanket authorization to no-fault insurance companies to use medical bill auditing without setting forth any protections for medical providers and without placing any limitations on the right of no-fault insurance companies to conduct medical bill auditing.

18. ***Stewart v State of Michigan; 471 Mich 692 (2004)***
[Corrigan, Cavanagh, Weaver, Marilyn Kelly, Taylor, Young, and Markman]

In this case, the Court denied no-fault benefits to a seriously injured person when the motorcycle on which she was riding struck a police cruiser which was stopped partially on the roadway to assist a disabled vehicle. The Court found that, although stopped and obstructing the flow of traffic, the police cruiser did not create an unreasonable risk because the motorcycle operator could have avoided the stopped vehicle. Therefore, the statutory exception for unreasonably parked vehicles, which would have allowed the Plaintiff to make a claim for no-fault PIP benefits, was not met.

19. ***Kreiner v Fischer and Straub v Collette; 471 Mich 109 (2004)***
[Taylor, Corrigan, Young, and Markman]

In this case, the Court departed from almost three decades of no-fault tort jurisprudence by redefining the threshold element of *"serious impairment of body function"* in such a way as to prohibit totally innocent victims with very serious and long term injuries from recovering noneconomic damages from the negligent and drunk drivers who caused those injuries. As a consequence of this decision, many believe the Michigan no-fault system lost that critically important *"balance"* which it had maintained for over 30 years and which is essential to its continued viability. (This decision was reversed by *McCormick v Carrier*, referenced below.)

20. ***Proudfoot v State Farm; 469 Mich 476 (2003)***
[Corrigan, Cavanagh, Weaver, Marilyn Kelly, Taylor, Young, and Markman]

In this *per curiam* Opinion, the Court determined that an insurance company is not liable for future allowable expenses under the no-fault law, because the no-fault statute only provides coverage for *"incurred"* expenses. Therefore, expenses that patients have not yet paid, such as home modifications for catastrophically injured victims, have not yet been *"incurred."* Similarly, the Court stated that any attorney fee or interest penalty available under the Act may not be assessed against an insurer where expenses have not yet been incurred by the patient. This ruling requires patients to actually pay, or become liable to pay, expenses before their no-fault insurance company is required to reimburse the expense.

21. ***Rednour v Hastings Mutual; 468 Mich 241 (2003)***
[Corrigan, Weaver, Taylor, Young, and Markman]

In this case, the Court narrowly construed the definition of an *"occupant"* of a vehicle under the Michigan No-Fault Act by denying coverage to a driver struck by a passing car while changing a flat tire on a Michigan insured vehicle being driven in Ohio. The Court determined that because he was not inside or on top of the vehicle, he was not an *"occupant"* and was, therefore, not entitled to benefits.

B. DECISIONS IN FAVOR OF PATIENTS/PROVIDERS

1. ***University of Michigan Regents v Titan Ins Co; 487 Mich 289 (2010)***
[Marilyn Kelly, Hathaway, Weaver, and Cavanagh]

In this case, the Court overturned *Cameron v ACIA* and re-adopted the rule that the no-fault one-year-back rule does not run against minors and mentally incompetent patients. This decision was a major victory for minors and victims suffering severe brain injury, as well as medical providers who render care to those patients. (This decision was reversed by *Joseph v Auto Club*, referenced above.)

2. ***McCormick v Carrier, et al; 487 Mich 180 (2010)***
[Cavanagh, Weaver, Marilyn Kelly, and Hathaway]

In this case, the Supreme Court overruled *Kreiner v Fischer*, thus restoring the rights of innocent, seriously injured accident victims to recover noneconomic damages from the careless, at-fault drivers causing those injuries. Many believe this decision restored the critically important balance that had been lost after the *Kreiner* case.

3. ***Cooper v Auto Club; 481 Mich 399 (2008)***
[Markman, Corrigan, Taylor, and Young]

In this case, the Court determined that if a patient can prove that he was defrauded by his no-fault insurance company regarding the payment of PIP benefits, the patient has six years from the fraud to bring suit against his no-fault insurance company, rather than being limited by the one-year-back rule.

4. ***Ross v Auto Club; 481 Mich 1 (2008)***
[Marilyn Kelly, Taylor, Cavanagh, and Young]

In this case, the Court determined that the sole employee and shareholder of a corporation who was injured in a motor vehicle accident, was entitled to work loss benefits for the income he would have earned as an employee of the corporation, despite the fact that his company had shown losses on its recent tax returns.

These facts regarding the Supreme Court's record in the auto no-fault area are a matter of great concern for many of us involved in the care and treatment of auto no-fault patients.