LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

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LOJM VICTORY: WORKER'S COMPENSATION SUBROGATION CLAIM NOT SUBJECT TO VERBAL THRESHOLD

Star Insurance v. Magee
Sup. Ct., Law Div.
BER-L-7185-17
(April 27, 2018)

Defendant in a worker's compensation subrogation claim filed by our office moved to dismiss on the basis that Plaintiff could not prove that its insured's injuries met the verbal threshold. In 1996, the New Jersey Appellate Division issued a decision that seemed to imply that a WC subrogation claim could be subject to such a threshold. Cont'l Ins. Co. v. McClelland, 288 N.J. Super. 185 (App. Div., 1996). More recently, however, the Appellate Division indicated that a WC carrier's right of recovery should not be affected by the no-fault scheme, which is the source of the verbal threshold defense. Lambert v. Travelers Indem. Co. of Am., 447 N.J. Super. 61 (App. Div., 2016). Craig and Pomeroy's 2018 edition of New Jersey Auto Insurance Law (§12:3 at pp.244-45 and §15:3-2 at pp.290-91) notes that McClelland is at odds with Lambert and other cases.

LOJM prevailed on its three main points: first, Plaintiff's claim was for economic damages and was therefore not subject to the verbal threshold by the terms of the statute. Second, to the extent that Continental restricts recovery of WC, it does so only where the injured party might have been eligible for PIP which was not the case here. Finally, Lambert makes clear that the legislature did not intend the no-fault statute to limit recovery rights under the Worker's Compensation Act.

The opinion is an unpublished and therefore non-precedential opinion. However, it indicates that WC carriers should be more aggressive in subrogation efforts, even where the verbal threshold may not be met, and in particular, in the many cases where the injured employee is occupying a vehicle that is not part of the PIP scheme. ■

SUMMARY JUDGMENT

Rodriguez v. City of New York
NY Court of Appeals
31 N.Y.3d 312
(April 3, 2018)

The NY Court of Appeals held that a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence in order to obtain partial summary judgment as to the defendant's liability. CPLR §1411's plain language states that "the culpable conduct attributable to the claimant…shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant …bears to the culpable conduct which caused the damages." Further, CPLR §1412 states that "[c]ulpable conduct claimed in diminution of damages…shall be an affirmative defense to be pleaded and proved by the party asserting the defense." Legislative history behind CPLR §1412's enactment indicates that it was intended to place the burden of

proving contributory negligence on the defendant invoking it, rather than plaintiff. The Court of Appeals reasoned that comparative negligence is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence and is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages. Partial summary judgment would also reduce the number of questions for a jury once defendant's negligence is established. ■

SOL

Contact Chiropractic, P.C. v. New York City Transit Authority
NY Court of Appeals
31 N.Y.3d 187
(May 1, 2018)

Girtha Butler sustained injuries as a passenger on a bus owned by the NYCTA. The bus did not have no-fault coverage, but was instead self-insured. Plaintiff provided health services to Butler, who then assigned to Plaintiff her right to recover first-party benefits from the self-insured defendant. Subsequently, about six years after the accident, Plaintiff filed suit for reimbursement. Defendant moved to dismiss due to Plaintiff's purported failure to file suit within three years, per CPLR §214(2), which applies to actions to recover upon a liability created or imposed by statute, rather than the six-year limitations provided by CPLR §213(2) for actions based upon a contractual obligation or liability. The Court of Appeals found for Defendant, finding that the three-year SOL applies. Here, the no-fault benefits in dispute are not provided by a contract with a private insurer; rather Defendant met its statutory obligation by self-insuring. Although the three-year SOL of 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, that condition does attach to instances in which "liability would not exist but for a statute." ■

UNKNOWN DRIVER

Krzykalski v. Tindall
NJ Supreme Court
A-55-16
(April 17, 2018)

The NJ Supreme Court held that a jury may allocate fault to an unknown driver, explaining that the Comparative Negligence Act N.J.S.A. 2A:15-5.1 to -5.8 generally requires the jury to fairly apportion fault among all tortfeasors and for each tortfeasor not to pay more than its fair share of the fault (except that Plaintiff may recover 100% of its damages from a tortfeasor found to be 60% or more at fault, per N.J.S.A. 2A:15-5.3(a)). The Court noted that in hit-and-run situations, the UM scheme is designed to protect plaintiffs from the harshness of fault being allocated to an unknown party. Finally, the Court noted that Plaintiff here had fair notice that the parties would be attributing fault to the unknown tortfeasor, and the UM carrier had the opportunity to intervene in the case if it cared to argue the point. ■

QUESTIONS AT DEPOSITION

Zbigniewicz v. Sebzda
Sup. Ct. of NY, Erie County
2018 NY Misc.3d. 340
(January 8, 2018)

Defendants in a BI action applied for an order compelling plaintiff-deponent to provide responses at a further deposition after plaintiff's counsel advised him not to answer a number of questions asked at a prior deposition. The trial court held that refusing to provide the claimant's Social Security Number was improper, as it is reasonably calculated to lead to admissible evidence; an SSN is useful for searching the claimant's medical records and determining the amount of his Medicaid lien, for example. Any investigation by Defendants into Plaintiff's prior claims or injuries, medical treatment, and criminal history also implicate the use of an SSN. Questions about property ownership are answerable as well since they bear directly upon Plaintiff's allegations that his injuries have adversely affected his ability to fully partake in recreational activities. A plaintiff who commences a personal injury action thereby waives the physician-patient privilege to the extent that his physical or mental condition is affirmatively placed in controversy; therefore, he must properly answer questions concerning the physical condition of his various body parts which he references as part of his injuries or symptoms. ■

OFFICE UPDATE

A belated welcome to attorney **Jonathan L. Leitman**. Mr. Leitman is a Senior Associate in the specialty litigation and subrogation departments. He received his J.D. at the Benjamin N. Cardozo School of Law in 2009, and previously served as an associate attorney in a New Jersey personal injury firm and at a Westchester County general litigation practice. ■