Local Voice

Steven M. Gursten

Why Johnson v. Wausau *encourages adjusters to lie*

Steven M. Gursten

I read with interest Daniel Bernard's recent Local Voice column in The Detroit Legal News. Mr. Bernard writes that my own previous letter about the *Johnson v. Wausau* Michigan Court of Appeals decision [Docket No. 281624], is factually incorrect, and moreover that I fail to "advance the discourse over how to improve our legal system." I welcome this opportunity to respond, and to hopefully advance the discourse about this important case, because the rights of thousands of Michigan residents are immediately and dangerously affected by this decision.

Again, if we accept the plaintiff's version of the facts as true in *Johnson*, an insurance company lied to save money from paying attendant care insurance benefits to the caregivers of a 10-month-old girl with catastrophic traumatic brain injuries from a car accident for 16 years. Instead, she was only allotted $20 per day in household replacement services.

That the claims adjuster did lie in the case is beyond dispute. The case stated: "...when plaintiff... inquired as to whether she was entitled to additional benefits, defendant told her that no additional benefits were available to her." And the insurance adjuster "admitted he never advised... plaintiff that (she) was entitled to attendant care benefits..."

However, Mr. Bernard would put the onus on the injured — and in the case of *Johnson*, the catastrophically injured — to determine their legal rights to attendant care insurance benefits; claiming that to do otherwise is to "jettison any concept of personal responsibility." I respectfully disagree.

How exactly would Mr. Bernard have had the plaintiff in *Johnson* exercise personal responsibility to learn of their legal rights? Mr. Bernard starts off his letter by stating that "I do not generally practice personal injury law, nor do I claim to be an expert on no-fault insurance..." Sadly, this lack of familiarity with our no-fault law shows through in the rest of his letter, and fatally undermines his arguments.

How exactly should the plaintiff in *Johnson* have exercised personal responsibility to learn about her legal right to attendant care, as Mr. Bernard demands?

Could she ask her insurance company? She tried that. The plaintiff in *Johnson* asked her adjuster. She questioned her adjuster on multiple occasions, directly and repeatedly, and the adjuster lied to her. The adjuster denied that there was any other type of to which benefit she — and the catastrophically brain-damaged infant child that she was caring for — was entitled. This created devastating financial hardship during the 16 years that this child required attendant care, both for the completely innocent brain injured child and for her caregivers.

Could the plaintiff check her insurance policy? No, she could not. I have read nearly every automobile insurance policy in Michigan at one time or another. These are long, complicated, difficult contracts to read and understand. And quite frankly, they are not written for the average person to understand. More specifically, however, almost none of the insurance policies in Michigan mention attendant care or similar nursing care services today. And I would wager that not a single insurance policy in Michigan specifically mentioned attendant care or nursing type services in their policies at the time this motor vehicle accident occurred or for years afterward. Therefore, the plaintiff in *Johnson* would not have known about this benefit by checking her insurance policy.

Could she check the law, perhaps even read the entire Michigan No-Fault Act? Let us now fictionally presume that the plaintiff in *Johnson* did have two years of law school training, can perform legal research, and looks through

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the entire Michigan No-Fault Act. She still would learn nothing about attendant care, because the words "attendant care" are not in the Act. She would not find anything that would suggest or resemble the attendant care benefits that she had repeatedly asked her adjuster about, on a first, second, third or more reading of the Act. Attendant care is never specifically mentioned. Instead, attendant care — or nursing services that require an "attendant" to provide "care" because of the extent and severity of injuries — is something that is derived by digging deeper and understanding the meaning of MCL 500.3107(1)(a), which states only that Personal Injury Protection (PIP) benefits are payable for "all reasonable charges incurred for reasonably necessary products, services and accommodations used for a person's care, recovery or rehabilitation." Throughout the years, and through much litigation about the exact meaning of the wording of the statute, attendant care has developed and evolved. No, she would not have learned about attendant care by reading the statute.

Could she ask a lawyer? This is, after all, what the Court in *Johnson* suggested she do, and as a result has now essentially destroyed any possible claim for fraud that can be made. I am not alone in this assessment. James L. Borin, a pre-eminent authority on no-fault and widely respected defense insurance lawyer, openly wondered the same after his own reading of *Johnson* in a LawFax publication that goes out to thousands of insurance adjusters and defense lawyers in Michigan: "Since a person, presumably, always has the ability to consult with a lawyer, can a plaintiff ever establish a claim for fraud???"

The problem with asking a lawyer is that very few lawyers know anything about attendant care. Very few lawyers from other areas and specialties of law know anything about no-fault benefits or attendant care. Even within the sub-specialized field of personal injury law, most lawyers know nothing about this important benefit. Ask any lawyer who frequently handles no-fault cases how often we go to court for a case evaluation hearing on a catastrophic attendant care case and have to spend the beginning of our presentation educating the case evaluation panel on what attendant care is, and the differences between no-fault replacement services and attendant care benefits. So even if the plaintiff in *Johnson* had picked up the phone and scheduled and paid for a meeting with a lawyer for legal advice, the chances are very good she never would have learned about this important benefit to which everyone agrees the plaintiff was entitled.

And this is where the whole argument calling for more "personal responsibility" runs smack into a wall. The whole idea of forcing someone to have to pay money to hire a lawyer in the first place, to essentially find out if their own insurance company is telling them the truth about anything and everything, as the Court in *Johnson* said the plaintiff should have done, is a toxic and absurd idea. I can't think of a reason the Court would protect insurance companies with such unclean hands, or punish those who are obviously in a vulnerable and unequal position by presuming they should know all of their legal rights — especially when these people have undergone horrible personal injuries that require attendant care. Why are we putting this burden on the plaintiff and requiring that people now assume that their own insurance company will lie to them, and then have to hire a lawyer to check the veracity of everything the claims adjuster is telling them?

In addition, there are no "long-standing" principles of Michigan law at issue here, as Mr. Bernard stated. In fact, quite the opposite is true. The "one-year back rule" that Mr. Bernard wrote about didn't exist in its present form until 2005, some 22 years after the car accident in *Johnson* occurred. This "long-standing" principle of Michigan law was judicially created in 2005, in a case called *Devillers v. Auto Club*, when a narrow, one-justice Republican majority (that has been accused many times of judicial activism for political purposes) overturned almost 20 years of Michigan law; saying for the first time ever, that there was now only one year to file for benefits after a car accident — with no exceptions and no tolling. *Devillers* held that the one-year-back statute of limitations that prohibits recovery of Michigan PIP benefits for any portion of a loss incurred more than one year before commencement of a lawsuit filed by a Michigan attorney, is not subject to judicial tolling, overruling what was long-standing law in this state under *Lewis v. DAIIE*. It is utter nonsense to say, 22 years before the fact, that the claim in *Johnson* was time-barred. So no, the claim in *Johnson* should not have been so summarily executed under the one-year back rule.

Mr. Bernard is right that we should have a dialogue about this important issue. I believe no recent case affects the rights of more Michigan citizens than *Johnson v. Wausau*. I believe the public policy implications of this decision could not be worse, and I believe that the shield and immunity the case now gives insurance adjusters to lie and defraud their own policyholders is disastrous to protecting the public. I most certainly welcome dialogue on how we can protect innocent people and prevent insurance company adjusters from taking unfair advantage of them. This is why I wrote my open letter to begin with.

There must be a better solution than simply imposing a "caveat emptor" requirement on our law for any injured Michigan resident, which is really the "personal responsibility" that Mr. Bernard demands as the solution.

Steven M. Gursten is head of Michigan Auto Law, which specializes in insurance benefits and car accidents in Michigan. Contact him at www.michiganautolaw.com.

THIRD CIRCUIT COURT NOTICE – DETROIT, MI

Effective January 1, 2007, any voucher submitted for any services rendered more than sixty (60) days from the case disposition on criminal matters will be denied in accordance with the Local Administrative Order 2006-08, Plan for Assignment of Counsel in the Third Judicial Circuit. This includes payment requests for either regular or extraordinary services.

Ronald R. Ruffin
Executive Court Administrator
Third Judicial Circuit