

CALENDAR CALL

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SOMETIMES IT IS JUST HARD TO BELIEVE

Mr. Charles Young (the insured) was with a group of campers in an Albany County State Park. They were involved in a dispute with another group of campers that led to a physical fight.

At 6:15 the next morning Mr. Young, in retaliation, intentionally drove his vehicle over the tent of one of the campers from the other group. The tent was occupied by Ms. Wood who suffered a very serious injury.

Mr. Young was thereupon arrested. He claimed that he did not know that anybody was in the tent at 6:15 in the morning. Nevertheless, he eventually entered a guilty plea to Attempted Assault in the First Degree and was sentenced to a period of 11 years in prison.

His insurance carrier timely denied coverage under the intentional act exclusion of the policy.

Despite all of these circumstances the

Supreme Court of Schoharie County held that, as a matter of law, the insurer had a duty to defend and indemnify. The court found that the possibility existed that even though Mr. Young must have appreciated the substantial risk that the tent would be occupied at that time of the morning, his conduct would only amount to reckless behavior and not intentional harm.

Incredibly, the Appellate Division affirmed.

DO NOT SIT ON DISCLAIMERS

In a recent case, the Appellate Division, Second Department held that an insurance carrier that failed to promptly disclaim, was obligated to provide excess coverage with respect to the underlying claim.

The plaintiff in this declaratory judgment action clearly demon-

strated that the accident fell within the coverage provisions of the defendant insurer as to excess coverage.

In addition, it was established that within days of the accident the insurer received a copy of the police report and became aware that the car had been driven by an unauthorized driver.

Nevertheless, for reasons that were never explained, the insurer waited 50 days before issuing a disclaimer.

Since an insurer must give written notice of a disclaimer of coverage as soon as is reasonably possible, the court held the insurer was obligated to pay despite an otherwise valid exclusion.

JURY VERDICT FOR DEFENDANT ~ LET'S TRY AGAIN

In the case of Anna Larson v Dawn Spano, the Appellate Division, Second Department set aside a jury verdict that was entered in favor of the defendant as being against the weight of the evidence and ordered a new trial on the issue of liability.

The plaintiff was a pedestrian who according to the decision of the appellate division, suffered severe brain and

body injuries when she came into contact with the defendant's car. It should be noted that, according to the defendant and the independent eyewitness, the defendant's car was at a full stop just prior to the accident.

The plaintiff maintains that the defendant was negligent in failing to yield to a pedestrian who was legally crossing the roadway.

The defendant

maintains that a pedestrian who is crossing a roadway outside of a marked crosswalk and not at an intersection must yield the right of way to a vehicle on the roadway.

This was clearly a question for the jury, but the Appellate Division determined that the failure of the defendant to see the plaintiff was proof of some level of negligence and therefore the jury was wrong.

STUPID HUMAN TRICKS

I thought that "sleeping it off" was the right thing to do.

Michael DeWitt, having determined that his driving ability may be a bit impaired, decided it would be best to get a room for the night.

He saw a Holiday Inn, drove erratically into the parking lot and told the man at the front desk that he was there "to get a room".

Unfortunately for Mr. DeWitt he had pulled into the parking lot next door, and the man he was talking to was the desk sergeant of the Fort Wayne Indiana, Police Department.

He was promptly arrested and initially charged with driving un-

der the influence. The police thereafter discovered that the reason Mr. DeWitt first determined that his driving may not be up to par, was that he had collided with another car nearby and had left the scene.

And they say that cell phones are a distraction.

A 28-year-old driver crossed over into oncoming traffic and fatally crashed into a Hummer just outside Yuba City, Nevada, while apparently working on his laptop computer.

The highway Patrol officers reported that they found the laptop open on the seat next to the driver and it was plugged into the car's cigarette lighter.

I couldn't help it, it was that last coffee cup.

Ann Biglin of West Yarmouth, Massachusetts was issued a traffic ticket for driving her car over the curb and knocking down a light post.

However, it was Ms. Biglin's claim that the incident was due to "several old coffee cups" and "assorted pieces of trash" that accidentally fell and hit the accelerator.

This story may not have been far from the truth. The police report found the car was filled with trash that was chest high, and that the driver's seat was uninhabitable.

APPELLATE TERM FINALLY REQUIRES PROOF

For many years, appellate courts have sided with no-fault plaintiffs on many issues.

Most important was the issue of what a medical provider needed to submit to the court in order to establish a *prima facie* case. The requirement that was set by the court, was that they needed to submit very little. The court held that a medical provider need only prove that a claim was sent to the carrier, and payment was not made within 30 days. If that wasn't bad enough, the appellate court further found that the claimant could establish proof that the claim was sent by merely providing a copy of the carrier's denial of claim form (NF-10).

Then it got worse.

In the case of Oleg Barshay, DC, P.C. v State Farm Ins. Co., the plaintiff medical provider not only did not provide proof of mailing, but also failed to submit a copy of the carrier's denial of claim form. In spite of these fatal flaws, and in direct contravention of well established

rules of law, the Appellate Term "searched the record" and found the denial of claim form in the defendant's papers. They then granted the plaintiff's motion for summary judgment.

It is no wonder that with rulings like these the medical providers began to favor litigation over arbitration. As we all know, the courts have become flooded with these no-fault lawsuits.

Now for the good news.

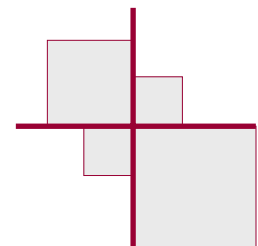
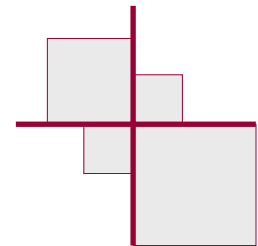
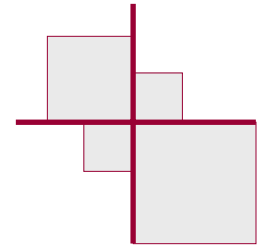
Two very recent appellate court decisions have, finally, applied some of the same rules to the plaintiff medical providers as they imposed upon defendant insurance companies with respect to proving their cases.

In Dan Medical, P.C. v. New York Central Mutual Fire Insurance Company, the court made it clear that a medical provider plaintiff in a no-fault action must make out a *prima facie* case entitling it to summary judgment. In this case, the affidavit submitted by plaintiff's corporate officer was held to be insufficient. It

failed to establish that the officer possessed personal knowledge of plaintiff's practices and procedures. Therefore, it could not lay a foundation for the admission of the documents as business records.

In a subsequent case handled by **BG&S, Bath Medical Supply, Inc. v Deerbrook Insurance Company**, the same court found that issues relating to plaintiff's *prima facie* showing of its entitlement to summary judgment, such as the necessity of plaintiff establishing the proper admission of its documentation as business records, could be raised for the first time on appeal.

Thus, appellate courts are now indicating a willingness to hold a no-fault plaintiff's feet to the fire by requiring it to establish its *prima facie* entitlement to summary judgment with proof in admissible form before a defendant insurance company has to establish a viable defense. The result should be a marked decrease in the number of successful summary judgment motions by no-fault medical service providers.



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DEFAULTING DEFT GETS HIPAA MED RELEASE

In a recent case, the Appellate Division, Second Department found that a motion to compel was the only device available to a defaulting defendant to ensure that there would be compliance with both a *subpoena duces tecum* and the federal “HIPAA” regulations.

The Appellate Division which had previously found this defendant to be in default was now faced with the question as to how to handle the re-

spective rights and obligations of the plaintiff and the defendant regarding the inquest on the issue of damages.

Since the defendant was deemed to be in default, there was no exchange of discovery materials and the defendant had little, if any, information regarding the plaintiff’s injuries.

The court nevertheless found that even though a defaulting defendant is not entitled to discovery,

such defendant “is entitled to present testimony and evidence and cross-examine the plaintiff’s witnesses at the inquest on damages” in order to mitigate the damages allegedly sustained by the plaintiff.

Therefore, it was appropriate for the defendant to *subpoena* the plaintiff’s medical records and to obtain an Order compelling the plaintiff to execute a “HIPAA” compliant medical authorization.