

CALENDAR CALL

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DISTURBING RULING FROM THE THIRD DEPARTMENT

The Appellate Division, Third Department recently issued a decision in the case of LMK Psychological Services v. State Farm Mutual Automobile Insurance Co. which not only completely misrepresents the Insurance Department's Regulations but specifically refuses to follow an opinion letter issued by the Superintendent of Insurance.

The issue at hand is the court's refusal to recognize that the Insurance Law and the Regulations "cap" attorney fees in no-fault claims at \$850.

The court concludes "...that such an

opinion letter is not an appropriate interpretation of the statute."

It is extremely difficult to understand how that court reached this conclusion when section 5106 (a) of the Insurance Law specifically provides that reasonable attorney's fees are "...subject to limitation promulgated by the superintendent in regulations."

The real reason behind the court's position becomes clear later in the decision. In the last paragraph the court states that "The Superintendent's interpretation undermines the goal of the no-fault law to fully compensate a

claimant for economic loss resulting from the wrongful denial of a claim."

This statement shows the use of an improper extension of the stated purpose of the no-fault laws which are to fully and expeditiously reimburse the eligible injured insured for necessary medical costs incurred and lost wages. The Insurance Law was not created to give a windfall to claimant's attorneys

Unfortunately, this ruling will stand until it is reversed or another Department speaks on the subject.

ZERO TOLERANCE FOR FAULTY MEDICAL REPORTS

The Appellate Division, Second Department has once again made it abundantly clear that they will not permit a "serious injury" medical report to stand if it does not set forth specific numerical values as to range of motion and compare those values to what is normal.

The Appellate Division reversed the Su-

preme Court in two different cases. In one they restored the case to the calendar and in the other they ordered that the defendant's motion be granted, and dismissed the action.

In both cases, the issue turned solely on the medical reports.

In the case that was restored they found that although the medi-

cal report set forth numerical values for the range of motion it did not compare those values to what is deemed normal.

In the other case the court found that plaintiff's medical report failed to compare the findings to normal range and also failed to show that the injuries were sustained from the subject accident.

INVENTIVE STATUTE OF LIMITATIONS DEFENSE FAILS

In the case of Pinnacle Open MRI v. Republic Western Insurance Co., the insurer moved to dismiss the plaintiff's claim for assigned no-fault benefits on the grounds that it was commenced beyond the three year Statute of Limitations. The usual Statute of Limitations for a no-fault claim against an insurance carrier is six years.

However, there is a three year statute that

applies to the Motor Vehicle Accident Indemnification Corporation (MVAIC) because their obligation to pay is by a statutory creation and not based upon a contractual requirement.

This insurer who is wholly owned by the same company that owns U-Haul, argues that it shares an identity with U-Haul and therefore, is self-insured.

It further argues that since it is self-

insured, there is no contract of insurance. therefore, any obligation to pay no-fault benefits is solely by statutory creation, and subject to the three year time limit.

In spite of this unique argument, the court found that they are not self insured and that even if they were, they are still obligated to provide no-fault benefits by agreement and not because of a statutory creation.

STUPID HUMAN TRICKS

I'm just built that way.

William Harvey who was arrested in Perth, Scotland for driving while intoxicated, told the judge that his elevated blood-alcohol reading was due to his having a sagging pouch-like neck. He claimed that his neck acted like a pelican's bill collecting most of the alcohol that he drank, thereby causing him to "blow" a falsely high reading.

Contributory negligence?

The co-pilot of a commuter airliner which crashed during take-off at a regional airport in Lexington, Kentucky raised the defense of

contributory negligence.

The basis of this defense was that the passengers were responsible for their own deaths by failing to choose a different airport that might have been safer.

What is quite obvious, is that they should have chosen a different airline.

Reputation for being kind.

Jenna Walters was arrested in Southern Pines, N.C. for reckless driving and harassment. She is charged with veering through traffic in order to pull in front of another woman and block her path.

She then got out

of her car and screamed and taunted the other woman. She finally left the scene only to return and bump into the other car and resume screaming at the other woman. She left again and returned once again bumping into the car and screaming.

Ms. Walters is next scheduled to appear in court in April and may raise as a defense her reputation for kindness and consideration. It turns out that Ms. Walters is the current Miss Fayetteville, N.C. and was voted Miss Congeniality last year.

It appears that Southern Hospitality is not what it used to be.

APPELLATE DIVISION STOPS “RUNAWAY” JUDGES

In the Matter of Pedro Aviles v. Allstate Insurance Co., Mr. Aviles was displeased at the fact that the arbitrator, in the underlying uninsured motorist action, found in favor of the defendant insurance company. He therefore brought an action in Supreme Court, Queens County to vacate the award on the grounds that the arbitrator was biased and had committed misconduct.

Although Mr. Aviles failed to present any evidence whatsoever of such bias, the trial judge found in favor of Mr. Aviles. The Appellate Division reversed this decision upon finding that the judge “...did not articulate a rationale in support of that result.” and directed that the lower court enter a judgment of dismissal.

This is an example of why we must be diligent in defending our rights and prosecuting appeals from “runaway” judges.

In the Matter of Clarendon National Insurance Co. v. Francisco Nunez, Mr. Nunez after reaching a settlement with the offending vehicle as to himself and his family filed a claim for underinsured benefits against the SUM endorsement of his own policy. The carrier filed a petition to permanently stay the arbitration

of their insured’s claim for underinsurance benefits on the grounds that the offending vehicle had the same policy limits as their insured’s SUM endorsement.

Unfortunately, the trial court denied the stay upon a unprecedented interpretation of the insurance regulations. The court seized upon the regulation which holds that for certain purposes an offending driver’s policy limits are deemed reduced by the payments made “to other persons”.

The Appellate court reversed the lower court on two separate grounds and granted the petition thereby permanently staying the arbitration.

In the first instance the court held that when the regulation speaks of payment to “other persons” it does contemplate a husband, a wife and two children who are under the same policy as “other persons”. Secondly, the insurance carrier is entitled to offset the payments made by the offending vehicle. Since, those payments amounted to the full policy limits, the insured is therefore precluded from any recovery.

Once again the appellate court stops a “runaway” judge.

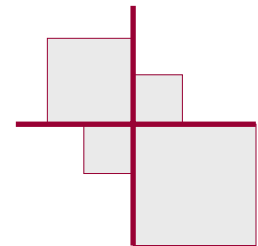
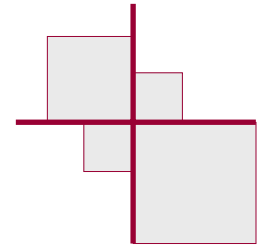
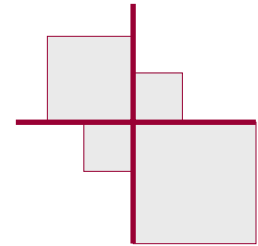
In the matter of Segundo Naula v. Arturo Lopez Dela Puente, Mr. Naula submitted a motion to compel nonparty Motor Vehicle Accident Indemnification Corporation (MVAIC) to serve an answer to his claim in this personal injury automobile case.

The undisputed facts establish that Mr. Naula was the record owner and the driver of one of the cars involved in the accident. It is also undisputed that the subject vehicle was “insured” by a Florida insurance company in the name of Angela Guzman who has a residence in Florida, but was living with Mr. Naula in New York.

One does not need to be a claims adjuster with years of experience to know that Mr. Naula was the owner and operator of an uninsured vehicle at the time of the accident, and that the Insurance Law provides that he is therefore, not entitled to the benefits of MVAIC.

Nevertheless, the judge of the trial court granted the motion to direct MVAIC to file an answer and on reargument granted it again.

Once again, it required the Appellate Division to reverse this “runaway” judge.



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NO PED HEADS ~ NO PROBLEM

An infant plaintiff was injured when she was struck by a vehicle while she was attempting to cross the street at an intersection.

Her parent and natural guardian commenced an action against the City of Schenectady, as well as the driver and the owner of the offending car. In addition, they also sued the engineering firm that designed the renovation of the traffic signal system in this area of the city.

The crux of the

plaintiff's claim against the engineering firm is that they negligent in their design of the subject intersection, by failing to recommend or incorporate any visual display of pedestrian crossing signals known as pedestrian heads or "ped heads".

The engineering firm's motion to dismiss was granted by the trial court, and on appeal by the Appellate Division, Third Department. The courts held that "ordinarily, breach of a contractual obliga-

tion will not be sufficient...to impose tort liability..."

There is, however, an exception to that rule which occurs if the contractor either creates a new risk or increases any risk that may exist.

The Appellate Division found that since the intersection did not have the "ped heads" prior to the renovation design by this defendant, the engineering firm could not have increased the risk of harm and can therefore, not be found liable.