

# CALENDAR CALL

Volume 6, Issue 2

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## ~MAJOR VICTORY~

**Vince Gerbino**, a named partner in **BG&S**, was one of the lead counsel in a case that resulted in wiping out more than twenty million dollars in no-fault claims.

After a five week trial, a jury in Richmond County agreed with the position presented by **Mr. Gerbino** to the effect that Andrew Carothers M.D. P.C. was actually owned and operated by non-physicians and were thus ineligible to collect first party no-fault benefits.

Inasmuch as there were numerous no-fault claims involving the same providers and the same insurance carriers, what was really at stake in this trial was more than twenty million dollars in outstanding no-fault benefit claims.

The case was heard in Civil Court, Richmond County before Honorable Judge Peter Sweeney. During the

course of these proceedings **BG&S** successfully argued before Judge Sweeney to stay all matters involving Andrew Carothers M.D.P.C. as a claimant as against all insurance carriers represented by **BG&S**.

Thereafter, other defense counsel jumped on board and were granted the same relief. The next step was to conduct extensive discovery.

The discovery aspect of this case played an important part in reaching a successful conclusion in this matter. In that regard, the depositions of Irina Vayman and Hillel Sher proved indispensable inasmuch as the defendant's position was that these non-physicians were, in reality, the true "owners" of the facility.

It was very telling that both of these witnesses asserted their fifth amendment rights and

refused to substantively answer any questions. We feel confident that this was a factor in the jury's decision in finding, that by clear and convincing evidence, that Andrew Carothers did not own and control the P.C..

The law concerning medical corporations is very clear and requires that the corporation must be solely and entirely owned by licensed physicians. In accordance with that requirement the Court of Appeals in State Farm v. Mallela held that if a professional medical corporation was not solely owned by physicians then it would not be entitled to collect no-fault benefits from an insurance carrier.

That is exactly what we were able to prove in this case. The result is that we extinguished over twenty million dollars in no-fault claims.

## NO LIABILITY AS A MATTER OF LAW

The deposition testimony of the plaintiff established that he was stopped in a left turning lane when the first defendant who was driving in the opposite direction, swerved into his lane and struck his car. The force of that collision pushed the plaintiff's car backwards and into the left lane of traffic where it was struck by the other defendant's car within one to two seconds after the

initial impact. These facts concerning the way that the accident happened are not in dispute.

The second defendant moved for summary judgment seeking a dismissal of the complaint on the grounds that he was faced with an emergency situation.

The trial court denied the motion, holding that there were unresolved issues of fact.

The Appellate

Division, Second Department reversed, granted the motion dismissing the complaint.

That Court found that the second defendant was presented with the classic emergency situation. He was faced with a car in his lane of traffic going in the opposite direction with no time to act. The Court found that under these circumstances the complaint must be dismissed as a matter of law.

## STUPID HUMAN TRICKS

**When I am the one at fault, who can I sue.**

A woman pulling into a parking space in Athens, Georgia opened her car door to politely inform another driver that she was taking this space. During that exchange, she fell out of the car and was run over by her own car.

A man in Montreal, Canada was pushing his car out of a ditch when it started to roll out of control. He jumped in and hit the brakes which caused the car to jerk and ejected him out of the car and under the wheels.

A man in Palm Beach, Florida was fleeing the police in a stolen truck. He attempted to leap out of the truck

while it was still moving and was run over by the truck that he stole.

**Tell it to the cops.**

A Mr. Grayson Clevenger of Minnetonka, Minnesota was being chased by the police as a suspected burglar. One of the officers who knew him from a previous encounter called his cell phone to persuade him to stop his car. Mr. Clevenger answered his phone and yelled to the caller, "Dude, I can't talk! I'm being chased by the police!" Hopefully, he was using a hands free device when he answered that call.

Willie Vickers of Cleveland Heights, Ohio was arrested on several

outstanding burglary warrants when he offered to help a woman and a police officer who were trying to get into the woman's locked car. Mr. Vickers volunteered that he had "lots of experience with locked cars." It apparently did not occur to him that the officer would run his name through the computer.

A 25 year old man was arrested in Corpus Christi, Texas for drug possession during a minor traffic stop. He explained to the officer "it's not my truck; If you find something, it's not mine; [and] If there's anything in the black bag, it's not mine." It turns out that there was plenty of something in the black bag.

## BE AWARE & BE PREPARED

**The Court of Appeals opens the door for grandstand move by Brooklyn Borough President on concerns about “redlining”.**

The New York State Court of Appeals reinstated an order of the New York County Supreme Court which had granted a petition filed by the Borough President of Kings County seeking information pursuant to the Freedom of Information Law (FOIL). The specific item at issue in the FOIL request is a list divided by each King’s County zip code, divided by individual insurance carrier, of the number of voluntary (automobile) policies issued, renewed, cancelled (other than for non-payment of premium), including policies that were “nonrenewed”.

The Court held that the Insurance Department must turn over such information which the department obtained pursuant to Reg. 90 filings.

Anyone who has been an adult in New York for more than ten minutes knows where this is going to lead. So as they said in the TV show Hill Street Blues, “be careful out there”.

**Be aware of a new trap for NF-10 peer review denials.**

A new line of cases is emerging from the

Appellate Term, Second Department granting summary judgment to medical claimants who have received timely NF-10 denials based on peer review reports.

The Appellate Term, Second Department has held for some time that an NF-10 based on a negative peer review report was not sufficiently “specific” and therefore invalid. That line of cases was finally reversed by the Appellate Division.

Claimants are making similar summary judgment motions and if the peer review report contained in the opposition papers was “signed” by a facsimile signature, the claimants are asserting that such reports are not admissible as evidence and are therefore invalid. This argument is winning summary judgment motions in the Appellate Term despite the fact that facsimile “signatures” are proper if affixed at the direction of the person named.

A frightening example is the matter of Radio Today v. GEICO. The court stated that “In opposition to plaintiff’s motion for summary judgment...the defendant submitted an affirmed peer review report which stated that there was a lack of medical necessity... plaintiff asserted that the peer review was not ad-

missible...because it bore a facsimile of the peer reviewer’s signature.”

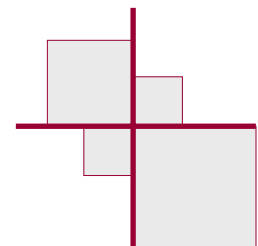
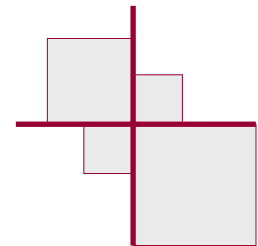
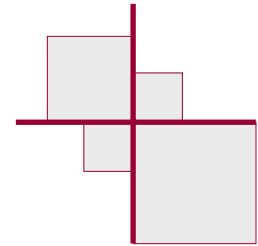
Defendant’s objection to the fact that this issue was being raised in reply papers was discounted by the court in that it was the first opportunity for plaintiff to do so.

The court then held that since “...there is nothing in the record to indicate that the facsimile signature was placed on the report by the doctor who performed the peer review or at his direction, defendant failed to raise a triable issue of fact...”

The court still had one more issue to deal with, since the defendant submitted an affirmation from the doctor swearing to the fact that he was the only one who could cause his facsimile signature to be printed on the report.

Although this was the first opportunity to submit such affirmation after the issue was raised, the court found “We note that the affirmation by Dr. Sharahy...may not be considered by the court as it is [not contained in] the record.”

It is vital to make sure that all your negative peer reviews are affirmed with an original signature or are accompanied by an affirmation by the doctor that the stamp signature was done at his direction.



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## **NICE TRY ~ BUT NO DOUBLE DIPPING**

While riding as a passenger in Mr. Chambers' car, Mr. Dunbar suffered an injury when the car was involved in an accident with a hit-and-run driver.

After settling his negligence action against Mr. Chambers in the amount of \$25,000 based on Mr. Chambers' liability as the driver; Mr. Dunbar then sought an Arbitration award of another \$25,000, this time based on the negligence of the hit-and-run driver.

GEICO Insurance Co. which held both the uninsured and supplemental uninsured/underinsured coverage for Mr. Chambers and Mr. Dunbar moved to permanently stay arbitration. The Judge in the Bronx County, Supreme Court denied that motion and dismissed the petition to stay arbitration.

Thankfully, the Appellate Division, First Department reversed the Bronx Supreme Court, on the law, reinstated the pe-

tition and granted a permanent stay of arbitration.

The Appellate Division found that it did not make any difference which policy Mr. Dunbar was making a claim under.

The court held that "Since respondent received \$25,000 in settlement of his claimed injuries, any potential UM claim under either the Chambers policy or a SUM claim under respondent's own policy was offset by the prior settlement payment."