

CALENDAR CALL

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NO-FAULT ~ THE BAD...

In a decision that ignores both logic and fairness, the Appellate Term of the Second Department reversed the ruling of a Judge in the King's County Civil Court which denied plaintiff's motion for summary judgment.

The Court in A.B. Medical v Utica Mutual held that as long as the plaintiff establishes that they submitted the claim and that payment was not made within 30 days, then the plaintiff

is presumptively entitled to summary judgment.

In this case the Court acknowledged that the carrier suspected fraud, conducted an investigation, and included a copy of the investigative report setting forth the factual reasons to suspect fraud attached to the affidavit of the claims representative.

The Court nevertheless found that because the claim repre-

sentative did actually adopt the factual allegations contained in the report, then there was insufficient proof.

However, in a strongly argued dissent, the majority is taken to task for placing additional and unwarranted burdens on the insurance carriers.

It appears that the majority of this court clearly wants the no-fault loss ratio to be as high as possible.

NO-FAULT ~ THE GOOD...

In an important ruling that will hopefully be expanded, the Appellate Term of the First Department in Inwood Hill Medical v General Assurance elected to follow the reasoning of the dissenting judge from the second department, and affirmed the Civil Court

judge's dismissal of plaintiff's claim for no-fault benefits.

Although the decision was based on the failure to attend an IME, it was not decided solely on the specific regulation requiring attendance at an IME that is reasonably required.

The importance of this case is that it relies on the overriding all regulation that there can be no action against an insurer unless there has been full compliance with all the terms of coverage. This should include timely notification, IME's, EUO's, valid assignments, etc.

IF THERE WAS FRAUD THEN THERE IS NO COVERAGE

An allegedly injured party filed for arbitration under the supplementary uninsured motorists (SUM) provisions of his policy upon a claim that the offending car was not insured.

His carrier moved to stay the arbitration claiming that the other car was insured and that the “accident” was really intentional, i.e. staged.

The Supreme Court granted a temporary stay in order to conduct a framed issue hearing. The court proceeded with that hearing, but restricted the testimony solely to the issue of whether or not there was insurance coverage on the offending vehicle.

The court found that there was no coverage and vacated the stay, thereby returning

it for arbitration under the SUM policy.

The Appellate Division reversed the decision and sent it back for a new hearing which must address the issue of fraud.

The court held that if there was fraud and the “accident” was staged, then there would be no coverage at all and therefore, no SUM coverage to arbitrate under.

WORKING INSIDE A VAN IS NOT USING A VEHICLE

A workman who sustained injuries to his neck while lifting a heavy television from the floor bed of his employer’s van sought to obtain no-fault benefits for his injury.

The carrier refused to pay and the Supreme Court granted the insurer’s motion to dismiss.

The Appellate Division affirmed and

found that the injury resulted from the strain in lifting a heavy package and would have occurred even if he had been standing on the ground.

STUPID HUMAN TRICKS

Alcohol can certainly impair your judgment:

A driver in Monheim Germany mistakenly called the police instead of his auto club when he had a flat tire.

Thinking that he was speaking to the auto club he is quoted as telling the police dispatcher, “My car is broken, and I need you to come and fix it. You better be quick because

I’m really pretty drunk and I don’t have a license so it wouldn’t be good if the cop’s drove past.”

The police obliged him, and got there as quickly as possible.

Maybe he needed 28 days to dry out:

A man in Juneau Alaska who just finished serving 25 days in jail for drunken driving,

stole a car, which had been left running by the owner, within minutes of his release.

The owner of the stolen vehicle got into another car and followed. He called the police on his cell phone to report that his car had been stolen and inform them where it was being driven.

The driver was arrested and faces up to five years in prison.

SUMMARY JUDGMENT CAN BE HARD TO GET

In three separate Appellate Division cases which highlight the difficulty in obtaining summary judgment, the court affirmed the lower court in denying judgment on a summary basis. These cases were each heard in a different department, the first, the second, and the third.

The case in the First Department addresses the issue of permissive use and implied consent.

The owner of a minivan entrusted the vehicle to his friend. His friend, in turn, permitted his son to drive it despite the fact that his son did not possess a valid drivers license. The unlicensed son promptly collided with another vehicle and injured the driver of that other car.

Upon being sued under Section 388 of the Vehicle and Traffic law, the owner claimed that he never gave permission to his friend or his friend's unlicensed son to operate the vehicle. He thereupon moved for summary judgment seeking dismissal.

The plaintiff submitted an affidavit from

the friend stating that the minivan was entrusted to him without any restriction.

The lower court denied the motion and the Appellate Court affirmed. The Court found that the evidence raised an issue of fact as to the owners implied consent to his friend to operate the vehicle and whether that consent extended to the son, licensed or otherwise.

The case in the Second Department addresses the issue that there can be more than one proximate cause.

The plaintiff was a passenger in vehicle #1 which stopped at an intersection controlled by four stop signs. After stopping, vehicle #1 proceeded to make a left turn when it was struck by vehicle #2 which failed to stop at the stop sign.

The Appellate Court held that regardless of the negligence of vehicle #2 in running the stop sign, there remains an issue of fact as to whether vehicle #1 was also negligent in failing to avoid an accident.

The case in the

Third Department addresses the issue of proximate cause.

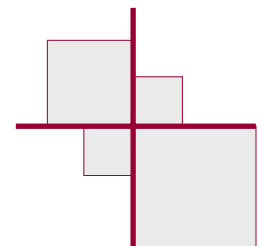
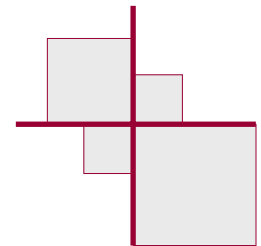
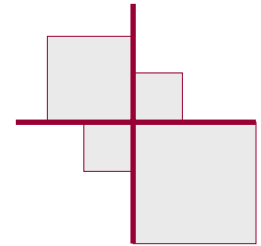
The plaintiff was driving his vehicle with his wife as a passenger when he was struck by the defendant's car.

Both the plaintiff and his wife claim to have been seriously injured as the result of this accident and brought an action against defendant.

At the conclusion of the trial, the court granted a directed verdict in favor of the plaintiff on the issue of liability and in favor of the plaintiff's wife on the issue of serious injury. However, the court denied plaintiff's application for a directed verdict on the issue of his claim of serious injury even though he had a fracture of his knee.

The court found that there was an issue of fact as to whether the subject accident was the proximate cause of the fracture.

The Appellate Court agreed and sustained the denial of the directed verdict.



BRUNO GERBINO & SORIANO, LLP

445 Broad Hollow Road, Ste 220
Melville, NY 11747

Phone: (631) 390-0010

Fax: (631) 393-5497

Email: BGS@BGSLAW-NY.COM

Website: www.bgslaw-ny.com

BRUNO GERBINO & SORIANO, LLP
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~HAPPY HOLIDAYS~

As the year closes we, at **BG&S**, wish you and yours a very happy holiday season as well as a joyous and prosperous New Year.

This past year had its share of tragedies that left us reeling. Our Country as a whole however, in each and every instance, dug down deep and proved ourselves to be a great Union. We would like to acknowledge just a few of those dedicated people in our **BG&S** family that gave of their time to help those in need this past year.

Diane Petillo and **Alison Goldstein** offered their time to serve at **Pal-O-Mine**, a non-profit therapeutic program dedicated to teaching horseback riding to individuals with disabilities.

As a firm, **BG&S** continued our tradition of collecting food for the **Long Island Cares** organization which distributes food to the homeless and less fortunate. With our donation of over 152 lbs of food this year, our total contribution for the past

seven years has exceeded 1300 lbs.

BG&S also participated in the **Susan G. Komen Breast Cancer Foundation's** "Lee National Denim Day". This event allowed our staff to wear blue jeans to work for a donation of \$5. Additionally, we have continued our support of **Hungerthon, Habitat for Humanity, The Red Cross** and **The U.S.O.**

Happy holidays, from all of us at **Bruno Gerbino & Soriano, LLP.**
