

CALENDAR CALL

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MARYLAND DR'S AFFIRMATION ~ NO GOOD IN NY

Mr. Young Hwan Park brought an action in Supreme Court, Queens County against Mr. Martin Orellana claiming that he was injured in an automobile accident. The defendant submitted a motion to dismiss on the grounds that Mr. Park did not sustain a "serious injury" as defined by section 5102(d) of the Insurance Law.

The judge denied the motion and the defendant appealed.

The Appellate Division, Second Department reversed the lower court and dismissed the complaint.

In an Appellate Division, First Department case the plaintiff was working at a job site threading gas pipe off the back of his truck. The defendant's truck pulled up next to his truck and he proceeded to unload pipe hangers off the defendant's truck.

After he finished, he returned back to his truck to continue his work when he testified

In their review of the record they found that the affirmed medical report of defendant's examining physician coupled with copies of the plaintiff's deposition was sufficient to establish that the plaintiff did suffer a "serious injury".

They then turned to the plaintiff's opposition papers and found that the plaintiff failed to raise a triable issue of fact. More specifically, they found that the affidavit by Mr. Park's treating chiropractor was insufficient because it was not based on a recent examination of the plaintiff.

In addition the appellate court found that the affirmation by the plaintiff's physician in Maryland did not constitute competent evidence because the doctor was not authorized to practice in New York. The court reached this determination even though the defendant failed to raise it.

This is a good example as to why we have to keep our eyes wide open and never assume that just because it is something that is commonly done, that it is always right.

PLAINTIFF MUST ESTABLISH NEGLIGENCE

that he felt himself tipping and fell down. He then felt pain in his right foot. He was unable to testify as to what caused him to fall or how his foot became injured.

The defendant moved to dismiss based upon several eyewitness accounts that nobody saw the defendant's truck run over plaintiff's foot.

The court found that the defendant made

out its prima facie case that defendant's was not negligent and was not the proximate cause of the plaintiff's injury.

They also found that the plaintiff's inability to relate how the accident happened did not relieve him of his burden to establish the defendant's negligence and that such negligence was a proximate cause of his injury.

KEEP FIGHTING FOR YOUR RIGHTS

The Plaintiff brought a Declaratory Judgment action in Kings County Supreme Court against his carrier seeking the court to direct the carrier to defend and indemnify the insured even though he failed to report the underlying incident for a period of more than one year. The court ruled in favor of the plaintiff and the defendant then filed a motion to reargue and to renew the prior motion in front of the same court. That court

failed to address the portion of the motion to renew and found no merit in the motion to reargue.

The carrier did not give-up and filed an appeal of that ruling at the Appellate Division.

The appellate court found that contrary to the Supreme Court's finding, the appellant sought leave to renew, in addition to reargument. The court also found that the new evidence that was submitted clearly estab-

lished that the failure of the plaintiff to notify the insurer for more than a year was not reasonable under the circumstances as a matter of law.

The appellate court reversed the denial by supreme court and upon renewal of the motion granted the motion in favor of the defendant and dismissed the declaratory judgment action thereby relieving the carrier from any obligation to defend and indemnify.

STUPID HUMAN TRICKS

I'm just following orders.

Brad Adams, a 52 year old charter bus driver, was carrying two dozen high school students when he crashed his 11 foot high bus into a 9 foot high pedestrian bridge in Seattle's Washington Park Arboretum. Mr. Adams claimed that he failed to see the warning sign because he was busy following the vehicle's navigation system.

In King's Lynn, England a taxi minibus had to be pulled out of the River Nar because the driver obediently followed the instructions of the navigation system and drove straight into the water.

I knew I should have taken auto me-

chanics.

Cash Burch, a 24 year old from Waterloo, Iowa broke into a parked truck and ran down the battery while trying to start the truck in order to steal it. Unfortunately for Mr. Burch, the truck's theft prevention device automatically locks the doors when the battery runs down and trapped him in the truck until the police arrived.

That's why they call it "dope".

Three geniuses in New Orleans, Louisiana who had either never smoked marijuana, or had smoked way too much of it, decided a good place to hide two pounds of marijuana was in the engine compartment of the car they were using to deliver

the drugs. As you may have surmised, their stash began to burn and the police arrested them at the scene.

The right to remain silent is a good idea.

As a police officer approached a man who was relieving himself on the side of the road, the guy explained that he had to "go" because he had just drank "a bunch" of beers. When he realized what he had said, he asserted that he was not driving under the influence. He further explained that his speech was slurred because his dentist told him that his mouth was too big for his tongue. Clearly, his mouth was too big for his own good.

COURT OF APPEALS IS NO HELP TO INSURERS

On June 5, 2008 the New York State Court of Appeals issued a ruling in the case of Fair Price Medical Supplies v Travelers Indemnity Co. that requires insurance companies to pay for medical supplies that may never have been provided.

Over the years we have come to learn that the courts will bend over backwards to find a way to award judgment to a plaintiff in a no-fault case.

They have twisted the clear meaning of the regulations to the point that a claimant need only show that a claim was filed and was not paid within 30 days. A claimant is not required to prove that the medical treatments were necessary, or that the assignment of claim form was signed and properly filled out. Although, they must prove that it was mailed to the defendant, the defendant's notice of denial will serve to prove receipt.

However, even though the denial of claim form will establish mailing of the claim form, it will not serve to establish that the denial of claim form was prop-

erly mailed.

The courts have come to require a defendant to raise any and all problems and defects by the claimant within strict time requirements and follow-up in strict accordance to certain protocols. Failure to do so will result in a judgment for the claimant.

The one saving grace was a Court of Appeals case that is affectionately known as the "Chubb" case. In that case the highest court in New York held that an insurance carrier can not be held to a time limit if they discover that a claim is not covered by the policy in issue. In the "Chubb" case the carrier learned that the injuries claimed were from another cause, and had nothing to do with the automobile accident. The court held that auto insurance is for injuries from auto accidents. Since the injury was not from the accident it was not a covered injury.

This ruling was very simple, very sensible and very logical. Unfortunately, the courts have morphed that ruling into "staged" or non-existent accidents only.

Now we come to the Court of Appeals rul-

ing in Fair Price.

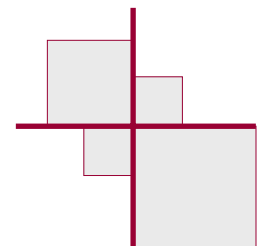
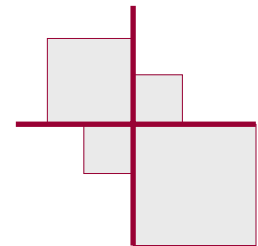
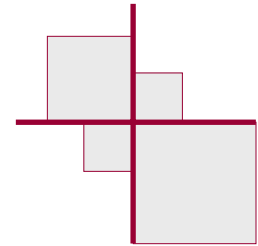
The issue in this case is really very simple. If an insurance company has a founded belief that it is being billed for items that were never provided to the eligible insured, must it pay that claim if it fails to deny it within 30 days?

The trial court and the dissenting judge in the Appellate Term and the dissenting judges in the Court of Appeals say "NO". Unfortunately, the majority of the Appellate Term, the Appellate Division, and the Court of Appeals say "YES".

This ruling only serves to underscore the need to handle no-fault claims as quickly as possible. Establish provable mailing procedures and follow all protocols to a "T". Most importantly, look for any and all problems with claims and make sure you properly and timely mail verification requests, follow-ups and denials when appropriate.

It seems that our only recourse is the Legislature. It is time to redouble our efforts.

I can only say that Charles Dickens' estimation of the Law was right.



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BOYFRIEND NOT COVERED UNDER SUM

Pearson Constantino allegedly sustained serious injuries when he was struck by a hit-and-run driver while riding his bicycle.

He filed for supplementary uninsured/underinsured motorist (SUM) benefits under his fiancée's family automobile policy on the grounds that he was listed on the insurer's website as a "driver covered" and an "individual covered". The carrier denied coverage and Mr. Constantino demanded Arbitration of his claim.

The carrier commenced a CPLR article 75 proceeding to permanently stay the Arbitration, and the trial court granted that relief upon finding that he was neither married to the policy holder nor was he a resident relative.

Mr. Constantino then filed an appeal.

The Appellate Division, Second department affirmed the trial court. They held that the policy, on its face, was unambiguous and only listed Ms. Wrona (fiancée) as the

named insured. Mr. Constantino is not listed in the policy and is admittedly not a resident relative. Thus, he is not entitled to any benefits under the policy.

The court further noted that the policy provided that its terms and provisions cannot be changed, except by an endorsement issued to form a part of the policy.

They found that mentioning Mr. Constantino on its Web page does not constitute such an endorsement.