E261 Feb 7

1. New Law Gives Car Accident Victims Priority over Car Insurance Company Subrogation Claims

2. Back to running after 5 months rehab

3. **Prior refusal to take breath test does not count for 3rd DWI**

1. New Law Gives Car Accident Victims Priority over Car Insurance Company Subrogation Claims

Gov. Chris Christie has signed a bill mandating that when an injured party and a PIP carrier seek recovery from an at-fault party's insurer, the injured party is to be made whole first. This law amends the statutory provision which permits an insurer, health maintenance organization or governmental agency which has paid personal injury protection (PIP) benefits under a private passenger automobile insurance policy to recover the amount of those benefits paid from the tortfeasor, or the Tortfeasors insurer. The amendment made by the bill provides that any recovery by the insurer, health maintenance organization or governmental agency from the tortfeasor's insurer shall be subject to any claim by the injured party and shall be paid only after satisfaction of that claim, up to the limits of the insured tortfeasor's motor vehicle or other liability insurance policy.

This bill is in response to the decision in Fernandez v. Nationwide Mutual Fire Ins. Co., 402 N.J.Super. 166 (App. Div. 2008), aff'd, 199 N.J. 591 (2009), in which the Appellate Division held, and the Supreme Court of New Jersey affirmed, that under the statute at issue, the claim of an insurer which has paid PIP benefits has priority over the claim of that insurer's insured who seeks recovery from the tortfeasor's liability insurance for unpaid medical expenses, pain, suffering, or other damages caused by the accident. The amendment made by this law would reverse that outcome. The measure, *S-191*, signed on Jan. 28, amends the Personal Injury Protection subrogation statute, N.J.S.A. 39:6A-9.1(b), to provide that recovery from a tortfeasor's carrier by an insurer, health maintenance organization or governmental agency is "subject to any claim against the insured tortfeasor's insurer by the injured party and shall be paid only after satisfaction of that claim, up to the limits of the insured tortfeasor's motor vehicle or other liability insurance policy." The Court held that giving priority to reimbursing the carrier "advances stability in the insurance marketplace by requiring that the ultimate cost of PIP benefits be borne by the insurer of the responsible party, not by the insurer of the victim."

Source: dailybriefing@njsba-njldailybriefing.com

Subject: Daily Briefing - 02/02/2011

2. Back to running after 5 months rehab

Small steps for Ken on Feb 6, the first sunny day since December
jogged for 12 minutes
my first running since the NJ Triathlon in July

Hope to get doctor clearance to jog in the following charity races:
March 13, 2011 Keith McHeffey 3 Mile Fun Run 11am Sea Bright, plus a party at a pub afterward

3/20/2011 St. Paddy's 5k 9:30 Freehold Keg of beer and some food great FARC event keg is outside. Dress warm

3/26/2011 Rat Race 10:00 AM - 10K and 11:00 AM - 20K Wells Mills Park on Barnegat Bay, Waretown, plenty of free beer, fun Bill Scholl party Rumson Hash event exit 69 on parkway

3. **Prior refusal to take breath test does not count for 3rd DWI**
State v. Ciancaglini __ NJ ___ (A-92/93-09)

Defendant Ciancaglini's conviction in 2006 for refusing to take a breathalyzer test does not constitute a prior conviction for purposes of determining her sentence for driving while intoxicated in 2008. Appellate Division reversed.

The Supreme Court held: 1. To interpret a statute, courts look to the Legislative intent, examining first the plain language of the statute. If the statute is clear on its face, courts enforce it; if it is ambiguous or open to more than one meaning, courts may consider extrinsic evidence, including legislative history and committee reports. Any reasonable doubt concerning the meaning of a penal statute must be strictly construed in favor of the defendant.

2. Although N.J.S.A. 39:4-50 and N.J.S.A. 39:4-50.4 are both part of a statutory complex designed to rid the highways of drunk drivers, each is a separate section with a different, albeit related, purpose, and each has different elements. Under the DWI statute, N.J.S.A. 39:4-50, operating a motor vehicle while intoxicated subjects the defendant to penalties that are based on the number of prior offenses the defendant has committed. For a first offense in which the driver's blood alcohol content is .10% or higher, the sentence includes a license suspension of seven months to one year, a fine, and a jail term of not more than 30 days. For a second violation, the sentence includes a two-year license suspension, a fine, and a jail term of up to ninety days. For a third or subsequent violation, the sentence includes a ten-year license suspension, a fine, and a jail term of 180 days. However, the DWI statute contains a "step-down" provision that states that "if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second conviction for sentencing purposes." The refusal statute, N.J.S.A 39:4-50.4a, is similarly structured with penalties based on whether the conviction is the driver's first, second, or third or subsequent offense. It requires the revocation of the right to operate a motor vehicle by any driver who, after being arrested for DWI, refuses to submit to a breathalyzer test. The length of license suspension for refusal mirrors the length of the license suspensions for DWI. However, no custodial sentence is authorized for refusal convictions.

3. Until the Appellate Division in this case reached the opposite conclusion, DiSomma represented the controlling case for sentencing DWI offenders with a prior refusal

conviction. In DiSomma, the Appellate Division examined both the DWI statute and the refusal statute and determined that their provisions were intended to be separate.

Concluding that a prior refusal conviction cannot serve as the basis to enhance a subsequent DWI conviction, the defendant, who had a prior conviction for refusal, was sentenced as a first offender after his DWI conviction. Since DiSomma, there have been no legislative revisions to the DWI or refusal statutes suggesting an integration of refusal convictions into DWI sentencing. Although a 1997 amendment to both the DWI and refusal statutes was designed to ensure that DWI and refusal convictions in other jurisdictions qualify as prior offenses under the respective sections in New Jersey, the Legislature never endeavored to provide that a prior refusal conviction could be treated as a prior DWI.

4. The DWI statute contains no reference whatsoever to the refusal statute, and nothing suggests that the references to prior violations in the DWI statute's lists of penalties are meant to refer to anything beyond DWI convictions.

Without any statutory cross-reference, or similar expression, the most natural reading of the DWI statute suggests that the "prior" violations described in N.J.S.A. 39:4-50 are meant to refer only to the DWI section in which they are contained. Such a reading is consistent with the well-established principle that penal statutes must be strictly construed.

5. While the record is not clear as to whether Ciancaglini's 2006 refusal conviction was or was not incident to an acquittal of DWI, it cannot be reasonably suggested that someone convicted of refusal when found not guilty of DWI can be treated as if he or she were convicted of the DWI offense. If the Legislature wanted to treat a refusal conviction as an enhancer for DWI, even after an acquittal of DWI, it would have to do so in clearer language.

6. The Court determines that it need not decide in this case whether a person can twice take advantage of a stepdown under N.J.S.A. 39:4-50 because Ciancaglini's refusal conviction cannot be considered a prior DWI violation for enhancement purposes. As such, she is not precluded from the benefit of the step-down since her first DWI conviction in 1979 was more than ten years prior to her second, the 2008 DWI conviction.