



25800 Northwestern Hwy, Ste. 890
Southfield, MI 48075

Phone: 248-569-4646
Toll: 800-606-1717
Fax: 248-569-6737

E-mail: daniel@buckfirelaw.com

Facebook: www.facebook.com/buckfirelaw
Twitter: www.twitter.com/buckfirelaw

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Our No-Fault Service Provider Spotlight



*Intentional Solutions
Statewide Services*

Ph: 248-765-8861 www.Intentional-Solutions.com

This month we spotlight Intentional Solutions, who provides innovative solutions for their clients. Intentional Solutions provides an innovative non-pharmaceutical pain relief device called the Nanobeam 940. The device is handheld and uses near infrared technology to treat a patient.

Near infrared technology has been researched and used by NASA for many years and has been successfully used by doctors, clinicians, and therapists for therapeutic purposes.

The Nanobeam 940's most notable uses are for muscle, joint, and arthritis pain, increasing local blood flow to speed up recovery time. The healing of sports related injuries are dramatically improved with the use of the Nanobeam 940.

The device is cleared by the FDA for both professional and prescriptive use. Patients who have used the Nanobeam 940 experience immediate and progressive pain relief results, with an increased range of motion. Treatment times are very quick and yield highly effective results.

The Nanobeam 940 is used by professional sports teams (NBA, MLB, and NFL), physical therapy & rehab clinics, and is now being prescribed by doctors for automobile accident victims for in home use. With continued use, patients have been able to reduce their need for pain medications, increase their mobility, and live better lives.

To streamline the prescription process for your patients/clients or learn more about the Nanobeam 940, contact Intentional Solutions directly. (See contact information above)



Patient getting treated with the Nanobeam 940.

October 2011

Special points of interest:

- Is a no-fault insurer authorized to deduct Social Security Disability benefits from no-fault work loss benefits payable to an injured person?
- Can the insurance company reduce the hourly rate of attendant care after prior judgment from the Court?
- How can I attend a 2nd presentation on Michigan motorcycle laws?

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The Michigan No-Fault Newsletter

Social Security Disability Set-offs in No-Fault Insurance Wage Loss Claims

Like other types of insurance benefits, no-fault benefits are subject to set-offs and reductions, which reduce an insurer's obligation to pay certain benefits. A set-off or reduction is only allowed in cases in which no-fault benefits would duplicate government benefits or benefits from other insurance policies. § 3109 and §3109a of the No-Fault Act are the sections that apply to setoffs and reductions from first-party PIP benefits.

The No-Fault Act allows a seriously injured person to recover work loss damages. MCL 500.3107(1)(b). "Work loss" is defined as "income [which the injured party] would have received *but for* the accident." Often times, claimants who are disabled for a prolonged period of time are entitled to Social Security Disability benefits.

When this occurs, the no-fault insurer is entitled to a

set-off from its obligation to pay wage loss benefits for amounts the claimant receives or is entitled to receive in Social Security Disability (SSD) benefits.

In this regard, once a claimant has been off work for a significant period of time, the no-fault insurer will often request that the claimant apply for SSD benefits.

The incentive for the no-fault insurer is obvious – if benefits are awarded by the SSA, the insurer will be entitled to deduct the SSD benefits from its obligation to pay wage loss benefits.

The insurer can require that the claimant apply for SSD benefits because the law states that claimants have a duty to make reasonable efforts to mitigate their losses. The duty to mitigate includes applying for SSD benefits.

If the claimant is initial-

ly denied benefits by the Social Security Administration (SSA) the insurer will often request that the claimant appeal.

A few key points, about this process. First, the Courts have held that even though a claimant incurs attorney fees and expenses in obtaining SSD benefits on appeal, the PIP insurer is still entitled to deduct the full amount awarded by the SSA. This is obviously unfair.

To prevent this from happening, our firm sends a letter to the PIP insurer demanding that it provide counsel, at its cost, if the insurer insists on the claimant pursuing the SSD claim.

We have never had an insurer refuse this demand. However, it is important to secure this arrangement

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Stay Updated on Proposed Reforms To The Michigan No-Fault System

The State House Insurance Committee is currently holding hearings regarding HB 4936 which is proposing significant changes to the Michigan no-fault system, as this current issue is being sent to the publisher.

There has been a massive grass roots campaign against the proposed changes, spearheaded by CPAN (Coalition

Protecting Auto No-Fault). www.cpan.us

If any legislative changes are made to the system, we will update you immediately on the changes and how these changes will affect patient care and your practice.

We are strong advocates for the current system and are deeply concerned by

this proposed legislation and how it will affect our clients and the citizens of the State of Michigan.

If you have any questions regarding the proposed changes, please email or call Daniel Buckfire at daniel@buckfirelaw.com or 248-569-4646.



Michigan Attorney Daniel L. Buckfire

Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.

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before an appeal and/or the award is issued where the claimant holds more leverage over the insurer.

In addition, the Michigan Attorney General has opined that the no-fault insurer is not authorized to require, as a condition precedent to the continued payment of work loss benefits under the No-Fault Act, that an injured person apply for Social Security disability benefits.

However, a claimant must make a “reasonable effort” to obtain such benefits. *Grau v. DAIIE*, 148 Mich App 82 (1985).

In summary, the no-fault insurer is authorized to deduct Social Security Disability benefits from no-fault work loss benefits payable to an injured person.

If requested by the no-fault insurer, a claimant

must make a “reasonable effort” to apply for SSD benefits. As long as the effort is being made by the claimant, the no-fault insurer cannot withhold wage loss benefits.

If the initial SSD application is denied, we believe it is reasonable that the insurer agree in advance to cover the legal cost of a SSD appeal.

Court Denies Survivor’s Loss Benefits to Family of Drug Overdose Victim

In *Keusch v. Farm Bureau Ins. Co.*, unpublished opinion per curiam of the Court of Appeals decided August 30, 2011, (Docket No. 297642), the Court of Appeals held that the David Keusch’s (the decedent) family was not entitled to No-Fault Survivor’s loss benefits, where he overdosed and died due to a combination of prescription pain medication and cocaine.

In January 2004, the decedent was unloading a large window from a truck when “something popped out of place in [his] neck.” The decedent immediately felt pain in his left shoulder and left arm. However, this was not decedent’s first accidental injury.

As a child, the decedent fell from a tree and broke his neck, and as an adult, the decedent, ruptured a disc in his back during an accident at work in 1996. Because of these injuries, the decedent suffered from a history of chronic pain.

Dr. Richard Kustasz became the decedent’s primary care physician in September 2000 and continued

to treat him for severe chronic pain through January 2004 and his subsequent death.

During their first meeting, Dr. Kustasz concluded that the decedent had, among other things, chronic back and neck pain, anxiety, depression, and insomnia. In April 2004, the decedent told Dr. Kustasz that his pain was so severe that he could hardly move.

At the end of 2004, the decedent’s back and neck pain were worse than in previous years. The range of motion of the decedent’s neck was significantly restricted.

According to Dr. Kustasz, the decedent’s neck and shoulder pain became even worse because of the window accident in January 2005. In February 2005, the decedent submitted a claim to Farm Bureau for no-fault insurance benefits with respect to the window accident.

On the morning of March 17, 2005, David’s wife Jane Keusch purchased a box of five fentanyl patches, returned home, and gave the box to the decedent. The

decedent started to run the bathtub water. Jane said goodbye to the decedent and went to the gym.

When she returned she found the decedent lying dead on the bed, wearing a fentanyl patch. Dr. James Banner, the pathologist who performed the decedent’s autopsy, stated that the decedent’s body contained, among other things, cocaine and fentanyl at the time of his death.

Dr. Banner concluded that the cause of the decedent’s death was a mixed drug overdose because he could not decipher which particular drug (cocaine or fentanyl) killed the decedent.

The decedent’s treating physician, Dr. Kustasz, opined that the drugs he prescribed to the decedent would not have caused the decedent’s death if the decedent had taken them as prescribed.

However, Dr. Kustasz also opined that the window accident was the “triggering event” for the stronger medication that he prescribed to the decedent, the

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decedent’s desire for medication, and the decedent’s self medicating.

Jane Keusch filed a complaint against Farm Bureau, seeking survivor’s loss benefits and alleging breach of contract for Farm Bureau’s refusal to pay personal protection insurance benefits. Jane Keusch’s complaint alleged that, if not for the window accident, the decedent would not have consumed drugs and would not have died.

Farm Bureau moved to dismiss the case, arguing that there was no genuine issue of material fact that the decedent’s death was the product of the decedent’s voluntary use of controlled substances in excessive quantities. Thus, Farm Bureau argued that the

decedent’s death was not accidental.

Farm Bureau asserted that Keusch’s cause of action was barred because the decedent’s death was proximately caused by his own wrongful conduct—his use of illegal drugs.

A Bench trial ensued and in January 2010, the trial court issued an opinion and order, granting judgment for Jane Keusch.

The trial Court relied primarily on Chief Justice KELLY’s concurring opinion in *Scott v State Farm Mut Auto Ins Co*, stating that “evidence establishing almost any causal connection will suffice when it is more than incidental, fortuitous or but for.”

The Court of Appeals reversed stating that Jane The Court of Appeals reversed stating that Jane Keusch failed to establish causation at trial.

In this regard, the Court stated that the evidence presented at trial did not provide a sufficient basis for the trial court to conclude that the fentanyl was more than merely fortuitous, incidental, or but for cause of the decedent’s death. The evidence at trial indicated that the decedent’s death could have arisen from one of three causes: (1) the fentanyl; (2) the cocaine; or (3) a combination of fentanyl and cocaine.

Change in Circumstance May Justify Reduction in Attendant Care Rate

The case of *Demery v. AAA*, unpublished opinion per curiam of the Court of Appeals decided August 30, 2011, (Docket No. 297189) involves an issue over the rate of attendant care payable to a catastrophically injured claimant.

In 2003, the Plaintiff sustained various injuries in an automobile accident, including severe damage to his left forearm and a closed head injury. He was insured by defendant AAA at the time of the accident.

In 2005, the Oakland Circuit Court entered a judgment for plaintiff’s recovery of attendant care benefits, whereby AAA was required to

pay \$30 per hour for family provided attendant care to/for the Plaintiff.

The \$30.00 per hour was based upon evidence that the Plaintiff required skilled nursing care.

AAA complied with the judgment until February 29, 2008, when it reduced the hourly rate it paid for family-provided attendant care services to \$11.00 per hour.

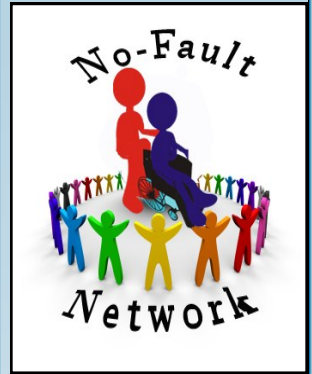
The Plaintiff filed a lawsuit against AAA to fight the reduction in the hourly rate.

The trial Court held that AAA was bound by the prior judgment, and barred from relitigating the rate

issue because AAA could not show a change in circumstances that would justify reducing the payment for attendant care benefits from \$30 per hour to \$11 per hour.

The Court of Appeals reversed stating that there was a question of fact as to whether the Plaintiff required skilled nursing care as opposed to unskilled supervision.

Thus, the Court held that whether AAA was required to continue to pay \$30.00 per hour for skilled care as opposed to \$11.00 per hour for unskilled care should be decided by the jury.



Michigan’s No-Fault Social Network

Join the No-Fault Network

<http://nofaultnetwork.com>

FREE MEMBERSHIP

- Make & Receive Professional Referrals
- Network With Other Professionals
- Publicize Meetings and Events
- Find A Support Group
- Discover New Service Providers
- Promote Your Business or Service For Free
- Post Employment Opportunities
- Find New Employment

Don’t miss out! You still have a chance to RSVP to the 2nd MI Motorcycle Law Presentation! RSVP Now!

Email or call Kathryn at Kathryn@buckfirelaw.com or 248-569-4646 to RSVP. Presentation is on Wednesday, November 9th from 4:00—6:00 P.M. at TBI Solutions in Southfield, MI and two CEU credits will be offered. Registration starts at 3:30 P.M.