At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 10 day of AUGUST, 2012

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

DAVID COREY,

Plaintiff,

v.

USAA GENERAL INSURANCE COMPANY,

Defendant.

DECISION and ORDER

INDEX NO. 2011/800111

APPEARANCES: BENJAMIN Y. KAUFMAN, ESQ and ROLAND RIGGS, ESQ., for Plaintiff
MICHAEL P. VERSICHELLI, for Defendant

PAPERS CONSIDERED: The NOTICE OF MOTION to dismiss of Defendant and the AFFIRMATION IN SUPPORT of Michael P. Vershichelli, Esq., with annexed exhibits;

the MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS;

the MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS; and

DEFENDANT'S REPLY MEMORANDUM OF LAW, with annexed exhibit.

THE ISSUE:

Before the Court is a strictly legal dispute concerning whether a no-fault carrier or insurer such as defendant must pay a no-fault claimant such as plaintiff the full amount of his claimed lost wages at the statutory rate of up to $2000 per month and up to the full amount of the three-year $50,000 cap (or up to what is left under that cap after the insurer takes appropriate credits or offsets against the cap for medical payments made on behalf of the claimant, among other possible appropriate offsets), or whether the insurer also may, as defendant did in this case, take a credit against the $50,000 cap (or whatever lesser amount

remains thereunder) for the statutory lost-wage tax reduction factor of 20% (hereinafter 20% tax reduction factor) (*see* Insurance Law §§ 5102 [a], [b]; 5103 [a]).

THE STATUTORY SCHEME:

Insofar as is pertinent to this matter, Insurance Law § 5102, entitled "Definitions," provides:

> "In this chapter:
>
> (a) 'Basic economic loss' means, up to fifty thousand dollars per person of the following combined items, subject to the limitations of section five thousand one hundred eight of this article:
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> (1) All necessary expenses incurred for: (i) medical ... services; ... without limitation as to time ...
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> (2) Loss of earnings from work which the person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to two thousand dollars per month for not more than three years from the date of the accident causing the injury. An employee who is entitled to receive monetary payments, pursuant to statute or contract with the employer, or who receives voluntary monetary benefits paid for by the employer, by reason of the employee's inability to work because of personal injury arising out of the use or operation of a motor vehicle, is not entitled to receive first party benefits for 'loss of earnings from work' to the extent that such monetary payments or benefits from the employer do not result in the employee suffering a reduction in income or a reduction in the employee's level of future benefits arising from a subsequent illness or injury.
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> ...
>
> (b) 'First party benefits' means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less:
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> (1) Twenty percent of lost earnings computed pursuant to paragraph two of subsection (a) of this section.
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> (2) Amounts recovered or recoverable on account of such injury under state or federal laws providing social security disability benefits, or workers' compensation benefits, or disability benefits under article nine of the workers' compensation law, or medicare benefits, other than lifetime reserve days and provided further that the medicare benefits utilized herein do not result in a reduction of such person's medicare benefits for a subsequent illness or injury.
>
> ...

> (j) 'Covered person' means any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by article six or eight of the vehicle and traffic law or which is referred to in subdivision two of section three hundred twenty-one of such law; or any other person entitled to first party benefits."

Insurance Law § 5103, entitled "Entitlement to first party benefits; additional financial security required," provides in pertinent part:

> "(a) Every owner's policy of liability insurance issued on a motor vehicle in satisfaction of the requirements of article six or eight of the vehicle and traffic law shall also provide for; every owner who maintains another form of financial security on a motor vehicle in satisfaction of the requirements of such articles shall be liable for; and every owner of a motor vehicle required to be subject to the provisions of this article by subdivision two of section three hundred twenty-one of the vehicle and traffic law shall be liable for; the payment of first party benefits to:
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> (1) Persons, other than occupants of another motor vehicle or a motorcycle, for loss arising out of the use or operation in this state of such motor vehicle. ..."

Insurance Law § 5104, entitled "Causes of action for personal injury," provides:

> "(a) Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. ..."

To sum up the foregoing statutory scheme, it generally extinguishes the common-law right of a victim of a motor vehicle accident, i.e., "a covered person," to sue in tort to recover damages intended to compensate him for up to $50,000 of "basic economic loss," as defined in the statute, in exchange for statutorily assuring such a victim of prompt payment of "first party benefits," as defined in the statute. As defined by the statute with considerable reference but by no means equivalence to the concept of "basic economic loss," "first party benefits" are thus generally intended to provide reimbursement to a covered person of up to $50,000 for all medical expenses incurred irrespective of time, and/or for up to three years' worth of earnings lost, due to accident-related injuries. However, first party benefit payments for lost earnings are

subject to a monthly cap or allowance of $2000. Moreover, first party benefit payments for lost earnings are to be reduced by 20% as well as by any income-replacing sums that the covered person receives from collateral sources such as state or federal disability benefits, workers compensation benefits, and the like. Case law clarifies that the 20% reduction in payments for lost earnings – again, what this Court refers to as the 20% tax reduction factor – is intended to prevent a windfall to the covered person, a windfall that might otherwise result from the fact that any earnings actually received from the employer would or at least might have been subject to federal income taxation (and presumably also state income taxes and state and federal payroll taxes), whereas the no-fault payments intended to compensate for the lost earnings may not similarly be taxed (*see Kurcsics*, 49 NY2d at 457; *see also Balanca v Geico Gen. Ins. Co.*, 13 Misc 3d 90, 91 [App Term, 2d Dept 2006]).

Insurance Law § 301 (*see also* Insurance Law § 5103 [d]) vests the New York State Department of Insurance (Insurance Department) with the power to prescribe regulations interpreting the provisions of the Insurance Law, provided of course that such regulations do not conflict with the explicit provisions of statute (*see Matter of New York Pub. Interest Research Group v New York State Dept. of Ins.*, 66 NY2d 444, 448 [1985]; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 457 [1980]). Whether or not equivalent regulations are still on the books is not clear to this Court (*but see* 11 NYCRR 65-3.19), but it is apparent that the Insurance Department at times pertinent to certain judicial precedents bearing on this matter had promulgated a regulation or regulations calling for the offset or credit, as against the $2000 (formerly the $1000) monthly cap,[1] of the 20% tax reduction factor and other statutorily mandated wage-reduction items (*see Kurcsics*, 49 NY2d at 458-459; *see also Heitner v*

[1]The Court cannot tell if there was ever a regulation that specifically called for the offset of the 20% tax reduction factor or other statutory wage-reduction items against the $50,000 cap (*but see generally Normile v Allstate Ins. Co.*, 87 AD2d 721, 722 [3d Dept 1982], *affd* 60 NY2d 1003 [1983] *for reasons stated below, remittitur amended* 61 NY2d 902 [1984]).

Government Empls. Ins. Co., (118 Misc 2d 752, 756 [Sup Ct Nassau Co 1983]), *revd* 103 AD2d 111, 119-120 [2d Dept 1984], *revd* 64 NY2d 834 [1985] *and Sup Ct judgment reinstated for reasons stated in that decision*).

THE FACTS:

The papers before the Court elucidate comparatively little of the essential background of this case, and the Court at oral argument had to ask counsel to supply it with the actual dollar figures pertaining to this case, lest the Court become hopelessly mired in the strictly theoretical legal debate and "for example" dollar-figure scenarios that characterize the papers, especially plaintiff's submissions. On January 13, 2007, plaintiff was involved, as a pedestrian, in an accident involving a vehicle driven and/or owned by Matthew M. Lesniak (Lesniak or the tortfeasor). The accident resulted in serious injury to plaintiff and caused him to incur medical bills, lost wages, and pain and suffering. Lesniak was insured for tort liability and first party benefits, otherwise known as no-fault benefits, by defendant USAA General Indemnity Company (hereinafter defendant or the insurer).[2] The Court gathers that plaintiff sued Lesniak,

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[2]That was plaintiff's original allegation in this matter and that, at least, remains defendant's assertion. Plaintiff, however, now seems to suggest that the tortfeasor was actually insured for liability by an entity known as USAA Insurance Company, the only insurer named in a certain release from further liability (*see infra*). Plaintiff thus now argues that defendant is not entitled to any rights or benefits under that release. Quite apart from overlooking the possibility that defendant is an assignee or successor of the release-named USAA Insurance Company (and that defendant thereby is entitled to all of its assignor/predecessor's rights under the release), it appears that plaintiff may not have thought this argument quite through. If defendant did not in fact insure the offending vehicle for tort liability (and perforce for first party benefits), and assuming that no other vehicle and insurer was involved in plaintiff's accident, then plaintiff would have absolutely no basis for recovery of any no-fault benefits, let alone any further no-fault benefits, from defendant. The Court somehow doubts that plaintiff will be relinquishing all of those no-fault benefits that he already has received from defendant (and/or the $25,000 settlement that he received from some putatively volunteer insurance company on behalf of the tortfeasor) on the basis that defendant was not in fact the insurer for the offending vehicle, or at least not the entity that paid the settlement in exchange for the release. The Court thus will construe (or effectively reform) the release to comport with its understanding that defendant, and not some entity named USAA Insurance Company (an entity that defendant asserts does not exist), was and is in fact both the liability and no-fault insurer in question (and

or perhaps plaintiff's claim was settled short of litigation. Whatever the case, on or about June 27, 2007, plaintiff, in exchange for a $25,000 settlement paid by defendant, gave the tortfeasor and defendant a "GENERAL RELEASE" from further liability arising out of the January 13, 2007 accident. More specifically, plaintiff "released and forever discharged" Lesniak and defendant "from any and all manner of action and actions, cause and causes of action, suits, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which [he] ever had [against them] for, upon or by reason of, any matter, cause or thing whatsoever, from the beginning of the world to" June 27, 2007.

Thereafter (and this timing is critical to plaintiff and of significance to the Court), plaintiff received first party benefits from defendant. The Court is told that defendant paid plaintiff $5,806 toward his medical expenses.[3] Such medical reimbursements left defendant with at most $44,184 ($50,000 minus $5,806) of potentially remaining no-fault liability to plaintiff for lost wages (and other compensable items, of which there are apparently none in this case). The Court is told, however, that defendant actually paid plaintiff only $35,366.19 toward his lost wages, which apparently exceeded $2500 per month. The Court is told that defendant did so at the rate of $2000 per month until (presumably) the last month (around August 2008) in which such lost wages were reimbursed to plaintiff.[4] At that point, defendant ceased paying plaintiff

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thus was and is the entity that purchased the release, and further thus was and is the entity against which lies the instant claim for further no-fault benefits).

[3]The Court has been told nothing about the nature or amount of any first party benefit claims or payments relative to any putative class member.

[4]The complaint at least implies that defendant paid plaintiff something less than $2000 per month in lost wages in months in which he was entitled to reimbursement of his lost wages at the statutory maximum rate of $2000 per month. Actually, the Court finds plaintiff's allegations in this regard to be highly confusing, and particularly feels the need to point out that plaintiff's hypothetically alleged lost-wage payment of $1667 per month is not 20% less than the statutory $2000 per month lost-wage allowance, but rather only 16.67% less (the Court points out the same with respect to plaintiff's complaint- and legal-memorandum-recited hypothetical figures of $41,667 and the statutory cap of $50,000). It is nonetheless the Court's

his lost wages because, in defendant's view, the $50,000 cap been reached. In taking that view, defendant clearly credited itself, against the $50,000 cap, with not only the paid medical expenses of $5,806, and not only the paid lost wages of $35,366.19,[5] but also with the (unpaid) 20% tax reduction factor, which in this case would properly amount to $8,841.55[6] ($35,366.19 in paid lost wages times .25 [the inverse of the 20% tax reduction factor]). Thus, defendant credited or could have credited itself with a total of $50,013.74 (i.e., $5,806 in paid medical expenses, plus $35,366.19 in paid lost wages, plus the $8,841.55, or 20%, tax reduction factor).

THE COMPLAINT:

Claiming to have been shortchanged by defendant to the tune of $8,827.70 (a figure that approximates the $50,000 cap minus the $5,806 in paid medical expenses minus the $35,366.19),[7] plaintiff commenced the instant action, by which he purports to sue on behalf of himself and all others (whether policyholders or not) similarly situated (i.e., allegedly likewise shortchanged by defendant since August 17, 2005, a date six years prior to commencement of this action). The purported legal basis of plaintiff's claim is simply that the no-fault statutory

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understanding, however, that all payments made by defendant toward plaintiff's lost wages were in the statutory maximum amount of $2000 per month prior to the last month of payment, and that plaintiff is thus not now actually complaining that defendant violated or departed from the $2000 per month lost-wage reimbursement cap or allowance.

[5]Although the Court gathers that defendant has paid plaintiff $41,172.19 ($5,806 in medicals and $35,366.19 in lost wages), plaintiff asserts in his memorandum of law that defendant has paid plaintiff $42,372.98. The Court cannot account for plaintiff's figure. In his complaint, plaintiff alleges that he is still owed $8,827.70, which implies a level of actual payment coming within 11 cents of defendant's figure.

[6]Counsel tell the Court that the insurer actually took an offset or credit of $8827.70 for the 20% tax reduction factor. Again, the Court would have expected to be told that the insurer had calculated the tax reduction factor at $8,841.55 ($35,366.19 in paid lost wages multiplied by .25) or at least $8827.81 ($50,000 minus $5,806 minus $35,366.19).

[7]Again, by the Court's lights, somebody's arithmetic is off by 11 cents, a discrepancy that the Court will ignore.

scheme, as interpreted by the Court of Appeals in *Kurcsics* (49 NY2d 451, *supra*), does not permit an insurer to apply (and indeed to make a practice of applying) the 20% tax reduction factor against the $50,000 cap and thus does not permit the insurer to credit itself for such (non)payments. Plaintiff seeks to hold defendant liable for damages to plaintiff and each of the putative class members in the amount of the allegedly improper underpayments, plus prejudgment interest (i.e., 2% per month after 30 days) and reasonable attorneys' fees (*see* Insurance Law § 5106 [a]; *see also* 11 NYCRR 65-3.9 [a], [c]). Plaintiff also seeks to enjoin defendant from engaging in the aforementioned practice *in futuro*. Plaintiff seeks such relief pursuant to causes of action that sound in or allege a violation of the no-fault statutory scheme; breach of contract (although plaintiff himself, unlike certain putative class members, had no contract with defendant, but rather is an alleged third-party beneficiary of another's insurance contract); unjust enrichment;[8] and violation of General Business Law § 349, which prohibits deceptive business practices.

THE MOTION:

Prior to answering, but after obtaining an extension of its time to answer or move, defendant moved to dismiss the complaint in its entirety based on documentary evidence and for failure to state a cause of action (*see* CPLR 3211 [a] [1], [7]). The documentary evidence consists of the general release, which allegedly encompasses plaintiff's instant no-fault claim against defendant, and a certain opinion of the New York State Insurance Department concerning what should happen in an inter-insurer loss transfer situation involving the claim of a workers compensation carrier against a no-fault carrier (*see* Insurance Law § 5105 [a]) . That is not the situation at bar, of course, but defendant nonetheless relies on the opinion for what it says with regard to the no-fault insurer's entitlement to a credit, against its potential $50,000

[8]The Court is told that the cause of action for unjust enrichment has been withdrawn.

loss transfer liability, for the 20% tax reduction factor. In short, the Insurance Department's opinion states that, in the foregoing situation, the no-fault carrier might be justified in paying less than the full $50,000 to the workers compensation carrier, taking into account the foregoing credit, because that lesser amount is what the no-fault insurer would have had to pay the covered person directly. That opinion mirrors defendant's position in this matter, in which it maintains, in support of its motion to dismiss the complaint, that it did not improperly calculate and pay lost wage benefits to plaintiff under the insurance policy and under the no-fault statute, but rather was authorized thereunder to pay plaintiff 20% less than his claimed lost wages, and moreover was entitled thereunder to take a credit for the 20% tax reduction factor against the $50,000 cap.

Plaintiff opposes the motion to dismiss, albeit only by his memorandum of law, in which he reiterates his position that defendant is not entitled to offset the 20% tax reduction factor against the $50,000 cap, but rather only against plaintiff's total claimed lost wages.

THE RESOLUTION:

Given its view of the merits of the parties' no-fault dispute, the Court sees no need to address whether plaintiff's claim is barred by the rather broad terms of the release. It is an interesting question, however, whether even such a broadly framed release executed in connection with the settlement of a plaintiff's personal injury claim against the tortfeasor and his liability insurer can or should be deemed to encompass the plaintiff's ancillary claim for no-fault benefits in the absence of a specific contractual relinquishment of the no-fault claim. The Court recognizes the situation at bar as one in which, because the accident involved a pedestrian and a single vehicle, the insurance company paying the settlement on behalf of the tortfeasor as his liability insurer was inevitably the same insurance company from which plaintiff would seek no-fault benefits. The Court nonetheless confesses that it is somewhat troubled by the prospect of

construing the release as covering plaintiff's no-fault claim even under such circumstances. So construing the release would be even more troubling to the Court, however, under different circumstances that the Court can readily imagine occurring, including those in which the release is executed in favor of a particular insurer of the settling tortfeasor's liability that coincidentally happens to be the no-fault (or indeed the liability) insurer of a different tortfeasor or vehicle involved in the accident, including the settling plaintiff's own vehicle, or the vehicle in which the settling plaintiff was a passenger, or perhaps a second or third vehicle involved in the striking of a settling pedestrian. The Court finds it difficult to believe that the release would be understood or held in such circumstances to encompass all such additional potential no-fault or liability claims of the settling plaintiff.

The Court nonetheless believes that the foregoing difficult and interesting question as to the meaning and scope of the release is best left for another day, for two reasons. The first reason is the fact that defendant has already paid plaintiff over $41,000 in no-fault benefits, with apparently most such payment having been made between June 27, 2007 and August 2008, i.e., after the execution of the release. That demonstrates that defendant itself long failed to give the release the no-fault-claim-precluding interpretation that defendant now advances, signifying in turn that defendant clearly waived its current contention and that the Court thus need not entertain it. The second reason is the Court's belief that defendant is clearly entitled to dismissal of the complaint, irrespective of the validity of the release, on the ground that the complaint lacks merit as a matter of law under New York's no-fault scheme, as interpreted by the case law, especially in the decision of the Court of Appeals in *Normile, supra* (87 AD2d 721, *affd* 60 NY2d 1003 *for reasons stated below*).

Analysis of that no-fault issue must begin with the *Kurcsics* case (49 NY2d 451, *supra*), which is heavily relied on by plaintiff, although this Court hastens to note that the narrow holding

of that case does not directly impact upon the issue at bar. In *Kurcsics*, the no-fault claimant had suffered lost wages of $1400 per month, and the issue was whether the no-fault insurer could credit itself for the 20% tax reduction factor against the monthly lost-wage cap or allowance, which at the time was set by statute (then Insurance Law § 671) at $1000. Supreme Court held that the insurer could not do so, i.e., that the insurer had to pay lost wages as they accrued each month up to the $1000 cap, and therefore could not limit such payments to $800 per month (93 Misc 2d at 283-285). On appeal, the Fourth Department modified the lower court's determination by deleting therefrom the provisions interpreting section 671 as requiring defendant to increase its monthly payments to plaintiff from $800 to the sum of $1,000 per month, retroactive to the date of the injury, and directing defendant to make such payments (65 AD2d 192). On further appeal, the Court of Appeals reversed by a 6-1 vote, holding that a covered person who sustains a loss of earnings in excess of $1,000 per month is entitled to recover as first-party benefits 80% of his actual lost earnings, up to a maximum recovery of $1,000 per month (49 NY2d at 457-459). In other words, finding no ambiguity in the statute, and deeming the contrary regulatory interpretation of the Department of Insurance (*see* 11 NYCRR former 65.6 [n] [2] [xi]) to run counter to the unequivocal mandate of the statute and thus to be entitled to no weight, the Court of Appeals construed the statute as requiring the 20% tax reduction factor to be offset against the gross amount of lost earnings claimed each month, and not against the monthly cap or allowance of $1000 (*id.*). The Court of Appeals concluded that it would be "remiss" in construing the statute in manner allowing the 20% tax factor reduction mandated by the Insurance Law (now § 5102 [b] [1]) to negate the benefit (i.e., the $1000 per month lost-wage allowance) bestowed by a different subdivision of the statute (now § 5102 [a] [2], and now allowing recovery of up to $2000 per month). The dissenter would have upheld the Insurance Department's regulation as a correct reading of the statute, i.e., as

warranting the application of the 20% tax reduction factor against the $1000 per month lost-wage allowance, thereby limiting every no-fault claimant to recovery of no more than $800 in lost wages per month (49 NY2d at 460-463 [Gabrielli, J, dissenting]).

In *Gurnee v Aetna Life & Cas. Co.* (55 NY2d 184, 191-194 [1982], *reard denied* 56 NY2d 567, 646 [1982], *cert denied* 459 US 837 [1982], the Court of Appeals reiterated its holding in *Kurcsics* and applied it "retroactively" to all non-time-barred claims arising before the Court of Appeals' decision in *Kurcsics*, potentially in favor of all monthly-wage-allowance-deprived no-fault claimants as a class.

In *Normile* (87 AD2d 721, *affd for reasons stated* 60 NY2d 1003, *supra*), the issues were whether the payments received by the no-fault claimant pursuant to state disability insurance, and also whether the 20% tax reduction factor, could both be credited or offset by the insurer against the $50,000 no-fault cap. That, at least with respect to the 20% tax reduction factor, is the precise issue in this case. Supreme Court held that the insurer was entitled to a credit for the 20% tax reduction factor (and also for the disability payments) against the $50,000 cap, and the Third Department held likewise on the ensuing appeal (87 AD2d at 721-722). Those courts thus rejected the plaintiff's claims for class action status and for punitive damages (*id.* at 721). The Third Department's decision moreover makes clear that the only reason that the plaintiff's complaint was not dismissed in its entirety was because there was a discrepancy concerning the amount of no-fault payments actually received by the plaintiff (*id.* at 721).

In resolving the issue of statutory interpretation against the plaintiff, the Third Department stated:

> "The basic question presented is whether the statutory setoffs enumerated in subdivision 2 of section 671 are to be deducted from basic economic loss up to $50,000, as was done by defendant, or whether the setoffs are to be deducted from actual economic loss so that the insurer is liable for a maximum payment of $50,000. Subdivision 1 of section 671 provides that ' "Basic economic loss" means, up to fifty thousand dollars per person' for certain expenses incurred and loss of earnings. ' "First-party benefits" ' are defined as 'payments to reimburse

a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less ... [certain deductions]' (Insurance Law, § 671, subd 2). In order to resolve the present controversy, we must ascertain the legislative intent from the wording of the statute. ... A fair reading of the language, in our view, imports a statutory scheme whereby an injured person is entitled to receive first-party benefits equal to his basic economic loss up to $50,000 less the statutory deductions set forth in subdivision 2 of section 671 of the Insurance Law. The statutory language is clear and unambiguous in its limitation of basic economic loss to $50,000. Since a covered person cannot recover for basic economic loss in an action for personal injuries arising out of negligence in the use and operation of a motor vehicle (Insurance Law, § 673, subd 1), the deletion of the $50,000 limitation from the definition of basic economic loss would eliminate the threshold amount indicating at which point the injured party may bring a tort action (*see Montgomery v Daniels,* 38 NY2d 41). One of the purposes of this insurance legislation is to reduce the cost of automobile insurance and we are of the opinion that our interpretation of the statutory language is consistent with such objective. In addition, an injured party, under certain circumstances, may bring a personal injury action against a third party once his basic economic loss has reached the maximum of $50,000 and, therefore, a reduction in the cost of automobile insurance could result by placing some of the burden elsewhere. Plaintiff seeks to hold the insurance carrier liable for up to $50,000 in coverage without any deductions. In other words, the $50,000 limitation would apply to first-party benefits rather than basic economic loss. If the Legislature had so intended, they could have easily provided that first-party benefits mean payments for basic economic loss, less the deductions, with the benefits payable up to $50,000. We conclude that by placing the limitation in the definition of basic economic loss, the Legislature clearly intended that the limitation apply to basic economic loss. This court's interpretation is bolstered by the fact that it is consistent with the established practice and regulations of the Superintendent of Insurance (*see* 11 NYCRR 65.2). The Legislature did not attempt to clarify the provision in 1977 (L 1977, ch 892) and we must assume that they were aware of such practice and regulations. In support of his interpretation of the provisions in question, plaintiff relies on *Kurcsics v Merchants Mut. Ins. Co.* (49 NY2d 451). *Kurcsics,* however, dealt with a different provision of section 671 of the Insurance Law. It was concluded in *Kurcsics* that the $1,000 limitation contained in section 671 (subd 1, par [b]) of the Insurance Law was not part and parcel of the definition of lost earnings (*Kurcsics v Merchants Mut. Ins. Co., supra,* p 458). We are of the opinion that the $50,000 limitation embodied in section 671 of the Insurance Law is clearly an integral part of the definition of basic economic loss. A contrary conclusion, in our view, is illogical and inconsistent with the purpose and intent of the legislation in question" (*Normile,* 87 AD2d at 721-722).

The dissenter would have held that the insurer was not entitled to offset the 20% tax reduction factor (nor, presumably, the disability payments) against the $50,000 cap (as opposed to against the total of lost wages claimed), "as though [the insurer actually] had paid

out such deducted sums to a claimant" (*id.* at 723 [Weiss, J., dissenting]). The dissenter reasoned that "until a carrier has paid out a total of $50,000 of basic economic loss, comprised of any combination of medical expenses and loss of earnings[,] it has not attained the outer limit of liability which it has assumed in return for a premium" (*id.*). The dissenter quoted *Kursics* (49 NY2d at 456-457) for the proposition that a no-fault claimant "is entitled to actual lost earnings claimed less 20%, unless such reduced figure exceeds $1,000 per month" (*Normile*, 87 AD2d at 723 [Weiss, J., dissenting]).

On appeal, the Court of Appeals voted 6-1 to affirm "for reasons stated in the memorandum of the Appellate Division" majority (87 AD2d at 721-722). It is to be noted that four of the six Court of Appeals Judges who comprised the *Normile* majority had likewise been in the majority in deciding *Kurcsics*. With not especially heavy reliance on the holding and reasoning of *Kurcsics*, the dissenter urged that the insurer had shortchanged the claimant by disbursing to him only $41,047 of its own funds, as opposed to the full $50,000 in statutorily defined "basic economic loss," and more particularly by crediting itself for the 20% tax reduction factor, as well as for the disability payments received by the claimant, against the $50,000 cap, as opposed to against the total of lost wages claimed (*Normile*, 60 NY2d at 1006-1011 [Cooke, C.J., dissenting]).

In *Heitner, supra* (118 Misc 2d 752, *revd* 103 AD2d 111, *revd* 64 NY2d 834 [1985] *and Sup Ct judgment reinstated for reasons stated in that decision*), the issue was whether an insurer is entitled to an offset against the then $1000 per month wage reimbursement cap – as opposed to against the full amount of lost wages incurred or claimed for that month – for the amount of workers compensation benefits received by the claimant for that month. The claimant had sustained lost wages of over $1700 per month, an amount that the insurer first reduced to $1000 per month pursuant to the statutory monthly cap, and then further reduced to $582 per month on account of claimant's receipt of $418 per month in workers compensation

benefits. The claimant, on behalf of himself and a class of similarly situated no-fault claimants, sued a number of no-fault insurers. The claimant took the position that the offset for the workers compensation benefits should be applied not against the $1000 per month allowance, but against the gross amount of actual lost earnings, so that only where the net or difference exceeded $1,000 per month should the amount payable be reduced to the $1,000 monthly cap. Supreme Court held for the insurer, specifically finding the reasoning of *Kurcsics* "inapplicable" to the matter before it. Supreme Court reasoned instead that the policy underlying the no-fault scheme is to guarantee prompt and full compensation only to the limits of basic economic loss; that first-party benefits are not synonymous with basic economic loss, but rather equal basic economic loss minus any applicable statutory offsets; and that the Legislature, in fixing the "outer limit" of wage reimbursement at $1,000, intended such figure to represent the total recovery from both the no-fault carrier (as the secondary source) and any other designated insurers such as the worker's compensation carrier (as the primary sources), subject to claimant's further recovery from the tortfeasor via plenary action (118 Misc 2d at 758-759). Supreme Court (*id.* at 756-759) found its reasoning to accord with the statute and (seemingly) with a certain regulation of the Insurance Department (11 NYCRR 65.15 [n] [2]), and also with the rationale of the Third Department's decision (not yet then affirmed by the Court of Appeals) in *Normile*.

On appeal, the Second Department disagreed. Placing considerable reliance upon *Kurcsics* and distinguishing *Normile* (which by then had been affirmed by the Court of Appeals), the Second Department held that the proper method of calculating the first-party benefits was to deduct from plaintiff's gross or actual lost monthly earnings the monthly disability benefits paid to him, while limiting the no-fault insurer's liability to the $1,000 per month statutory ceiling (103 AD2d at 113-117). The Second Department rejected the Insurance Department's contrary interpretation as being at odds with the statute (*id.* at 119-120).

On further appeal, however, the Court of Appeals unanimously and summarily reversed the Second Department and reinstated the determination of Supreme Court "for reasons stated by" that court (64 NY2d at 836).

In *Balanca* (13 Misc 3d 90, *supra*), the court was called upon to apply the holding of *Normile* to a situation involving the optional additional no-fault coverage, known as APIP or OBEL, available under certain insurance policies. Finding no basis for disparate treatment of the basic and optional coverages, the court held that the insurer was entitled to a credit, against the combined $75,000 cap (i.e., the $50,000 basic coverage plus the $25,000 optional coverage), for both the 20% tax reduction factor and the amount of any collateral source payments to the claimant (*id.* at 92-93). The court characterized the *Normile* case as "unequivocally" holding "that an insurer's obligation to pay lost earnings as basic economic loss can be satisfied notwithstanding the fact that the actual amount paid will be less than the amount of coverage for available basic economic loss," i.e., the $50,000 (or, as in the *Balanca* case, the combined $75,000 cap) (*id.* at 92). The *Balanca* court exhibited no apparent difficulty in reconciling that holding of *Normile* – that the 20% tax reduction factor may be offset against the $50,000 cap – with the earlier holding of *Kurcsics* – i.e. that the 20% tax reduction factor was not to be offset against the monthly cap of $1000 or $2000 (*id.* at 91-92).

Applying the foregoing authorities, especially *Normile*, the Court concludes that there is no merit to plaintiff's contention that the insurer may not offset the 20% tax reduction factor against the $50,000 cap. That the insurer may in fact do so, and is indeed obligated to do so by statute, is the explicit holding of *Normile* (87 AD2d at 721-722, *affd* 60 NY2d 1003 *for reasons stated below*). The Court well understands that the holding of *Normile* is two-pronged, relating to the propriety of offsetting both the statutory 20% tax reduction factor (*see* current Insurance Law § 5102 [b] [1]) and the other statutory deductions (*see* current § 5102 [b] [2]) against the $50,000 cap. However, contrary to plaintiff's suggestion, the dual dimension of the

Normile holding does not undermine the validity of that part of the decision that unequivocally upholds the offset of the 20% tax reduction factor against the $50,000 cap. To put it another way, the Court assures plaintiff that it is herein applying only that part of the *Normile* holding that actually pertains to this case and that undeniably mandates the rejection of plaintiff's claim. That part of the holding is that, in the instance of any no-fault claim involving lost wages, the $50,000 cap is subject to an offset or credit in favor of the insurer not only for those lost wages actually paid or reimbursed by the carrier, but for the 20% tax reduction factor as well (*Normile*, 87 AD2d at 722, *affd for reasons stated* 60 NY2d at 1005).

With respect to plaintiff's argument that a "plain reading of the statute" precludes the carrier from offsetting the 20% tax reduction factor against the $50,000 cap, and with regard to plaintiff's further appeal to judicial consideration of the legislative purposes in enacting the no-fault scheme, this Court need only note that the very same argument and appeal were made by the claimant (and by the dissenters) but were rejected by the Appellate Division and Court of Appeals majorities in *Normile*. Plaintiff does not argue, let alone demonstrate, that some intervening change in the language or structure of the No-Fault Statute brooks a different result than that arrived at in *Normile*. Moreover, unlike plaintiff, this Court cannot regard the result in *Heitner* as somehow undermining or eroding away the holding of *Normile*. Thus, contrary to plaintiff's contention, *Normile* is controlling and unequivocally holds that an insurer's obligation to pay lost earnings as part of first party benefits can be satisfied or discharged notwithstanding the fact that the actual amount paid by the insurer totals less than the $50,000 sum at which basic economic loss is capped (*Balanca*, 13 Misc 3d at 92).

Plaintiff may be astute in suggesting that the reasoning and holding of the earlier *Kurcsics* decision presaged a different result than that ultimately reached in *Normile*. However, given the actual outcome in *Normile*, it is long past the day in which it could be argued, by a logical extension of the *Kurcsics* principles, that the statute precludes insurers from offsetting

the 20% tax reduction factor against the $50,000 cap. Like the Second Department in *Heitner* (103 AD2d at 115-116), this Court has some difficulty understanding why, in terms of their respective treatments as an offset against the monthly cap, the 20% tax reduction factor set out in current Insurance Law § 5102 (b) (1) (the subject of *Kurcsics*) should be treated differently from those statutory reductions for disability and worker's compensation payments and the like set out in current section 5102 (b) (2) (the subject of *Heitner*). More to the point of this case, this Court, like plaintiff, is not crystal clear concerning why, in terms of the propriety of applying the 20% tax reduction factor as an offset against it (as opposed to against the gross lost wages), the $2000 monthly cap or allowance of current Insurance Law § 5102 (a) (2) (the subject of *Kurcsics*) should be treated differently from the $50,000 cap or allowance of current section 5102 (a) (the subject of *Normile*). However, the Court of Appeals in its wisdom clearly can reconcile the *Kurcsics* and *Normile* holdings (and those of *Kurcsics* and *Heitner*), which holdings are subject to no further reconciliation or explanation by this Court.

Because plaintiff's interpretation of the statute is untenable in light of the Court of Appeals' holding in *Normile,* all of his causes of action and claims for relief, whether stated on behalf of himself or a class of similarly situated individuals, are lacking in merit as a matter of law.

Accordingly, the motion of defendant to dismiss the complaint in its entirety is GRANTED.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

AUG 10 2012

BY KEVIN J. O' CONNOR
COURT CLERK