



Amy's Auto Alert

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Topic: Production of surveillance tapes

Ward v. AT Systems, Inc.

2008 U.S. Dist. LEXIS 67990 (E.D. Pa. 2008)

Date of Decision: September 8, 2008

In this Federal Court case, the diversity action lawsuit arose from an accident that occurred at a Citizens Bank. Defendant, Keith Snipes, while making a delivery of coins and cash to the Citizens Bank, in the course and scope of his employment for the Defendant, AT Systems, Inc., tilted his hand-truck forward and caused a box of dimes to fall onto Gina Ward's foot and leg. Gina Ward and her husband, Chris Ward, alleged that the accident caused severe injuries, including Reflex Sympathetic Dystrophy, leaving her permanently disabled.

Pursuant to the scope of discovery, the Defendants conducted investigative surveillance of Mrs. Ward. The Plaintiffs served a Request for Production of Documents upon the Defendants, specifically requesting all surveillance tapes and reports of Mrs. Ward. The Defendants provided a description of all surveillance conducted, but objected to the production of the surveillance tapes on the theory that the information contained on the surveillance tapes was work-product. The Defendants informed the Plaintiffs that they do not intend to produce the surveillance tapes at the trial of the matter, and if they do, the tapes would be produced pursuant to the discovery deadline. The Plaintiffs filed a motion to compel the surveillance tapes, arguing that the Defendants should be compelled to produce the tapes, regardless of whether they intend to produce the tapes at trial.

The United States District Court for the Eastern District of Pennsylvania stated that because video surveillance of a plaintiff would tend to show a plaintiff's physical condition, movements and restrictions, courts generally consider such video to be highly relevant. However, because such video is obtained in anticipation of litigation by a party or the party's representative, it must be regarded as work-product. Nevertheless, when a party intends to use surveillance evidence at trial, courts generally find that the work-product privilege is waived on account of plaintiff's (1) substantial need for evidence that may prove critical at trial, and (2) inability to obtain the substantial equivalent of this record of plaintiff's condition at a particular time and place. When a defendant intends to use surveillance video at trial but fails to produce the video during discovery, the defendant may be precluded from using surveillance evidence at trial. However, if a party does *not* intend to introduce any surveillance evidence at trial, it need not produce such evidence during discovery. Accordingly, the Court denied the Plaintiffs' Motion to Compel.



In a nutshell ... Defendants are not required to produce surveillance tapes unless the Defendants intend to produce the tapes at trial.

Topic: Stacking of UM/UIM coverage in a guest passenger situation

Generette v. Donegal Mutual Insurance Company

957 A.2d 1180, 2008 Pa. LEXIS 1904 (Pa. 2008)

Date of Decision: October 23, 2008

In this Supreme Court case, on April 29, 1997, Josephine Generette suffered injuries while riding as a guest passenger in a motor vehicle that collided with a third-party tortfeasor's vehicle. Ms. Generette recovered \$25,000 under the third-party tortfeasor's liability insurance policy. She also recovered \$50,000 from Nationwide, which provided UIM coverage for the car in which she was a guest passenger. She then sought UIM coverage under her own policy with Donegal.

When Ms. Generette purchased her policy with Donegal in December 1982, the policy was governed by the No-Fault Motor Vehicle Insurance Act with \$100,000 of BI coverage and \$30,000 of UM coverage. She renewed her policy in December 1984, and in order to comply with the newly enacted MVFRL, she increased her UM/UIM coverage to equal her liability coverage of \$100,000 per accident. In June 1985, she renewed the policy again with the same policy limits. In December 1985, however, Ms. Generette executed a waiver form reducing her UM coverage from \$100,000 to \$35,000. She continued to renew her policy with these limits. At her first renewal following the enactment of Act 6 of 1990 amending the MVFRL, Ms. Generette rejected stacking of UM/UIM coverage. In January 1992, she added another car to her policy but did not change her waiver of stacking. In December 1992, she removed a car from the policy. Every six months from December 1992 to December 1999, she renewed her policy with the same limits.

Donegal denied coverage for the April 1997 accident based on the "Other Insurance" provision of the policy. The "Other Insurance" clause was included in her policy to implement the waiver of stacked UIM benefits. It limited recovery of UIM coverage under the Donegal policy to the amount by which Donegal's UIM limit exceeded the coverage of the UIM policy at the first priority level. Accordingly, Donegal argued that the \$35,000 limit on her Donegal policy did not exceed the \$50,000 of UIM coverage provided by Nationwide, the first priority policy.

Ms. Generette filed a declaratory judgment action in the Court of Common Pleas of York County, asking the trial court to declare the "Other Insurance" clause of the Donegal policy void as against public policy. Both parties filed motions for summary judgment. The trial court found in favor of Donegal, stating that the waiver of stacking was valid and that the language of the Donegal policy did not violate public policy. The trial court denied Ms. Generette's motion for reconsideration. Ms. Generette appealed to the Superior Court, which reversed the trial court's decision, finding the stacking waiver did not apply to the facts of Ms. Generette's case and instead, concluded that recovery under the Donegal policy was proper pursuant to the MVFRL's priority of recovery provision, §1733. Donegal sought reargument *en banc*, which was granted. Upon reargument, the majority of the *en banc* panel concluded that Ms. Generette could not recover under the Donegal policy because she waived stacking and the "Other Insurance" clause applied to bar recovery. Ms. Generette sought allowance of appeal from the Supreme Court, which was granted. As a side note, after the filing of the Superior Court's opinion in this case, the Supreme Court determined in Craley v. State Farm Fire and Casualty Co., 586 Pa. 482, 895 A.2d 530 (Pa. 2006), that stacked coverage may be waived in single vehicle policies.

In her appeal to the Supreme Court, Ms. Generette argued that the stacking waiver language is limited to policies for which the injured person is an "insured" as defined by §1702 of the MVFRL, and thus does not apply to coverage received as a guest passenger. Further, she argued that Donegal, by expanding the definition of "insured" to include guest passengers, has drafted a policy that contradicts the statutory language.

The Supreme Court noted that the application of the stacking waiver turned on whether the use of the term "insured" in the stacking and stacking waiver section, §1738, is limited to the definition of "insured" as provided in the MVFRL's definition section, §1702, which does not include guest passengers. If the term in §1738 is limited by §1702, then §1738, and the relevant provisions relating to the waiver of stacking, does not apply to injuries received as a guest passenger in a vehicle because guest passengers are not "insureds". The Supreme Court concluded that it was bound to apply the specific definition of "insured" provided by the General Assembly in §1702. Accordingly, the Supreme Court ruled that the stacking waiver does not include guest passengers. The Supreme Court also concluded that the "Other Insurance" clause violated public policy as expressed in the MVFRL of requiring excess, rather than gap, UIM coverage.



In a nutshell ... a waiver of stacking does not apply to coverage received as a guest passenger.

Topic: Exhaustion of primary UIM coverage

Nationwide Insurance Company v. Schneider

960 A.2d 442, 2008 Pa. LEXIS 2047 (2008)

Date of Decision: November 19, 2008

In this Supreme Court case, in October of 1996, police officer Paul Schneider suffered injury when his police cruiser was struck by a vehicle driven by Ayanna Lee Cooper. At that time, Ms. Cooper maintained a policy of insurance issued by American Independent Insurance Company

with \$15,000 in liability coverage. Schneider's employer, Upper Darby Township, maintained a policy with Granite State Insurance Company with a \$1 million UIM limit. Upon consent of Granite State, Schneider settled his claim against Ms. Cooper with American Independent for Ms. Cooper's liability limit of \$15,000. He then settled his primary UIM claim with Granite State for \$750,000, \$250,000 less than the policy limit. Two months later, he sought secondary UIM benefits from his personal automobile insurance policy issued by Nationwide Mutual Insurance Company, which provided \$200,000 in stacked UIM coverage. Nationwide denied coverage based on the exhaustion clause and consent-to-settle provision. After Nationwide denied the claim, Schneider demanded arbitration. In response, Nationwide filed a declaratory judgment action seeking a determination that it had no obligation to pay secondary UIM benefits due to Schneider's failure to exhaust his primary UIM benefits and his failure to obtain Nationwide's consent to settle his primary UIM claims. Nationwide contended that exhaustion was required not only by the terms of the policy, but also under pertinent priority-of-coverage provisions of the MVFRL. 75 Pa.C.S. §1733. Nationwide pursued summary judgment, and Schneider responded with a cross-motion, arguing that there was no need for exhaustion of the primary UIM benefits, as he had extended a credit to Nationwide for the full amount of those benefits. Additionally, Schneider argued that Nationwide had not established that its' interests were prejudiced by Schneider's failure to obtain its consent to settle.

The common pleas court awarded summary judgment in Nationwide's favor. On appeal, after an initial affirmance by a three-judge panel of the Superior Court, a unanimous *en banc* panel reversed on reargument. Nationwide filed a petition for appeal to the Supreme Court. The Supreme Court noted that §1733 does not mention exhaustion of policy limits. It also noted the strong, prevailing public policy in Pennsylvania to encourage voluntary settlements. Accordingly, in the absence of express legislative direction or administrative agency involvement, the court found the Superior Court's longstanding application of a credit-for-limits approach to contractual exhaustion in the UM/UIM context, as found in Boyle v. Erie Ins. Co., 656 A.2d 941 (Pa. Super. 1995), to represent a reasonable compromise. The Supreme Court affirmed the order of the Superior Court.



In a nutshell ... a claimant need not exhaust primary UIM benefits to pursue a claim for secondary UIM benefits.

Topic: Alleged abuse of PRO process and bad faith

Perkins v. State Farm Insurance Company

2008 U.S. Dist. LEXIS 101931 (M.D. Pa. 2008)

Date of Decision: December 16, 2008

In this Federal Court case, on January 21, 2005, Robin Perkins was struck by a motor vehicle while she was walking in a grocery store parking lot, resulting in injuries. At the time, Ms. Perkins was insured under an automobile policy issued by State Farm, which provided first-party medical coverage in the amount of \$50,000. Ms. Perkins received treatment from a chiropractor for the alleged injuries and, initially, State Farm paid for this treatment. Based upon a peer review, State Farm sent a letter to the chiropractor stating that it would not pay for any further

treatment. Further, State Farm requested that the chiropractor reimburse State Farm for some of the treatment State Farm had paid for. Ms. Perkins filed a lawsuit against State Farm for breach of contract, statutory bad faith, violation of the Pennsylvania UTPCPL and fraud. State Farm filed a Motion to Dismiss the claims for bad faith, violation of the UTPCPL and fraud. In support of its argument for dismissal of the claim for bad faith, State Farm argued that the bad faith claim must be dismissed since Pennsylvania's MVFRL provided the exclusive remedy for Ms. Perkin's claim, pre-empting her claim under the bad faith statute.

In its discussion, the United States District Court for the Middle District of Pennsylvania noted that there is a potential conflict between §8371 and the MVFRL. The Court discussed many cases that addressed this conflict. The Court, when applying the rulings in these cases to the facts of the case at hand, noted that some of the allegations made in support of Ms. Perkins' bad faith claim, such as State Farm's alleged failures to conduct a reasonable investigation, fairly evaluate coverage, or timely notify her of a denial of benefits, are nothing more than a challenge to the denial of first-party benefits and would fall under §1797 of the MVFRL. However, it further noted that Ms. Perkins' bad faith claim was also premised upon the allegation that State Farm engaged a PRO that did substantial work for State Farm and thus had a financial interest in providing a biased determination, and that the PRO had continuously provided negative peer review reports to State Farm and other insurers to maintain their business. According to the Court, these allegations of abuse of the PRO process are not within the scope of §1797 and, accordingly, fell within the scope of §8371.



In a nutshell ... alleged abuse of the PRO process is not within the scope of §1797 of the MVFRL and, thus, such allegations properly set forth a claim under the bad faith statute, §8371.

ALERT **REFLEX SYMPATHETIC DYSTROPHY**

As previously addressed in my September 25, 2008 newsletter, Reflex Sympathetic Dystrophy diagnoses are becoming more common. I had provided examples of the large jury verdicts and settlements in cases of this nature:

Piascik v. Wyndam Garden Hotel

\$2.5 million verdict in Dauphin County in March of 2006

Moser v. Giant Food Stores

\$2.6 million settlement in Philadelphia County in January of 2008

Another case, more fully discussed above, resulted in a significant settlement:

Ward v. AT Systems, Inc.

\$2.5 million settlement in Eastern District on September 11, 2008

If you get a case with this diagnosis, please make sure you retain an expert in reflex sympathetic dystrophy. This is a difficult injury to prove and this must be addressed.

