

RICHARD E. COVER AND PAMELA L. COVER,  
husband and wife, Plaintiffs vs. LISA J. METZ, A/K/A  
LISA J. KEMP, Defendant, C.P. Franklin County Branch,  
Civil Action - Law, A.D. 1997-477

*Cover v Metz*

*Motor Vehicle Financial Responsibility Law - Medical bills  
- limited tort election - Security records - surveillance  
videotape*

1. The purpose of the Motor Vehicle Financial Responsibility Law is to decrease the amount of uninsured motorists.
2. In action under Motor Vehicle Financial Responsibility Law, plaintiff may not recover amounts for the reasonable value of services that exceed accepted payment by insurance providers.
3. A plaintiff subject to a limited tort election may only recover for non-economic loss if he or she sustained serious impairment of bodily function.
4. Whether a plaintiff has sustained a serious impairment of bodily function is a question of fact for jury determination.
5. Social Security records are admissible to attack the credibility of a witness if the records disclose contradictory statements. To avoid potential prejudice, the term "Social Security" should not be mentioned, but "another proceeding."
6. Surveillance videotapes are highly probative evidence, and are only prejudicial when doctored. The opponent of such evidence may attempt to put the videotape in a proper context upon cross examination.

*Clark DeVere, Esquire, Attorney for Plaintiffs*  
*John Keller, Esquire, Attorney for Defendant*

### **OPINION AND ORDER**

WALKER, P.J., July 13, 1999:

#### **Factual and Procedural Background**

On October 24, 1995, plaintiff Pamela L. Cover and defendant Lisa J. Metz were involved in a motor vehicle

accident in Franklin County, PA. The plaintiff alleges that as a result of the accident she has been diagnosed with chronic pain syndrome and fibromyalgia. She further alleges that she has suffered permanent injuries and is totally disabled. The plaintiff commenced this civil action based upon the defendant's negligence in operating her vehicle.

A pre-trial conference was held in chambers on April 23, 1999, and the court issued a pre-trial order on April 28, 1999. Following the conference, the parties each filed a motion in limine (per the pre-trial order) on legal issues that had to be resolved prior to trial. On July 1, 1999, the parties appeared before the court to argue their motions. This opinion addresses the following legal issues raised by the parties:

- (A) Plaintiff's speed estimate
- (B) Medical bills
- (C) Limited tort election
- (D) Dr. Clawson's testimony
- (E) Social Security records
- (F) Surveillance videotape

### **Discussion**

The Court will address each legal issue individually.

#### A. Plaintiff's speed estimate

The defendant argues that the plaintiff's estimate of the speed of the defendant's vehicle should be excluded from her testimony. It is admitted by the plaintiff that at the time immediately before impact, she looked in her rear-view mirror for an "instant". Furthermore, the plaintiff also admits that her view of the vehicle before impact did not occur until the vehicle was one foot away. This court does not believe that the plaintiff had sufficient time to estimate the speed of the defendant's approaching vehicle, and

therefore must grant the defendant's motion to exclude her testimony concerning the vehicle's speed. Nevertheless, the plaintiff may elect to demonstrate the speed of the defendant's vehicle by using an accident reconstruction report based upon the circumstantial evidence available.

#### B. Medical Bills

The pre-trial memorandum declares that the plaintiff's medical expenses total \$20,756.72. However, because she has recouped the first five-thousand dollars (\$5,000.00) of those expenses from her first party automobile insurance carrier, she stipulates that the amount she may recover should be reduced to \$15,756.72 at this time. In addition, the plaintiff was also covered by a Mailhandlers Benefit Plan. It appears that this plan offered approximately three-thousand dollars (\$3,000.00) as payment for the medical services provided to the plaintiff, and that this amount was accepted as payment in full by the medical providers.

The issue to be determined is whether a plaintiff seeking tort recovery under the Motor Vehicle Financial Responsibility Law (MVFRL) may recover amounts for the reasonable value of the services that exceed what was accepted as payment in full by the medical providers. More specifically, the court must determine whether this plaintiff may recover twelve-thousand dollars (\$12,000.00) that was in effect waived by the medical providers when they accepted three-thousand dollars (\$3,000.00) as payment in full for the fifteen-thousand dollar (\$15,000.00) bill. After a review of the futile case law submitted by the parties and a more careful construction of the statute in consideration, this court determines that it would be a windfall for the plaintiff to recover this excess amount.

The plaintiff argues the amount recoverable should be the reasonable value of the medical services provided to her

as evidenced by the face amount of the bills. She gauchely relies on a medical malpractice case to support her argument, even though her claim rests on a specific provision of a motor vehicle statute. In the cited case, the Superior Court divined that it is better for a plaintiff to receive a windfall than a tortfeasor to parry away his responsibility. *Moorhead v. Crozer Chester Medical Center*, 705 A.2d 452 (1997). The case, however, is not authoritative on the present issue as it does not reach the MVFRL.

The defendant also ungainly relies upon authority that does not elucidate the present issue. The case cited by the defendant involves a worker's compensation claim and holds that the law of the state in which the worker obtained the benefits controls whether or not the carrier is allowed subrogation. *Davish v. Gidley*, 417 Pa.Super. 145, 611 A.2d 1307 ((1992). *Davish* is more narrow than the defendant proposes, and is not applicable instantly.

To determine the current issue, an analysis of the pertinent provision of the MVFRL is required. Of paramount importance in statutory analysis is the effect given to the legislative intent. 1 Pa.C.S. §1921(a); *Bamber v. Lumbermens Mut. Cas. Co.*, 451 Pa.Super. 548, 680 A.2d 901, 904 (Pa.Super 1996). No part of the statute is mere surplusage. *Id.* The enactment of the MVFRL was to contain the escalating costs of insurance coverage so as to decrease the amount of uninsured motorists on the state highways. *Motorists Ins. Companies v. Emig*, 444 Pa.Super. 524, 664 A.2d 559, 566 (Pa.Super. 1995). While the defendant argues that the applicable provision is Section 1720, this court disagrees because the present issue does not involve subrogation by Mailhandlers Benefit Plan. The relevant portion of the MVFRL is Section 1722.

§1722. Preclusion of recovering required benefits

In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or worker's compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) *shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or worker's compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.* (emphasis added)

75 Pa.C.S.A. §1722.

This court believes that the plain meaning of the statute reveals that a plaintiff may not recover as damages any benefits that were paid by his carrier or any amounts that were effectually waived by the service provider in accepting a lower amount from the carrier. By disallowing a recovery of the waived amount, the legislative intent of insurance cost-containment is realized. The costs are kept down when the service providers accept a lower payment from the carriers. The ability of the insurers to pay at the low rate affords them the ability to offer insurance coverage at lower rates. Consequently, more citizens will be able to afford insurance. This result would not be achieved by allowing recovery of the excess amount. The MVFRL keeps this money out of the loop to keep the rates down. Were plaintiffs allowed to recover this amount in tort actions, the costs of insurance coverage could not be contained and the purpose of the MVFRL would be extinguished.

Here, the plaintiff had approximately twenty-thousand dollars (\$20,000.00) in medical bills. Practically, her

insurers were able to settle this amount with the service providers and eventually paid approximately eight thousand dollars (\$8,000.00) to cover the bills. The excess twelve thousand dollars (\$12,000.00) are not claimed by anyone in particular, but, under the statutory scheme of the MVFRL, should enable the insurance industry to lower the costs of coverage. The plaintiff is not entitled to this amount. She had medical bills to pay. Her insurers paid them for her. She no longer has to pay medical bills. It would indeed be a windfall for her to receive the twelve thousand dollars (\$12,000.00), and an affront to the intent of the General Assembly. The plaintiff may not recover the face amount of the medical bills as damages.

C. Limited tort election

Because the plaintiff is subject to a limited tort election, she may only recover for non-economic loss if she sustained "serious impairment of bodily function". The defendant argues that it is up to the jury to decide whether the plaintiff has proven that she has suffered the required serious impairment. In opposition, the plaintiff argues that given these facts, the court must rule as a matter of law that the plaintiff has sustained a serious impairment of bodily function. After a review of the case law and briefs presented by the parties, this court firmly concludes that the jury must make the determination. While the jury will be instructed that the plaintiff must prove serious impairment of bodily function, there will be no mention of the limited tort election to the jury.

D. Dr. Clawson's testimony

Dr. Clawson testified in his deposition that the plaintiff told him that a previous doctor of hers relayed that her findings were consistent with myofascial pain syndrome. The defendant seeks to exclude this portion of the doctor's

testimony because it is "double hearsay". Pennsylvania Rule of Evidence 803(4) allows statements made with the purpose of medical diagnosis or treatment, as an exception to the hearsay rule. The plaintiff argues that the her statement fits neatly under this exception because it describes medical history and was necessary for the doctor to make a complete, thorough evaluation. Such a statement would be admissible as an exception because it is believed that a person seeking medical assistance would only purport reliable, trustworthy information.

The plaintiff also argues that her statement is admissible under Pennsylvania Rule of Evidence 703. Rule 703 allows an expert to testify based upon facts or data which in themselves are not admissible if they assist him in forming his opinion and are the type reasonably relied upon by other experts in the field. The plaintiff asserts that her statement to Dr. Clawson should not be excluded from his testimony because the information she relayed to him was essential to him in forming his medical opinion regarding her physical condition.

While the plaintiff's first argument has some merit and is persuasive, it does not persuade this court to allow the statement to come in. Traditionally, the concerns over the admissibility of hearsay in court have focused on reliability, trustworthiness, and opportunities for cross examination. Instantly, there appears to be little danger of deception and unreliability. However, there would a legitimate prejudice to the defendant if the statement were to be allowed in through Dr. Clawson. In effect, the plaintiff would have the opportunity to introduce an additional expert opinion; an opinion the defendant would be unable to test on cross examination. The plaintiff may introduce the opinion of the Hershey doctors only by calling upon them to testify at trial.

#### E. Social Security records

The plaintiff seeks to preclude the defendant from offering her Social Security disability claim records at trial. She argues that the benefits from Social Security are collateral to the damages that the defendant may be found liable to redress. Further, the plaintiff argues that the introduction of the records would prejudice her (presumably because she was not awarded any benefits following her claim).

The defendant counters that she only intends to utilize the records as a means of attacking the credibility of the plaintiff. The defendant asserts that the plaintiff has made contradictory prior statements in the records, and that the use of the statements contained in the records would be limited to impeachment of the plaintiff's testimony on cross examination. The defendant assures the court that it does not desire to use the records for the purposes of lowering the amount of the potential award.

The court finds that the records may be used by the defendant on cross examination of the plaintiff only for the purposes of attacking her credibility. To eliminate any potential bias and prejudice toward the plaintiff, there shall be no mention of "Social Security benefits". In reference to the source of the statements in the records, the parties shall refer to it as "another proceeding" as opposed to a claim for Social Security disability benefits.

#### F. Surveillance videotape

Finally, the plaintiff seeks to exclude the introduction of a surveillance videotape of the plaintiff done by the defendant's insurance carrier from March 5 through March 30, 1999. The particular segments the defendants seek to introduce occurred on March 19 and March 30, 1999. The

plaintiff first argues that introducing the videotape to the members of the jury would mislead them. She argues that because the defendant only intends to show a very brief portion of the overall surveillance done by the insurance carrier, the jury would receive an inaccurate and prejudicial overview of the investigation. Secondly, the plaintiff argues that the existence of the videotape was not revealed to her until the pre-trial conference. Thus, she suggests that her own witnesses will not have had a sufficient opportunity to peruse the video since they have already been deposed. Third, the plaintiff argues that the videotape is irrelevant because its probative value does not outweigh its prejudice.

The court finds that the videotape is highly probative evidence, and that such tapes cannot be prejudicial unless they are doctored. Indeed, videotaped surveillance is helpful to a finder of fact that must determine credibility. So long as the surveillance is not done on private property, this court does not consider it an invasion of privacy in these circumstances. There is no prejudice to the plaintiff instantly because she has an opportunity on cross examination to show that the portion used was perhaps not indicative of the overall surveillance. The plaintiff can remind the jury that they have only seen five minutes of seven days. As for the plaintiff's argument that she will not have enough time to review the videotape and show it to witnesses, the court finds that the October date for trial leaves her with more than enough time.

#### ORDER OF COURT

July 13, 1999, having considered each party's motion in limine, the briefs submitted to the court, and the arguments made by counsel, this court finds that:

1. The plaintiff's speed estimate of the defendant's vehicle shall be inadmissible at trial.

2. The plaintiff may not recover the face amount of her medical bills.

3. The jury will be instructed that the plaintiff must prove "serious impairment of bodily function", with no mention of the limited tort election.

4. The testimony by Dr. Clawson shall be excluded to the extent that it contains hearsay statements regarding the plaintiff's prior medical treatment.

5. The plaintiff's Social Security disability claim records are admissible to the extent that they may impeach the credibility of the plaintiff. The source of the plaintiff's statements contained within the records shall be referred to as "another proceeding".

6. The surveillance videotape is admissible.