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Black v. Jamison, et al

ELLEN L. BLACK, as Administrator and Executrix of the  
Estate of ERIC L. BLACK, and on her own behalf  
and RANDY L. BLACK, Plaintiffs,  
v. TODD L. JAMISON, DIANE E. MYERS as Administrator and  
Executrix of the Estate of JOHN R. MYERS,  
and COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION, Defendants  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action — Law, No. 2001-1609, Jury Trial Demanded

*Applicability of privileges when a party requests discovery of incident numbers within PennDOT's possession*

1. A party may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not ground for objection that the information sought will be inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1.
2. In-depth accident investigations and safety studies and information, records and reports used in their preparation shall not be discoverable nor admissible in any legal action or other proceeding, nor shall officers or employees or the agencies charged with the development, procurement or custody of in-depth accident investigations and safety study records and reports be required to give depositions or evidence pertaining to anything contained in such in-depth accident investigations or safety study records or reports in any legal action or other proceeding. 75 Pa.C.S. §3754(b).
3. Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying[, ] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130 (Railway-Highway Crossings), 144 (Highway Bridge Replacement and Rehabilitation Program), 152 (Hazard Elimination Program) of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. 23 U.S.C. §409.
4. Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for truth.

Appearances:

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Dennis J. Bonetti, Esq.

Steven C. Gould, Esq.

## OPINION

Van Horn, J., January 29, 2004

### Factual History

1. Plaintiffs' cause of action arose out of an automobile accident occurring on May 15, 1999, at the intersection of Lincoln Way East (State Route 30) and Rocky Mountain Road North (State Route 233), Greene Township, Franklin County, Pennsylvania.
2. The automobile accident involved vehicles driven by decedent, John R. Myers, and Defendant, Todd L. Jamison.
3. Eric L. Black was a front seat passenger in the automobile operated by decedent, John R. Myers, and owned by Defendant Diane E. Myers.
4. At all times relevant to the automobile accident, Lincoln Way East (State Route 30) and Rocky Mountain Road North (State Route 233) were State Highways fully owned and maintained by the Commonwealth.

### Procedural History

1. On May 9, 2001, Plaintiffs, Ellen L. Black, as Administrator and Executrix of the Estate of Eric L. Black, and on her own behalf and Randy L. Black (hereinafter, collectively, "Plaintiffs"), commenced the above-captioned action against several defendants, including the Commonwealth of Pennsylvania, Department of Transportation (hereinafter "PennDOT").
2. On or about April 26, 2002, Plaintiffs served a Request for Production of Documents and Interrogatories upon PennDOT.
3. While the Request for Production of Documents and Interrogatories is not part of the record, it is apparent that within the document was a request for accident reports concerning prior accidents which occurred at the subject intersection because on May 10, 2002, PennDOT filed Objections to the discovery request for of accident reports on the grounds that the reports are confidential and privileged.
4. Although PennDOT objected to releasing the accident reports, PennDOT said, "[w]ithout waiver of objection, the Commonwealth Defendant will produce an accident history for the subject intersection for the five year period prior to the date of the accident."
5. PennDOT produced said accident history.
6. When subsequently asked to provide copies of the accident reports listed in the accident history, PennDOT stated that Plaintiffs must subpoena the reports from the Pennsylvania State Police.
7. On January 27, 2003, Plaintiffs served a subpoena on the Pennsylvania State Police for the accident reports. The Pennsylvania State Police responded to the subpoena by stating that they needed incident numbers and/or the date of the accident and the name of at least one person involved in the accident in order to locate the requested accident reports.
8. In February and March of 2003, Plaintiffs attempted to contact PennDOT by telephone in order to obtain the incident numbers for the relevant accident reports.
9. On March 24, 2003, a letter followed the telephone messages. PennDOT did not respond to the letter.
10. On April 14, 2003, Plaintiffs sent a second letter requesting the incident numbers. This letter included a formal Interrogatory for the accident report numbers.
11. The Interrogatory asked PennDOT to "[i]dentify the Pennsylvania State Police report numbers for the 11 accident reports for the 11 prior accidents that occurred at the intersection that is the subject of this lawsuit between 1994 and 1999."

12. On or about May 9, 2003, the Commonwealth filed an Objection to Plaintiffs' request on the grounds that the accident report numbers requested are confidential and privileged.

13. On June 18, 2003, Plaintiffs filed a Motion to Dismiss Objection to Supplemental Interrogatory. Also, Plaintiffs filed a Memorandum of Law in support of their Motion.

14. On September 24, 2003, PennDOT filed an Answer in Opposition to Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory.

15. On December 3, 2003, PennDOT filed a Memorandum of Law in Support of Commonwealth Defendant's Opposition to Plaintiffs' Motion to Dismiss Objections.

16. On December 15, 2003, Plaintiffs filed a Supplemental Brief in Support of Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory Directed to Defendant, Commonwealth of Pennsylvania, Department of Transportation.

17. On January 5, 2004, Oral Argument was heard on Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory.

18. On January 21, 2004, PennDOT alerted the Court to the Pennsylvania Supreme Court decision handed down on January 20, 2004, Commonwealth v. Taylor. Plaintiffs responded.

#### Discussion

Before the Court is Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory Directed to Defendant, Commonwealth of Pennsylvania, Department of Transportation.

It is important to note at the outset what Plaintiffs have and have not requested from PennDOT. PennDOT, by way of an accident history, provided Plaintiffs with a document which verified that 11 accidents occurred at the subject intersection between 1994 to 1999. Plaintiffs are requesting the incident numbers for the 11 accident reports listed in said accident history so that they may obtain the accident reports from the Pennsylvania State Police. Plaintiffs are not requesting copies of accident reports from PennDOT. Nor are they requesting copies of any in-depth accident investigations or safety studies.

Neither party disputes that the accident reports within the possession of the Pennsylvania State Police are public record nor that Plaintiffs are free to walk in and acquire a copy of the 11 accident reports listed in the accident history. Therefore, the issue before the Court is not whether Plaintiffs may obtain a copy of the 11 accident reports from the Pennsylvania State Police, but rather the issue is whether PennDOT is going to assist Plaintiffs in obtaining said reports by revealing the incident numbers or whether Plaintiffs will have to search through all of the Pennsylvania State Police files to find the 11 accident reports they know exist due to the accident history furnished by PennDOT.

PennDOT claims the incident numbers are privileged and confidential pursuant to 75 Pa.C.S. §§3747, 3751, 3753 and 3754, as well as 23 U.S.C. §§402 and 409. By way of further objection, PennDOT asserts that Plaintiffs are not of the class of persons permitted access to accident reports, as set forth in §§3747 and 3751.

A party may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not ground for objection that the information sought will be inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1.

Plaintiffs have alleged, in their Complaint, that PennDOT was negligent, careless and reckless in its ownership, custody, control and maintenance of the highways that intersect at the point of the accident at issue. Plaintiffs claim that the intersection was a particularly dangerous and hazardous roadway which PennDOT knew or had notice of prior to said occurrence. It is undisputed that the incident numbers which Plaintiffs have requested are relevant in that they will lead to the corresponding accident reports which are relevant in determining whether a dangerous condition existed at the scene of the accident and whether PennDOT had notice of such condition, both of which Plaintiffs may be required to prove in order to establish liability against PennDOT.

The Court will first examine whether the incident numbers are discoverable under state law and then examine the protections from discovery claimed by PennDOT pursuant to 23 U.S.C. §§402 and 409.

Pennsylvania's Motor Vehicle Code contains a comprehensive group of statutes dealing with accident reports. The overarching statute, §3753, requires that PennDOT establish a repository for all accident reports. Section 3751 requires investigating police departments to forward their accident reports to

PennDOT. Section 3747 requires drivers and owners of vehicles involved in an accident which has not been investigated by the police to forward their accident reports to PennDOT. Section 3754 states that in-depth accident investigations and safety studies conducted by PennDOT in association with the Pennsylvania State Police are protected from discovery.

### **75 Pa. C.S. Section 3751 and Section 3747**

PennDOT argues that the incident numbers are privileged and confidential pursuant to Section 3751 and Section 3747 and that Plaintiffs are not of the class of persons permitted access to accident reports as set forth in said statutes. First, the issue before the Court is discoverability of incident numbers, not accident reports. Therefore, the Court is not concerned at this time about whether Plaintiffs are of the class of persons permitted access to accident reports pursuant to said statutes. Second, no part of either §3751 or §3747 prevents Plaintiffs from discovery of the incident numbers from PennDOT so that they may obtain the reports from the Pennsylvania State Police. Therefore, neither statute prevents discovery of the accident reports as neither statute provides a privilege.

### **75 Pa. C.S. Section 3753 and Section 3754**

While there is an ongoing debate among trial courts in Pennsylvania regarding the discovery of accident reports in the hands of PennDOT which requires an analysis of the relationship between §3753's mandate to collect all reportable accident reports and §3754's mandate to keep certain information related to accident reports privileged, the Court will not weigh in on the debate as that specific issue is not before it. Again, the issue before the Court is whether Plaintiffs may obtain incident numbers from PennDOT so that they may request the accident reports from the Pennsylvania State Police when PennDOT has already released to Plaintiffs a list citing that 11 accidents occurred at said intersection between 1994-1999.

PennDOT asserts that Plaintiffs' request is privileged and confidential pursuant to §3753 and §3754.

#### **Section 3754. Accident prevention investigations**

General rule – The department, in association with the Pennsylvania State Police, may conduct in-depth accident investigations and safety studies of the human, vehicle and environmental aspects of traffic accidents for the purpose of determining the causes of traffic accidents and the improvements which may help prevent similar types of accidents or increase the overall safety of roadways and bridges.

Confidentiality of reports – In-depth accident investigations and safety studies and information, records and reports used in their preparation shall not be discoverable nor admissible as evidence in any legal action or other proceeding, nor shall officers or employees or the agencies charged with the development, procurement or custody of in-depth accident investigations and safety study records and reports be required to give depositions or evidence pertaining to anything contained in such in-depth accident investigations or safety study records or reports in any legal action or other proceeding.

Section 3753 does not establish any kind of privilege. More specifically, §3753 does not establish a privilege regarding the discovery of incident numbers. Therefore, it is not relevant to the issue before this Court.

In order for a privilege to attach pursuant to §3754, the incident numbers must fall within one of the following categories: an in-depth accident investigation, safety study or information, records or reports used in the preparation of the in-depth accident investigation or safety study. Having stated this, the Court must determine whether PennDOT has met its burden of demonstrating that the incident numbers are part of an in-depth investigation, safety study or information, records or reports used in their preparation.

PennDOT has not met its burden of demonstrating that the incident numbers requested by Plaintiffs are within the scope of the statutory privilege. PennDOT has not asserted in any of its pleadings that the incident numbers fit within the confines of the statute.

The purpose of §3754 is to protect PennDOT's work product and opinions so as to facilitate candor, comprehensiveness and accuracy in PennDOT's analysis and use of the information received by it. *Simon v. Allegheny County*, 23 Pa.D.&C.3d 360, 365 (1982). The purpose is not to hinder the free flow of information that happens to be in the hands of PennDOT, but which does not belong exclusively to them as something they themselves created. Therefore, because no privilege is proven, the incident numbers are discoverable.

### **23 U.S.C. Section 402 and Section 409**

PennDOT claims not only that the incident numbers are privileged and confidential pursuant to state law

but also pursuant to 23 U.S.C. §§402 and 409.

Section 402 mandates a highway safety program but does not in any way deal with incident numbers being privileged and confidential. Therefore, this section is not relevant to the present discussion.

Section 409, in its present form, provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying[, ] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130 (Railway-Highway Crossings), 144 (Highway Bridge Replacement and Rehabilitation Program), 152 (Hazard Elimination Program) of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The current United States Supreme Court decision of *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003), addressed whether §409 is a valid exercise of Congress' authority under the Constitution. *Id.* at 618. Before holding that §409 is constitutional, the Court determined the proper scope of the statute. *Id.* at 624-625.

The Court began its analysis with a brief history of the statute. The Hazard Elimination Program, §152, provides state and local governments with funding to improve the most dangerous sections of their roads. *Id.* at 618. §152(a)(1) requires that participating states survey "all public roads to identify hazardous locations...assign priorities for the correction of such locations...and establish and implement a schedule of projects for their improvement."

Soon after the inception of the Program, the Secretary of Transportation reported to Congress that state and local governments were hesitating to take part in the program when no measures were taken to protect the confidentiality of their work. *Id.* at 619. State and local governments were worried that identifying trouble spots would subject them to liability. *Id.* Therefore, the Department of Transportation recommended the adoption of legislation that would keep confidential any information compiled in connection with the Program. *Id.* 23 U.S.C. §409 was thus adopted and subsequently amended several times with the present version set forth above. *Id.* at 620.

In *Pierce County*, Ignacio Guillen's wife, Clementa Guillen-Alejandre, died on July 5, 1996, in an automobile accident at an intersection in Pierce County, Washington. *Id.* Several months before the accident, Pierce County had requested §152 funding for this intersection, but the request had been denied. *Id.* Pierce County renewed its application on April 3, 1996, and a second request was approved on July 26, 1996, only three weeks after the accident. *Id.* Beginning on August 16, 1996, counsel for the Guillens sought to obtain information about accidents that occurred at the subject intersection. *Id.* This request included copies of reports of prior accidents at the intersection. *Id.* Pierce County declined to provide any responsive information, asserting that any relevant documents were protected by 23 U.S.C. §409. *Id.*

The Supreme Court said "that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for truth." *Id.* at 625 (citations omitted). Addressing §409 specifically, the Court went on to say, "§409 establishes a privilege; accordingly, to the extent the text of the statute permits, we must construe it narrowly." *Id.* at 626.

The Court was offered three different interpretation of §409 and adopted the following interpretation as its own:

§409 protects all reports, surveys, schedules, lists, or data actually compiled or collected for §152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to §152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for §152 purposes. *Id.* at 625.

The Court goes on to say, "under this interpretation, an accident report collected only for law enforcement purposes and held by the county sheriff would not be protected under §409 in the hands of the county sheriff, even though the same report would be protected in the hands of the Public Works Department, **so long as the department first obtained the report for §152 purposes.**" *Id.* (emphasis added).

Applying the same reasoning as *Pierce* did for accident reports to incident numbers, the Court determines that the incident numbers, if collected by PennDOT pursuant to §152, or any other purpose within §409, are protected from discovery by §409. After making this determination, the Court must still determine whether PennDOT has met its burden of demonstrating that the reports requested by Plaintiff are within

the scope of the federal privilege.

PennDOT has not met its burden of demonstrating that the incident numbers requested by Plaintiff are within the scope of the federal privilege. Section 409 does not provide an overarching privilege. Rather, in order for the incident numbers to be privileged pursuant to §409, PennDOT has to prove that the Commonwealth applied for federal aid and that the information at issue, the incident numbers, were compiled or collected for purposes set forth in the statute. PennDOT has not proven that the Commonwealth applied for federal money. Furthermore, PennDOT presented no factual information in its pleadings to evidence that PennDOT collected or compiled the incident numbers requested for purposes of the safety evaluation programs described in 23 U.S.C. §§ 130, 144, 152, or for the purpose of developing other highway safety improvement projects which may be federally funded. Rather, PennDOT asserts a privilege with nothing to support its imposition.

#### Conclusion

It is important to note exactly what Plaintiffs have and have not requested from PennDOT. PennDOT, by way of an accident history, provided Plaintiffs with a document which verified that 11 accidents occurred at the subject intersection between 1994 to 1999. Plaintiffs are requesting the incident numbers for the 11 accident reports listed in said accident history so that they may obtain the accident reports from the Pennsylvania State Police. Plaintiffs are not requesting copies of accident reports from PennDOT. Nor are they requesting copies of any in-depth accident investigations or safety studies.

PennDOT asserts that Plaintiffs' request is beyond the scope of discovery since it seeks information which is privileged and confidential pursuant to 75 Pa.C.S. §§3747, 3751, 3753, 3754, as well as 23 U.S.C. §§402 and 409.

The only statutes relevant to the question before the Court are 75 Pa.C.S. §3754 and 23 U.S.C. §409. Because PennDOT presented no evidence to establish how the information requested by Plaintiffs fit within the privilege of either of said statutes, the Court finds that no privilege applies.

#### ORDER OF COURT

And now this 29th day of January, 2004, this matter having come before the Court on Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory Directed to Defendant, Commonwealth of Pennsylvania, Department of Transportation, the Court having considered the relevant documents and having heard Oral Argument hereby orders that Plaintiffs' Motion to Dismiss Objection to Supplemental Interrogatory is granted.

The Commonwealth of Pennsylvania, Department of Transportation, is directed to supply the information requested in the Supplemental Interrogatory within fourteen (14) days of this date.

#### Section 3751. Reports by police

- General rule – Every police department that investigates a vehicle accident for which a report must be made as required in this subchapter and prepares a written report as a result of an investigation either at the time and at the scene of the accident or thereafter by interviewing the participants or witness shall, within 15 days of the accident, forward an initial written report of the accident to the department. If the initial report is not complete, a supplemental report shall be submitted at a later date.
- Furnishing copies of report – Police departments shall, upon request, furnish at a cost not to exceed \$15 a certified copy of the full report of the police investigation of any vehicle accident to any person involved in the accident, his attorney, or insurer, and to the Federal Government, branches of the military service, Commonwealth agencies, and to officials of political subdivisions and to agencies of other states and nations and their political subdivisions. The copy of the report shall not be admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident. Police departments may refuse to furnish the complete copy of investigation of the vehicle accident whenever there are criminal charges pending against any persons involved in the vehicle accident unless the Pennsylvania Rules of Criminal Procedure require the production of the documents.

Section 3747. Written Report of accident by driver or owner

- General rule – If a police officer does not investigate an accident required to be investigated by section 3746 (relating to immediate notice of accident to police department), the driver of a vehicle which is in any manner involved in the accident shall, within five days of the accident, forward a written report of the accident to the department.

....

- Confidentiality of reports – All written reports required in this section to be forwarded to the department by drivers or owners of vehicles involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or any other governmental agency or their representatives having use for the records for accident prevention purposes, except that the department shall disclose the identity of a person involved in an accident when the identity is not otherwise known or when the person denies his presence at the accident and shall disclose whether any person or vehicle was covered by a vehicle insurance policy and the name of the insurer.

(f) Use of reports as evidence – No accident reports forwarded under the provisions of this section shall be used as evidence in any trial, civil or criminal, arising out of an accident except that the department shall furnish upon demand of any party to the trial, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department in compliance with the law, and if the report had been made, the date, time and location of the accident, the names and addresses of the drivers and the owners of the vehicles involved. The reports may be used as evidence when necessary to prosecute charges filed in connection with a violation of section 3748 (relating to false reports)

....

The Court assumes PennDOT is arguing that Plaintiffs' are not of the class of persons permitted access to accident reports from PennDOT and not that PennDOT is arguing that Plaintiffs' cannot obtain the accident reports from another source as neither party has disputed that the accident reports are public record and thus discoverable when in the hands of the Pennsylvania State Police.

In their Memoranda of Law in support of their respective positions, each party fully discussed the issue as if it were whether or not accident reports are discoverable from PennDOT. Clearly, that is not the issue presently before the Court. Therefore, none of the case law regarding accident reports which the parties raised before, during, and after Oral Argument is relevant.

In pertinent part, §3753 provides:

Section 3753. Department to tabulate and analyze accident reports

- Central accident records agency – the Department shall establish a central accident records agency which shall be the repository for all reportable traffic accidents as defined in this subchapter. The agency will have primary responsibility for the administration and supervision of storing, processing and providing the informational needs to all official agencies having responsibility in the highway transportation system. . . .
- Central accident analysis system – the Department shall provide accident data for analysis in selecting crash prevention programs and in evaluating the effectiveness of those programs implemented. The system shall provide an annual report to the General Assembly assessing traffic safety in Pennsylvania, including but not limited to, an analysis of accident characteristics and mitigation strategies to reduce the potential for future accidents.

....

Section 402, in pertinent part, provides:

- Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary.

....

Although the Court deals only with §152 in its Opinion, it would naturally follow that the same decision applies to reports collected or compiled pursuant to §130, §144 or "for the purpose of developing any highway safety construction improvements project which may be implemented utilizing federal-aid highway funds." 25 U.S.C. §409.

Two Common Pleas courts discussed §409 before *Pierce*, and both were consistent with the Supreme Court's decision as to accident reports but the decisions are applicable to the present situation as well.

In *Van Horn*, the court said, §409 "does not exempt from discovery or admissibility reports or data unrelated to Section §152 activity." *Van Horn v. Reinhart Flynn, Inc. et. al, XV Carbon Co. L.J. 576, 588 (2002)*.

In *Werner*, the court said, §409 "will be strictly construed to protect documents and data prepared for purposes of safety enhancement, but not for documents compiled for some other purpose, even if their contents or parts of them eventually become ingredients in a safety enhancement program." *Werner v. IA Construction Corp., 51 Pa.D.&C.4th 509, 513 (2001)*.

A third Common Pleas court handed down a decision involving §409 and accident reports after *Pierce* and while it determined the accident reports were not discoverable, the court in *McGaughey* did recognize that the Supreme Court found that "the privilege [of §409] is inapplicable to information compiled or collected for purposes unrelated to Section 152 and held by agencies not pursuing Section 152 objectives." *McGaughey v. Commonwealth of Pennsylvania, Department of Transportation, No. 10102 CD 2002, Indiana Co. 1, 13-14 (2003)*.