Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

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Date Submitted: July 31, 2013
Date Decided: August 30, 2013

RE: Andre J. Mottas v. Jodie E. Eberhard
C.A. No. N11C-03-091 JRJ

Upon Defendant's Motion to Permit a Setoff for Medical Expenses Paid by the Defendant – ***DENIED***

Dear Counsel:

This letter follows our second pretrial conference held August 26, 2013. Given the press of time in light of the September 30, 2013 trial date, this letter constitutes the Court's opinion on the Defendant's Motion to Permit a Setoff for Medical Expenses Paid by the Defendant. Having reviewed the authorities cited by both parties, the Court's decision is as follows.

On March 9, 2009 the Plaintiff was allegedly injured in a motor vehicle accident while employed and working for a Pennsylvania pest control company. At the time of the accident, the Plaintiff was driving a Pennsylvania registered

truck in Delaware. Because the Plaintiff was indisputably injured in the scope and course of his employment, his employer's workers' compensation carrier, Zurich Insurance Company ("Zurich"), paid his medical expenses. Plaintiff filed the instant personal injury action against the Defendant, who is insured by State Farm Insurance Company ("State Farm"). Despite this pending personal injury suit, Zurich sought subrogation directly against State Farm through intercompany arbitration to recover the amount of the medical expenses it paid on Plaintiff's behalf. Through that process, State Farm paid Zurich's full lien totaling $35,223.16, and then reduced Defendant's liability coverage by that amount.

State Farm now seeks a set off for the medical expenses and to prevent the Plaintiff from boarding the amount of his medical expenses at trial. State Farm argues that the collateral source doctrine does not apply to the medical expenses because they were ultimately paid by, or on behalf of, the alleged tortfeasor.[1] The Plaintiff counters by arguing that pursuant to § 319 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 671, the employer "shall be subrogated" to the right of the employee and, thus, Zurich did not have a statutory right of subrogation

[1] State Farm mainly relies on *Yarrington v. Thornburg*, 2005 A.2d 1 (Del. 1964) in support of this argument. (*See* Defendant's Motion to Permit a Setoff for Medical Expenses Paid by the Defendant ("Def. Motion") [Trans. ID 49809927] at ¶¶ 3-4); however, *Yarrington* is distinguishable. *See* Plaintiff's Response [Trans. ID 53226215] at p. 4, n.6.

against the defendant.[2] Plaintiff further argues that State Farm had no legal obligation to pay Zurich's workers' compensation lien and thus did so voluntarily.

The Court agrees with Plaintiff that the workers' compensation carrier's right to reimbursement of monies paid under the compensation claim is subrogated to the injured party's claim against the tortfeasor, and the carrier "has no independent cause of action for indemnification and contribution" from the tortfeasor.[3] As under Delaware law,[4] the Pennsylvania subrogation statute provides the workers' compensation carrier with a lien entitlement from Plaintiff's third party suit, but provides Plaintiff a lien reduction by requiring the carrier to contribute on a pro-rata basis toward Plaintiff's attorneys' fees and costs incurred in the third party case.[5] Allowing State Farm to pay Zurich's lien and thereby exclude evidence of that lien, which is unquestionably admissible under the collateral source rule,[6] or allowing State Farm to reduce the jury's verdict by the amount it paid to Zurich, would circumvent Pennsylvania law and deprive Plaintiff of his legal right to demonstrate to the jury the full measure of his damages and to reduce Zurich's lien if the jury renders a verdict in his favor.[7] Consequently,

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[2] Plaintiff also points out that State Farm "stands to benefit if the Plaintiff is prevented from boarding his medical expenses at trial by minimizing the size of the jury award," and that Zurich has benefited by "avoiding its statutory obligations to share in the litigation expenses. *See* Plaintiff's Response at ¶ 5.
[3] *Id*.
[4] 19 *Del. C* § 2362 as clarified by *Keeler v. Harford Mutual Ins. Co*., 672 A.2d 1012 (1996).
[5] 77 P.S. § 671.
[6] The medical expenses paid by Zurich were from a source "unconnected with the defendant."
[7] Consider, by way of example, the net result to Plaintiff in the case of a $75,000 verdict. Considering only a one-third attorney's fee and no costs for purposes of this hypothetical, Zurich would be responsible for 47% of Plaintiff's $25,000 attorney's fee (or $11,750) under § 671, resulting in a net to Plaintiff of $26,526.84 ($75,000-$25,000

Defendant's Motion is **DENIED**. Defendant is not entitled to a setoff under the circumstance presented, and Plaintiff is entitled to "board" the workers' compensation lien.

IT IS SO ORDERED.

Jan R. Jurden, Judge

attorney's fee = $50,000 – reduced lien of $23,473.16). In contrast, under State Farm's proposal Plaintiff would net only $14,776.84 ($75,000-$25,000 = $50,000 - $35,223.16 in the amount previously paid to Zurich).