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DAILY REPORT

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$1.3M awarded for lingering neck injury

Umbrella policy limit paid even though insured didn't sign up for it

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Lyn Dodson and Rob Katz

Overriding an insurer's objections that it should not be liable for the entirety of a jury's award stemming from a 2007 car wreck case, a Fulton County judge has ordered USAA to pay $1.3 million to a woman who ran a half-marathon three months after the accident that three years later required cervical disk surgery.

The Dec. 13 order by Fulton County State Court Judge Susan B. Forsling said that Georgia law at the time of the wreck and appellate precedent make clear that, unless an insured driver had expressly rejected uninsured motorist coverage being included in an umbrella policy, that policy's limits must be available for payout even though the insured never signed up for-nor paid premiums on-such coverage.

The order rejected USAA's contention that Carol and John Thurman's umbrella policy-purchased in addition to their primary policy with the insurer-only offered an additional $15,000 in coverage.

By the time the case came to trial, said plaintiffs' attorney Robert N. Katz, both sides faced strategic challenges. The Thurmans had filed for bankruptcy in 2009 and the bankruptcy trustee, Kyle Cooper, assumed the role of plaintiff, which "was a double-edged sword for both us," he said.

"Our position was, 'We just want you to look at the issues,' we didn't want them to feel like, 'Oh Carol Thurman is just doing this because she's in bankruptcy.'"

The defense, he said, may have been concerned that there would be a "sympathy factor" for someone in bankruptcy facing a big insurance company.

USAA's attorney, Jessica E. Sanford of Fain Major & Brennan, declined to discuss the case. Her post-judgment motion seeking a new trial or reduction in the verdict says "excessive verdict in this case bears no relationship to the evidence. It is surely the product of bias and prejudice against USAA."

The case began in August 2007 when Carol Thurman, now 57, was sitting in a line of cars at the Howell Mill Road exit ramp in a Cadillac Escalade. Another driver, Stephen Brown, was heading north on I-75 in a Ford Ranger when, according to the pretrial order, an unknown driver in a silver car pulled out of the exit-ramp line and cut diagonally into traffic.

Brown struck the silver car in the rear and spun out of control, hitting Thurmond's car in the driver's side door.

"An ambulance did not arrive to the scene, and no one complained of injuries at the scene," said the defense portion of the order. "There was no broken glass from the Thurman vehicle and Mr. Brown believes that Ms. Thurman could have exited out of her driver's side door. Mr. Brown was ticketed for failure to maintain his lane."

Brown's truck was lightly damaged, said Katz, while the Escalade had to be towed.

"What was bad from a personal injury standpoint is that she didn't get treated immediately," said Katz. Thurmond began feeling neck pain several days later and, three weeks after the accident, consulted with a doctor, who treated her with massage therapy and anti-inflammatory drugs.

"She didn't see an orthopedist for five months," he said, "and that raised another challenge: She was treated by a chiropractor for two years, and they only discovered a herniated cervical disk two years later."

In the meantime, Thurman participated in a half-marathon in California in November 2007, and in the Peachtree Road Race in 2008 and 2009.

It was nearly three years after the accident when Thurman underwent cervical disk fusion surgery, Katz said.

In 2009, about a month before the two-year filing deadline ran, Katz and partner Lyn B. Dodson of Decatur's Katz Stepp Wright & Fleming filed suit seeking personal injury damages for Carol Thurman and including a loss of consortium claim on behalf of John Thurman, naming Brown and "John Doe" as co-defendants.

As the Thurmans' uninsured motorist carrier, USAA undertook the John Doe defense, while Brown, who was insured by American Century, was represented by Trevor G. Hiestand of Harper, Weldon & Craig.

A mediation effort failed, said Katz.

"Everything was very cordial and appropriate," Katz said, "but Brown offered very little, and USAA just felt the causation issues would carry the day at trial."

In accordance with the Georgia offer of judgment statute, USAA tendered a $100,000 settlement offer in early 2011, but then withdrew it prior to trial.

"We argued that, because my client was in bankruptcy, they couldn't assert a claim against the bankruptcy estate unless the bankruptcy court allowed the claim," Katz said.

In October 2011, Brown was dismissed from the case for a $3,000 settlement, according to a post-trial defense brief.

Four days before trial, USAA dropped John Doe as a defendant and defended the case under its own name.

"That was probably a good strategic decision; it makes it more of a business dispute," said Katz, who has defended such cases. Otherwise, "you've got an empty-chair defense; the jury's saying, 'Who is this John Doe, why isn't he here' My thought is that it's very difficult to defend a case either as a John Doe or as an insurance company. There's a risk factor on both sides."

During a two-day trial that began Nov. 2, the plaintiffs called as witnesses the Thurmans; Brown, via video-deposition; Carol Thurman's massage therapist; and Dr. Hal Silcox, who performed the cervical fusion. Carol Thurman had medical expenses of almost $72,000, according to the pretrial order.

The defense didn't call any additional witnesses, said Katz, instead arguing that any injuries Carol Thurman suffered were not due to the accident, but to a subsequent incident in which a shelf fell and hit her in the jaw.

"They called and read portions of Mr. Brown's deposition that the accident was not as severe as we were asserting, and they attacked Dr. Silcox's credibility because he knew her and he knew her younger brother," Katz said.

The defense also raised the question of whether Carol Thurman's injuries might be linked to her history as a runner.

"There was a causation issue, but Dr. Silcox was very clear that, if running caused neck injuries, we would be doing surgery on every runner in the country," said Katz.

The trial ended about 3 p.m. on Nov. 3, and the jury of four men and eight women "including a runner," noted Katz, took about an hour and a half to award $1,370,031 to Carol Thurman and $25,000 to her husband.

"Opposing counsel did a good, solid job," said Katz, "but the jury just had to call it like they saw it."

In a Nov. 28 motion for new trial or reduction of the award, USAA argued that the verdict was far in excess of what was justified by Carol Thurman's medical expenses, and noted that she suffered no lost wages and was unlikely to need further medical treatment.

If she decided against a new trial, the motion asked Forsling to reduce the verdict to no more than $300,000, the per-person limit of the Thurmans' primary auto policy's uninsured motorist benefits.

The same day, the insurer filed a motion arguing that the Thurmans' umbrella policy, which carried a $1 million per occurrence limit and which they had first purchased in Texas in 1989, contained no uninsured motorist coverage.

In 2001, the Legislature changed Georgia's uninsured motorist law to make the limit of auto coverage the default amount of uninsured motorist coverage, and a 2006 Court of Appeals decision, Abrohams v. Atlantic Mutual Insurance Agency, said that provision applied to umbrella policies as well.

In 2008 the Legislature passed Senate Bill 276, which excluded umbrella policies from automatically covering uninsured motorists "unless affirmatively provided for in such polices," but-as USAA noted-the "relevant facts" of the case predated that bill's passage.

USAA argued that, under Abrohams, the insurer should be liable for no more than the $15,000 minimum coverage available under the umbrella policy when it was issued, along with the $300,000 uninsured motorist benefits contained in the principle policy, for a total of $315,000.

But on Dec. 13, Forsling issued a ruling declaring that, under Abrohams, USAA was liable for the full $1 million umbrella policy limit as well as the $300,000 uninsured motorist coverage. She reduced the award by $95,000 and awarded the Thurmans $1.3 million.

On Dec. 15, Sanford filed another motion seeking a new trial or reduction in the verdict.

"There are serious questions whether Ms. Thurman's cervical disk problem and related surgery are causally related to the auto accident," it said. "Ms. Thurman's activities following the auto accident are inconsistent with her having sustained a herniated disc during the subject auto accident. The Plaintiff continued to train vigorously for marathons immediately following the accident and she continued to work."

The verdict is almost 20 times the amount of Carol Thurman's medical bills, wrote Sanford, asking that the court re-try the case or reduce the "current and excessive outrageous amount to $300,000 and condition whether to grant a new trial upon Plaintiff's acceptance of that amount."

The case is Cooper v. United Services Automobile Association, No. 2009EV007882.