

**Uninsured Motorist Arbitration of Catastrophic Injury and Death Claims
Results in Finding for the Defendant**

By: John P. Connor, Esquire

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The case arose out of a tragic accident that occurred on a highway in West Springfield, MA. One woman was killed and two others seriously injured when their car exited the southbound lane of travel, crossed the median and rolled over in the northbound lane of travel where it was struck by two on coming vehicles. The driver, who was pronounced dead at the scene, was 18 years old. Her two passengers, her 16 year old sister and her 17 year old friend, were ejected from the car and suffered serious injuries. The driver's surviving sister alleged that the accident was caused by an unidentified white pickup truck that she maintained merged into her sister's lane of travel forcing her off the road. The deceased driver's estate and the surviving sister pursued an Uninsured Motorist (UM) claims under the household member provision of their parents' automobile insurance policy. (The other passenger settled her UM claim under her own policy with a different insurer prior to arbitration).

The UM insurer undertook a full investigation of the UM claims based upon information obtained in the earlier stages of the claims handling that appeared to conflict with the "phantom vehicle" theory put forth by the claimant. The accident report generated by the responding state troopers indicated that the claimant's vehicle was observed by another motorist maneuvering from the first to the third lane of travel at a speed greater than the speed limit and that the car began to fishtail just before entering the median. The roads were wet and it was noted to be raining heavily. There was no mention of any white pickup truck merging into the claimants' path of travel. The problem however, was that the report did not identify the witness.

The insurer made an exhaustive, but unsuccessful, effort to identify the witness referred to in the accident report. An investigator hired by the insurer interviewed each of the several responding state troopers in an effort to find the witness that appeared essential to the defense. All of the troopers recalled the accident scene and all agreed it was chaotic. One of the troopers recalled speaking to a witness but could not recall the witness's name. The trooper agreed to check his pocket notebook, but after doing so could not find any notation identifying the witness. He speculated that he may have given the identifying information to one of the other responding troopers. All of the responding troopers searched their own notes from the accident, but none of them could find any notations naming the witness.

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As part of the investigation, the insurer also retained Smith & Brink, P.C. to conduct the Examination Under Oath (“EUO”) of the driver’s surviving sister. (The other passenger suffered a brain injury and had no recollection of the accident.) At the EUO, the claimant made an extremely sympathetic witness. Her version of events appeared credible. She testified that her sister was not changing lanes as the police report suggested that her sister’s vehicle was traveling below the speed limit because it was raining very hard. She asserted that her sister was established in her lane of travel for about one mile when a white pickup truck traveling to their right began to enter their lane of travel. She testified that it was right next to her sister’s vehicle, but couldn’t say whether it made contact. She admitted that that was the last thing she could remember. She could not say how, if at all, her sister reacted to the white pickup truck.

At the conclusion of the insurer’s investigation it was quite clear that the only eyewitness account of how the accident occurred would be presented at arbitration by the very sympathetic and seemingly credible sister of the deceased driver. Nevertheless, it appeared that her version of events lacked key details and called for too much speculation to simply rely on and voluntarily pay the substantial policy limits. The insurer opted to test the claimants’ “phantom vehicle” theory at arbitration.

The strategy of the arbitration called for the defendant to walk a fine line when cross examining the sole eyewitness. An overly aggressive cross examination ran the risk of alienating the arbitrator, making the witness more sympathetic than she already was and drowning out the defense theory that this was a case where the evidence was too lacking and speculative to find for the claimants. Accusing the witness of fabrication or exaggeration would surely backfire. Accordingly, it was important to focus methodically and concisely on what the witness **did not observe**, to establish that the witness could not say enough about the operation of the white truck to support the conclusion that its operator was negligent. For instance, she could not say whether it crossed the lane markers into their lane, she didn’t know whether it contacted their vehicle, she didn’t know what speed it was traveling, and she couldn’t say whether her sister saw the truck or reacted to it. She also admitted that it was raining so hard she could barely see out the windows.

After hearing, the arbitrator found for the defense. In doing so, he specifically found the witness to be credible. However, the arbitrator also determined that the claimants could not sustain their burden of proving that the accident was caused by the negligent operation of the white pickup truck where the sole witness’s account lacked necessary details and called for too much speculation. From the defense point of view, it was clearly the right decision. Pinning down the only known witness’s version of events in an EUO and agreeing to an arbitrator with the integrity to focus solely on the evidence were key to the successful defense.

If you have any questions, please contact John P. Connor, Esquire at (617) 770-2214 or jconnor@smithbrink.com.

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