

BAD FAITH BLOG

Insurer Barred from Deposing Aggressive Claimant's Attorney

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Summary: Stefanie Hardacre struck and injured motorcyclist Grand Nelson. A third vehicle was also involved, but that driver's insurer paid Nelson the policy limits of \$100,000. Hardacre's insurer, Progressive, determined that Hardacre was not at fault. Progressive denied Nelson's claim; it had closed its investigation file three days after acknowledging receipt.

Nelson v. Hardacre

Nelson then sued Hardacre. After a year of litigation, the parties reached a settlement wherein Hardacre waived her right to a jury trial in exchange for Nelson's agreement to seek recovery solely from the Progressive policy. After Judgment was entered against Hardacre for \$530,539.11, Nelson filed a garnishment proceeding against Progressive.

After filing the lawsuit, Nelson's attorney, Michael Kuckelman, personally contacted Hardacre's father (the named insured) to discuss the potential of a bad faith claim against Progressive. During the deposition for both Hardacre and her father, Progressive asked them about the substance of their conversation with Kuckelman. Neither recalled any specific details. During the garnishment action, Progressive served a notice of deposition and subpoena upon Kuckelman to learn about his conversations with the Hardacres. Having personally contacted the Hardacres after filing suit against them, Progressive argued Kuckelman was the impetus to the bad faith claims.

After applying the factors outlined in *Shelton v. American Motors Corp.* and *Simmons Foods, Inc. v. Willis*, the district court expressed reluctance to allow depositions of opposing counsel, noting they tend to be harassing and cause undue delay. Nonetheless, the court also noted that such depositions may be required in some circumstances. In the context of bad faith claims, the opposing attorney may be the only source of necessary information.

The court quashed the subpoena issued to Kuckelman. Since many communications between Kuckelman and Hardacre had been previously produced in discovery, Progressive had failed to show the information it sought in a deposition was not otherwise available. The relevance of Kuckelman's actions was also questioned. The court acknowledged that his contact with Hardacre was atypical, but did not find it to be problematic because there was little evidence to suggest the manufacturing of a bad faith claim, such as setting arbitrary deadlines and refusing settlement offers hopes of later recovering on a bad faith claim. Since the testimony sought through deposition was not crucial to Progressive's case, the subpoena was quashed.

By Brett Simon

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