

## Oregon Case Update

***PIP Application Form Inadmissible in Suit by Insured Against Tortfeasor***

**From the Desk of Josh Hayward:** Insureds who submit a personal injury protection (“PIP”) claim are often asked by their insurer to fill out a PIP application form. When the insured later sues the defendant who was allegedly at fault for the accident, can the PIP application be admitted into evidence at trial? Read on to find out.

**Claims Pointer:** Following an incident where the defendant drove over and fractured a minor’s leg, a dispute arose as to whether the PIP application could be admitted into evidence. The Washington Court of Appeals held that the PIP application was protected under the work product doctrine, and further determined that admitting the PIP application was prejudicial. This case is important to adjusters who regularly deal with PIP claims, applications, and litigation.

***Figueroa v Mariscal, 34671-4-III, Washington Court of Appeals Div. III (April 3, 2018)***

In this case, Defendant Consuelo Prieto Marisca (“Defendant”) was driving her minivan down the road when she heard a noise and felt a slight bump underneath her tires. Defendant pulled her vehicle over and saw Plaintiff Monica Diaz Barriga Figueroa’s (“Plaintiff”) minor son lying on the road next to his bicycle. The child was taken to the hospital where imaging results revealed a fractured leg.

A few days later, Plaintiff contacted an attorney for assistance in making an insurance claim to her insurer for her son’s injuries. Because Plaintiff was a monolingual Spanish speaker, a legal assistant who spoke Spanish assisted Plaintiff. The assistant first asked Plaintiff to sign a blank PIP application form. After Plaintiff signed the form, the assistant filled out the form by using facts in the police report to describe the accident – the police report stated that Plaintiff’s child was struck after he drove his bicycle into the road from a blind spot in between two cars.

At trial, Defendant asked the court to admit the PIP application form into evidence. The trial court determined that the PIP application was an “admission against interest” and allowed the PIP application form to be admitted. The jury returned a verdict in favor of Defendant, and after Plaintiff unsuccessfully requested the court to rule in her favor notwithstanding the verdict, Plaintiff appealed. In support of her appeal, Plaintiff argued that the PIP application should not have been admitted because it was hearsay and because it was privileged under the work product doctrine.

The Washington Court of Appeals first considered whether the PIP application was hearsay. Hearsay is a statement (other than a statement made by the declarant) that is offered to prove the truth of the matter being asserted. The court noted that certain out of court statements are not considered hearsay, one of which is an opposing party’s statement. An opposing party’s statement is defined as a statement that is “offered against a party and is . . . a statement by the party’s agent or servant acting within the scope of the authority to make the statement for the party.” (emphasis added) ER 801(d)(2)(iv). In this

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case, Plaintiff hired an attorney to assist her with the PIP claim, and the legal assistant for the attorney completed the PIP application. Based on those facts, the court concluded that the legal assistant was Plaintiff's agent and that the statements in the PIP application were "made within the legal assistant's scope of authority." Accordingly, the court ruled that the PIP application was an opposing party statement and not hearsay.

The court next considered whether the PIP application was confidential work product. Work product is material that is prepared in anticipation of litigation in a particular case. A typical example of work product would be notes that contain an attorney's impressions from a meeting with a witness or client. The court's opinion contains no discussion on whether the PIP application was actually "prepared in anticipation of litigation." Instead, the court pointed out that Plaintiff had a contractual obligation to cooperate with her insurer, including filling out the PIP application. As a result, Plaintiff had "a reasonable expectation that her PIP application would be kept confidential and not be shared with opposing counsel." The court determined that it would be an injustice to allow Defendant to "surreptitiously obtain [Plaintiff's] PIP application and use it against [Plaintiff] simply because the two shared the same insurance company." Accordingly, the court held that the trial court erred by failing to extend the work product protection to Plaintiff's PIP application.

Lastly, the Washington Court of Appeals considered whether the trial court's decision to admit the PIP application was prejudicial. The court explained that a trial court's erroneous ruling is insufficient grounds for reversal unless the ruling was prejudicial. The court pointed out that throughout trial, Defendant's entire defense was based on the PIP application, alleging

that Plaintiff's son was "hit after he rode his bicycle between two parked cars and into the road." The court also took note of the fact that the trial court refused to admit the police report into evidence or read the police report into the record. Accordingly, the court held that the "improper admission of the PIP application was prejudicial," and reversed the trial court's decision.

View full opinion at: [https://www.courts.wa.gov/opinions/pdf/346714\\_pub.pdf](https://www.courts.wa.gov/opinions/pdf/346714_pub.pdf)



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