

Flanagan v Utter

2017 NY Slip Op 31590(U)

February 23, 2017

Supreme Court, Dutchess County

Docket Number: 50321/2014

Judge: Victor G. Grossman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X

Thomas S. Flanagan,

Plaintiff,

-against -

Bonnielin A. Utter and Caitlin E. Utter,

Defendants.

-----X

Heather N. Slyter,

Plaintiff,

-against-

Caitlin Utter, Bonnielin A. Utter and Thomas S. Flanagan,

Defendants.

-----X

Erin E. Corey, an Infant, by her Father and Natural Guardian,
Donald Corey, and Donald Corey, Individually,

Plaintiffs,

-against-

Thomas S. Flanagan, Caitlin Utter, and Bonnielin A. Utter,

Defendants.

-----X

GROSSMAN, J.S.C.

DECISION & ORDER

Index No. 50321/2014
Seq. #1

Index No. 50350/2014
Seq. #3

Index No. 4305/2014
Seq. #2

The following papers, numbered 1 to 33, were considered in connection with Defendant Caitlin Utter's Notice of Motion, dated September 14, 2016, for an Order:

1. Precluding Defendant Flanagan from offering into evidence an accident reconstruction report, where no expert has been disclosed;
2. Limiting the testimony of investigating police officers to facts and their observations, thereby excluding any hearsay or opinion testimony of the investigating officers; and
3. Precluding any evidence related to Defendant Caitlin Utter's drug use as being irrelevant and highly prejudicial.

PAPERS	NUMBERED
Defendant Utter's Notice of Motion/Affirmation/Exhs. A-Z	1-28
Defendant Flanagan's Affirmation in Opposition to Defendant Utter's Motion in Limine/Exhs. 1-2	29-31
Defendant Utter's Reply Affirmation in Opposition	32
Defendant Utter's Memorandum of Law in Reply	33

This is an action to recover damages for personal injuries as a result of a collision that occurred on State Route 22 in the Town of Dover, New York on March 20, 2014. According to the deposition testimony, 19-year old Caitlin Utter was driving north on Route 22 at approximately 55 miles-per-hour. Defendant Thomas S. Flanagan, who was driving a truck south at about the same speed, testified that when the vehicles were about 150 feet apart, Utter's vehicle veered into the southbound lane, but quickly returned to the northbound lane. Flanagan took his foot off the accelerator, coasted and kept his eye on Utter's vehicle. When the two vehicles were approximately 30 yards apart, Utter's vehicle again crossed into the southbound lane, ending up almost perpendicular to the flow of traffic. Utter claims she only crossed into the opposing lane of traffic once, immediately before the accident. Flanagan swerved into the northbound lane apparently attempting to avoid a collision. Virtually at the same time, however, Utter swerved back into the northbound lane. The two vehicles collided. A toxicology screen on Defendant Utter revealed the presence of marijuana and morphine, although no criminal charges

were brought. Morphine was administered at the scene and at the hospital.

The report at issue was prepared by Investigator Shannon Alpert, a member of the New York State Police Troop K Accident Reconstruction Unit. A certified copy of the report will be offered as a business record pursuant to CPLR §4518. Defendant Flanagan concedes that any inadmissible hearsay in the report must be precluded, but evidence constituting an exception to the hearsay rule will be permitted. See generally Memenza v. Cole, 131 A.D.3d, 1020 (2nd Dept. 2015); Hatton v. Gassler, 219 A.D.2d 697 (2nd Dept. 1995). The report does not appear to contain a causation analysis or conclusion by either Investigator Alpert or the investigating officers. To the extent such a conclusion or opinion is asserted, it will be inadmissible. Szymanski v. Robinson, 234 A.D.2d 992 (4th Dept. 1996). In the absence of an opinion or conclusion in the report, there is no obligation requiring expert disclosure. The report does not appear to be offered as the report of an expert, further negating the need for disclosure. Therefore, it begs the question, “For what purpose is the report being offered?” This question has not been answered in the moving papers, and, in the absence of any admissible purpose, the report, as a whole, shall not be admitted. However, the report contains factual observations, which may serve an evidentiary purpose. Counsel are directed to meet and confer in advance of trial to address any issues of inadmissible hearsay, opinions, or conclusions contained in the report. Failing agreement, the Court will address any open issues either in advance of, or during, trial.

With respect to Defendant Utter’s drug use, she testified at her deposition to ingesting marijuana the day before, but not the day of, the accident, and she denied being under the influence of marijuana at the time of the accident. Further, she consented to a blood test which

revealed the presence of THC (delta 9 tetrahydrocannabinol the active ingredient in marijuana), and carboxy THC (a metabolite of THC, the chemical substance in marijuana). The toxicology report indicates these two forms of THC. According to Defendant Flanagan's moving papers, one form remains in the body for up to 3-4 weeks after usage, while the second form reflects a more recent usage within a 24-hour period. However, there is neither expert testimony or a report to support these assertions, nor is there any expert support for: (1) the effects of THC; (2) the amount necessary to generate effects; (3) the time period of ingestion and its effects; and (4) the individual variations based on age, gender, weight, etc. Contra People v. Crandall, 255 A.D.2d 617 (3d Dept. 1998). In Crandall, there was testimony of observations about the defendant's driving, as well as expert testimony that the defendant was under the influence of marijuana. There was also officer testimony about signs of marijuana intoxication. Unlike common-law alcohol intoxication and statutory standards reflecting a correlation between blood-alcohol levels and driver impairment, THC's presence, standing alone, is an insufficient basis on which to invite the jury to determine impairment. People v. Walton, 70 A.D.3d 871, 873 (2d Dept. 2010). Moreover, the effects of marijuana usage may be highly individualized. There may be impacts on motor skills, judgment, perception, reaction time, and the duration of these effects on each individual user will vary. There is an incongruity between asking Defendant Utter whether, and when, she ingested marijuana, thereby inviting the jury to speculate, or infer, that she was under the influence of marijuana at the time of the accident, while simultaneously prohibiting the use of the toxicology screen to establish the presence of THC as a basis to infer and speculate that she was under the influence of marijuana at the time of the accident. The reconciliation of the incongruity is found in the absence of an expert to explain the science of

THC as a basis for inference and speculation. Accordingly, Defendant Utter may be asked about her marijuana use prior to the accident, but such questioning may not rely on the presence of THC in her blood.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
February 23, 2017


HON. VICTOR G. GROSSMAN, J.S.C.

To: Gary P. Kauget, Esq.
Attorney for Plaintiff (Flanagan)
9201 Fourth Avenue, Suite 707
Brooklyn, New York 11209

Robert W. Folchetti, Esq.
Klein & Folchetti Law P.C.
Attorneys for Plaintiff (Slyter)
219 Westchester Avenue, 6th floor
Port Chester, New York 10573

Stenger, Roberts, Davis & Diamond, LLP
Attorneys for Plaintiffs Corey
1136 Route 9
Wappingers Falls, New York 12590

Paul G. Hanson, Esq.
Adams, Hanson, Rego, Kaplan & Fishbein
Attorneys for Defendant Flanagan
725 Broadway, 4th floor
Albany, New York 12207

Sarah N. Wilson, Esq.
McCabe & Mack LLP
Attorneys for Defendants Utter
63 Washington Street
P.O. Box 509
Poughkeepsie, New York 12602-0509