

# VIRGINIA LAWYERS WEEKLY

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## VERDICTS & SETTLEMENTS

### Resolution of umbrella coverage allows settlement to paraplegic

#### \$2.8 Million Settlement

In June 2015, Tanya Dombrosky, 16, crashed her Hyundai Veloster in Botetourt County, hitting a tree and rolling the car. Liability was not seriously contested. Her unrestrained passenger, Matthew Green, 17, was ejected from the vehicle and suffered a fractured left maxillary sinus, right lung aspiration, and a wedge compression fracture of T12 with severe spinal stenosis and spinal cord compression. Matthew was diagnosed with acute paraplegia, and thoracic spine fracture, closed, with no feeling below the T10 level. He underwent surgery resulting in an open reduction internal fixation arthrodesis from T10 to L2 to stabilize his spine, including a discectomy at T11/T12.



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He also had urinary incontinence, pressure ulcers and bedsores. The accident also left him with some post-concussive effects such as cognitive deficits and impairments, including some memory loss. He had extensive rehabilitation therapy at Carilion and at Shriners' Hospital in Philadelphia to address pain, functional strength deficits, impaired mobility, impaired balance, limited ADLs/IADLs, limited lower extremity function, impaired sensory function and myofascial/spinal restrictions and tenderness. Finally, he also suffered a torn right deltoid muscle which gave him a winged scapula and led to the diagnosis of "right serratus nerve palsy" which required a nerve pedicle transfer in the shoulder in an attempt to innervate part of the deltoid muscle.

This involved harvesting two intercostal nerves from the C3-C4 area of the neck, and transferring them, leaving a 7-inch scar extending from under the right nipple to around to the back.

Dombrosky lived with her mother and grandmother in her grandmother's home. She was insured under a USAA policy with \$300,000 limits obtained by the mother. In addition, Encompass had issued to the grandmother an umbrella policy with limits of \$2.5 million and an auto policy with limits of \$250,000 which did not name the Veloster. Encompass denied coverage under ei-

ther policy and filed a declaratory judgment proceeding in federal court against Green and Dombrosky (the "coverage action"). The parties agreed to stay the state court action and that upon final disposition of the coverage action USAA would pay over its entire policy limits, Encompass would pay over all policy limits found applicable in the coverage action, and Green would give Dombrosky a general release and dismiss the state court action with prejudice. The coverage action was decided in Encompass Independent Ins. Co. v. Dombrosky (VLW 017-3-090). With regard to applicability of the umbrella policy, the issue was whether the grandmother maintained or regularly used the Veloster which had only been in the household for nine days prior to the accident. The Veloster had not needed any repairs, but the grandmother had filled the tank with gas at least once, and when not in use, it remained in the grandmother's garage.

Also, the purchase price of the Veloster included an oil change coupon and a limited warranty. Encompass argued that "maintain" was limited to acts of maintenance such as state inspections, tire rotations, oil changes and the like. Green argued that the plain meaning of the word means "to preserve from failure or decline" which could include mechanical or aesthetic decline. The court ultimately found that the undefined word "maintain" in the policy was ambiguous, and that the meaning advanced by Green afforded coverage because the grand-

mother sheltered the vehicle in her garage for appearance purposes, fueled the vehicle and paid for its first oil change and warranty.

The court also found that the Veloster was furnished and available for the grandmother's regular use because she drove the vehicle two to three times in nine days, she did not have to ask permission to use the vehicle, the keys were kept inside the vehicle, and there were no restrictions on the grandmother's use of the vehicle. The grandmother's "dominion and control" over the vehicle were important factors.

While the vehicle was furnished and available for grandmother's use for purposes of the extended non-owned coverage endorsement to the auto policy, the court ultimately found that endorsement did not apply given the non-conflicting carve out for vehicles owned by a family member though not specifically listed in the policy's declarations. The court also noted that emailed assurances of coverage by Encompass to the grandmother's husband at the time of purchase did not stop it from denying coverage under the language of the policy.

With no appeals taken by any party, Matthew's claims were resolved with the payment by USAA of its policy limits and by Encompass of its umbrella policy limits for a total of \$2.8 million. Plaintiff's counsel worked with JMW Settlements to structure part of the settlement to ensure Matthew would receive periodic payments throughout his lifetime with a 40-year guarantee.

[17-T-104]

**Type of action:** Automobile Accident

**Date resolved:** May 10, 2017

**Injuries alleged:** Grade 2 anterolisthesis of the T11 on T12 vertebral body and wedge compression fracture of T12 with severe spinal stenosis and spinal cord compression; acute paraplegia with no feeling below T10 level; open reduction internal fixation of spine extending from T10 to L2 level; discectomy at T11/T12; urinary incontinence; fractured sinus; some cognitive deficits including some memory loss; torn right deltoid muscle with right serratus nerve palsy

**Special damages:** Medical bills of \$487,851; lifetime lost wages claimed; expense of life care plan not incurred

**Verdict or settlement:** Settlement

**Amount:** \$2,800,000

**Attorney for plaintiff:** Francis H. "Chip" Casola, Roanoke

**Attorneys for defendant:** Melissa W. Robinson, Roanoke; Carter T. Keeney, Richmond

**Plaintiff's experts:** Carilion Clinic and Shriners' Hospital treating physicians; Robert Waters, JMW Settlements, Inc.

**Name of case:** Matthew T. Green v. Tanya N. Dombrosky

**Court:** Botetourt County Circuit Court

**Case no.:** CL16-00211

**Name of judge:** Judge Glen Conrad

**Insurance carrier:** USAA and Encompass Independent Insurance Company