

## Scholarly Commons @ UNLV Boyd Law

---

Nevada Supreme Court Summaries

Law Journals

---

10-1-2009

### Summary of Delgado v. American Family Ins. Group, 125 Nev. Adv. Op. 44

Thomas D. Pilkington  
*Nevada Law Journal*

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Law Commons](#)

---

#### Recommended Citation

Pilkington, Thomas D., "Summary of Delgado v. American Family Ins. Group, 125 Nev. Adv. Op. 44" (2009).  
*Nevada Supreme Court Summaries*. 354.  
<https://scholars.law.unlv.edu/nvscs/354>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

*Delgado v. American Family Ins. Group*, 125 Nev. Adv. Op. 44  
(Oct. 1, 2009)<sup>1</sup>

**INSURANCE LAW – POLICY STACKING**

**Summary**

Appeal from a district court order granting summary judgment in a contract action.

**Disposition/Outcome**

Reversed the order of the district court, concluding that a passenger injured by concurrently negligent drivers may recover from both the permissive driver’s insurance policy liability benefits based on the permissive driver’s negligence and underinsured motorist benefits based on the other driver’s underinsured status.

**Factual and Procedural History**

In December 2004, Dionicia Delgado was injured in an automobile accident while riding as a passenger in a car owned and operated by Eunice Marcelino. Another car, owned and operated by Toquanda Dean, struck Marcelino’s car, severely injuring Dionicia. Marcelino was insured by American Family Insurance Group (hereafter “AF”) for liability up to \$50,000 per person and had underinsured motorist coverage up to \$25,000 per person. Dean carried an insurance policy with a \$15,000 liability limitation.

Marcelino’s underinsured motorist policy promises that AF will “pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle.” An “[i]nsured person” is defined as the contracting party, relatives, and “[a]nyone else occupying [Marcelino’s] . . . insured car.” The parties do not dispute that Dionicia was an “[i]nsured person” under Marcelino’s underinsured motorist provision.

AF’s policy defined an “[u]nderinsured motor vehicle” as “a motor vehicle which is insured by a liability bond or policy at the time of the accident and the amount of the bond or policy . . . [i]s less than the limit of underinsured motorists coverage under this policy.” Although Marcelino’s policy excludes Marcelino’s vehicle from underinsured/uninsured coverage, another driver’s vehicle qualifies as underinsured if the other driver’s policy carried less liability coverage than the limit of Marcelino’s under/uninsured coverage.

Delgado offered to settle with AF for \$75,000--\$50,000 for liability plus \$25,000 for underinsured coverage. Dionicia also offered to settle with Dean’s carrier for the extent of Dean’s \$15,000 liability policy. AF denied Dionicia’s underinsured motorist claim.

Dionicia and her husband filed suit, complaining that by denying Dionicia’s demand for payment of Marcelino’s underinsured coverage, AF breached its contractual obligations. The Delgados grounded their breach of contract claim on the factual assertion that Marcelino’s vehicle qualified as the underinsured vehicle.

---

<sup>1</sup> By Thomas D. Pilkington

AF moved for summary judgment, arguing that the Delgados could not recover under the assertion that Marcelino's car was the underinsured vehicle because Marcelino's policy excluded Marcelino's car from qualifying as underinsured. In support, AF cited to Nevada Supreme Court decisions *Peterson*,<sup>2</sup> and *Baker*,<sup>3</sup> where the court precluded recovery under both liability and underinsured motorist coverage provisions of a single insurance policy.

In opposition, the Delgados argued that the policy only excluded vehicles covered under Marcelino's policy, and the Delgados alleged that their underinsured motorist claim was based on the Dean vehicle being underinsured. Further, the Delgados distinguished their case from *Peterson* and *Baker* by arguing that, unlike in those cases, where claimants sought to recover under the permissive driver's negligence alone, here, the Delgados' claim sought to recover based on Dean's joint negligence and the Dean vehicle being underinsured.

The district court concluded that Marcelino's vehicle was not "underinsured" as defined by the policy and that *Peterson* and *Baker* barred recovery for both liability and underinsured benefits, and consequently granted AF's motion for summary judgment. This appeal followed.

## **Discussion**

Initially, AF contended that the Delgados' claim was barred by judicial estoppel because the Delgados named the wrong motorist in the complaint. The court disagreed since the Delgados argued the correct underinsured party in their opposition to AF's motion for summary judgment, without objection by AF.

In resolving the appeal, the court addressed an issue of first impression: whether, in light of *Peterson* and *Baker*, a passenger injured in a two-car collision where both drivers are concurrently negligent may recover liability benefits under the permissive driver's policy based on the permissive driver's negligence, and also recover underinsured motorist benefits under the same policy for the negligence of the other driver, whose vehicle was underinsured.

### **A. *Peterson* and *Baker* are not controlling in this case**

#### **1. *Peterson***

In *Peterson*, the court addressed whether a passenger "is entitled to recover benefits under both the 'bodily injury' and the uninsured/underinsured motorist coverages afforded by a single insurance policy."<sup>4</sup> Because *Peterson* sought recovery based only on the permissive driver's negligence, but under both coverages in the single insurance policy, the court concluded that *Peterson* was essentially attempting to increase the liability coverage under the owner's policy, and the stacking of both policies was impermissible.<sup>5</sup>

#### **2. *Baker***

In *Baker*, the passenger sought to recover liability and uninsured/underinsured motorist benefits under her own policy of insurance, and not the permissive driver's.<sup>6</sup> The court determined that once a passenger has recovered under the vehicle owner's liability policy—

---

<sup>2</sup> *Peterson v. Colonial Ins. Co.*, 100 Nev. 474, 686 P.2d 239 (1984).

<sup>3</sup> *Baker v. Criterion Ins.*, 107 Nev. 25, 805 P.2d 599 (1991).

<sup>4</sup> *Peterson*, 100 Nev. at 475, 686 P.2d at 239.

<sup>5</sup> *Id.* at 476, 686 P.2d at 240.

<sup>6</sup> *Baker*, 107 Nev. at 26, 805 P.2d at 599-600.

whether that policy is the permissive driver's policy or the passenger's own policy—the passenger may not also recover under the owner's uninsured/underinsured motorist policy.<sup>7</sup>

3. District court erred when it relied on *Peterson* and *Baker*

The Delgados argued that their case was factually distinguishable from the *Peterson* and *Baker* cases, which involved single automobiles and the vehicles' respective insurance policies, whereas their case involves the concurrent negligence of two drivers, with separate insurance policies, both of which were insufficient according to Dionicia.

In *Peterson* and *Baker*, the court relied upon a Nevada statute requiring underinsured vehicle coverage to enable “the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer which he is legally entitled to recover from the owner or operator of the other vehicle.”<sup>8</sup> The *Peterson* and *Baker* courts reasoned that allowing a passenger to recover under the permissive driver's liability and underinsured policy based solely on the permissive driver's negligence would impermissibly increase the liability limit for the owner/insured.<sup>9</sup>

Neither *Peterson* nor *Baker* precludes recovery of underinsured benefits under the facts presented in this case. In *Peterson* and *Baker*, both claims were based on the negligence of the permissive driver, not a third-party tortfeasor. Contrary to the facts in *Peterson* and *Baker*, here, Dionicia made her claim based on Dean's concurrent negligence and the Dean vehicle being underinsured. The Delgados did not assert that Marcelino's vehicle qualified as an underinsured vehicle. This distinction is important because the stacking prohibition set forth in *Peterson* and *Baker* is not implicated in this situation.

4. Allowing recovery of underinsured benefits under the facts presented in this case coheres with the purpose of the uninsured/underinsured motorist coverage

The court stated in *St. Paul Fire* that the purpose of uninsured/underinsured motorist coverage is to compensate the insured for damages “based upon the tort liability of the uninsured, underinsured, or hit-and-run driver.”<sup>10</sup> Allowing a passenger to recover both liability and underinsured motorist benefits under a single policy of insurance is consistent with the purpose of such coverage because the passenger is being compensated for damages caused by the joint negligence of an uninsured/underinsured driver.

The court pointed to several secondary sources to support the proposition that a passenger that is insured by the permissive driver's insurance policy may also recover under the underinsured motorist provision when a second negligent vehicle involved in the accident was underinsured.<sup>11</sup>

---

<sup>7</sup> *Id.* at 26, 805 P.2d at 600.

<sup>8</sup> NEV. REV. STAT. § 687B.145(2) (2007); *Peterson*, 100 Nev. at 475, 686 P.2d at 240; *Baker*, 107 Nev. at 27, 805 P.2d at 600.

<sup>9</sup> *Peterson*, 100 Nev. at 476, 686 P.2d at 240; *Baker*, 107 Nev. at 27, 805 P.2d at 600.

<sup>10</sup> *St. Paul Fire v. Employers Ins. Co. of Nev.*, 122 Nev. 991, 993, 146 P.3d 258, 260 (2006).

<sup>11</sup> 3 IRVIN E. SCHERMER & WILLIAM J. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 39:12 (4th ed. 2004); 1 ALAN I. WIDISS & JEFFREY E. THOMAS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 14.6 (3d ed. 2005).

Other jurisdictions have also determined that a guest passenger may recover for another driver's negligence under his or the permissive driver's uninsured or underinsured motorist policy and recover for the permissive driver's negligence as a third party claimant.<sup>12</sup> The court in *Dairyland* reasoned that when the permissive driver's negligence—i.e. when the permissive driver's policy excludes the permissive driver's vehicle from being deemed underinsured—a passenger could recover underinsured motorist benefits for injuries caused by a jointly negligent and underinsured motorist involved in the accident when the permissive driver's policy language extended coverage to that passenger.<sup>13</sup>

Similarly, other courts have reasoned that prohibition against stacking policies is not implicated when the passenger's injuries are attributable to joint tortfeasors because it is the other driver's concurrent negligence and uninsured status that triggers the passenger's claim for underinsured benefits from his driver's insurer.<sup>14</sup>

Here, under Marcelino's policy, Delgado was a lawful occupant of Marcelino's vehicle; therefore, the policy extended underinsured motorist coverage to Delgado at the time of the accident. Although Marcelino's vehicle could not qualify as an underinsured vehicle under the terms of the policy, the Dean vehicle could. Based on the aforementioned rationale, the court concluded that if Marcelino and Dean are adjudged jointly negligent, the Delgados can recover under Marcelino's underinsured motorist policy for Dean's negligence and the Dean vehicle's underinsured status. Therefore, AF was not entitled to judgment as a matter of law.

## **Conclusion**

The court reached several conclusions. First, judicial estoppel did not preclude the Delgados from raising the argument that their claim was based on the concurrent negligence of both drivers involved in the accident. Second, because the Delgado case is factually distinguishable from *Peterson* and *Baker*, the stacking prohibition set forth in those cases is inapplicable to the facts presented in the Delgado case. Third, accordingly, Dionicia was entitled to recover under both the liability and underinsured motorist provisions of Marcelino's policy with AF. Lastly, because AF was not entitled to judgment as a matter of law, the court reversed and remanded the order of the district court.

---

<sup>12</sup> See, e.g., *Dairyland Ins. Co. v. Bradley*, 451 S.E.2d 765 (W. Va. 1994).

<sup>13</sup> *Id.* at 767-68.

<sup>14</sup> See, e.g., *Woodard v. Pa. Nat. Mut. Ins. Co.*, 534 So. 2d 716, 721 (Fla. Dist. Ct. App. 1988); *Lahr v. Am. Family Mut. Ins. Co.*, 528 N.W.2d 257, 260 (Minn. Ct. App. 1995).