2008 BENCH BAR CONFERENCE

CIVIL LITIGATION UPDATE

by

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ATTORNEY-CLIENT PRIVILEGE

A. WAIVER OF PRIVILEGE

Carbis Walker, LLP v. Hill, Barth and King, LLC, 930 A.2d 573 (Pa. Super. 2007)

Background: Consulting firm brought action against former employee and competitor for breach of contract, interference with contractual relations, misappropriation of confidential information or trade secrets, and unfair competition. The Court of Common Pleas, Lawrence County, Civil Division, Cox, J., granted consulting firm's motion for protective order in connection with confidential document inadvertently faxed by competitor's counsel to firm's counsel. Competitor appealed, claiming that document was protected by attorney-client privilege.

Holdings: The Superior Court, No. 1323 WDA 2006, Orie Melvin, Jr., held that:

(1) protective order was a collateral order subject to immediate appeal

(2) Pennsylvania law, rather than Ohio law, governed the issue; and

(3) competitor's counsel waived attorney-client privilege such that document was discoverable.

Affirmed.

Pennsylvania law, rather than Ohio law, governed application of the claimed attorney-client privilege to confidential document inadvertently faxed to plaintiff's counsel, although communication originated in Ohio and headquarters of defendant and its counsel were located in Ohio. The Court noted that the action was filed in Pennsylvania under allegations that the cause of action arose out of transactions or occurrences taking place in Pennsylvania. Also, the defendant admitted each of those averments pertaining to Pennsylvania. The Court also noted that the lawsuit arose from employee's employment with both plaintiff and defendant in their respective offices located in Pennsylvania. Additionally, the inadvertent disclosure was made to plaintiff's counsel in Pennsylvania and the communication was intended to be transmitted to defendant's local counsel in Pennsylvania. 42 Pa. C.S.A. § 5928; Ohio R.C. § 2317.0.

Generally speaking, the attorney-client privilege is designed to foster confidence between attorney and client, leading to a trusting, open dialogue. The Court noted that the privilege derives from the recognition that full and frank communication between attorney and client is necessary for sound legal advocacy and advice, which serve the broader public interests of observance of law and administration of justice.

It was held that four elements must be satisfied in order to successfully invoke the protections of attorney-client privilege: (1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate, (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort, and (4) the privilege has been claimed and is not waived by the client. 42 Pa. C.S.A. §5928.

Here, the competitor's counsel was found to have waived attorney-client privilege in connection with a two-page document mistakenly faxed to the consulting firm which contained general legal opinion regarding the enforceability of competitor's employee's previous employment contract with consulting firm such that the document was found by the Court to be discoverable. The Court noted that the competitor could have reasonably taken preventative steps to avoid disclosure. It was also emphasized that the disclosure consisted of a single document and that the disclosure was complete. The Court was also influenced by the fact that the competitor delayed in taking steps to rectify the disclosure and did not seek return of the document until 18 days after competitor's counsel was notified of the transmission. Lastly, the court found that the interests of justice were served by allowing waiver. 42 Pa. C.S.A. §5928.

As for the standard of review, the Court noted that the question of whether attorney-client privilege protects a particular communication from disclosure is a question of law reviewed de novo. 42 Pa. C.S.A. §5928.

The party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked. The burden then shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege has been waived or because some exception applies. 42 Pa. C.S.A. §5928.

In this matter, the Court applied a five-factor balancing test to determine whether inadvertent disclosure amounted to waiver of the attorney-client privilege: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) any delay and measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would or would not be served by relieving the party of its errors.

RULES OF CIVIL PROCEDURE

A. JURISDICTION

Haas v. Four Seasons Campground, Inc., PICS Case No. 08-1078 (Pa. Super. June 26, 2008)

Subjecting parties to general personal jurisdiction solely on the basis of a highly interactive website would best Pennsylvania with jurisdiction over almost every business with a website today, and that is going too far. The Superior Court affirmed the decision sustaining the defendant's Preliminary Objections.

Defendant Four Seasons Campground, in New Jersey, rents campground and cabin spaces. Plaintiffs, Pennsylvania residents, viewed the defendant's website, and decided to lease campground space. The website, however, did not allow contract purchases online, so plaintiffs drove to New Jersey and signed a seasonal contract.

While staying at the site they rented, a branch fell on plaintiff-husband's head. They later brought an action against Four Seasons in Pennsylvania. Four Seasons filed Preliminary Objections on the basis of a lack of personal jurisdiction, which the trial court granted.

On appeal, the Superior Court found there was neither general or specific personal jurisdiction. The basis inquiry distilled to whether the defendant had availed itself of the minimum contacts necessary to vest the Commonwealth with jurisdiction in accordance with notions of fair play and substantial justice.

Here, the website and brochures Four Seasons sold were not sufficient to subject it to specific jurisdiction. A website must target users of the forum state, and engage the user in such a way as to give rise to a claim that a transaction occurred because of the use of the website. Four Season's contracts were not available online, and in that sense the website was passive, and the contract in question here was entered into in New Jersey.

Further, contracts over the internet between a party and Pennsylvania must be continuous and systematic in order to vest Pennsylvania courts with jurisdiction. This is a sliding scale, and here the website occupied a middle ground on the spectrum. It is minimally interactive. In this instance, the court had to determine whether the website was targeted directly at Pennsylvanians and whether the website was central to the defendant's business in Pennsylvania. This website made only de minimis references to Pennsylvania, largely as an indicator of relative location of the campground ("30 minutes to Philadelphia") and there was no real evidence about how the website affected revenues, let along what percentage of the website users were Pennsylvanians.

Accordingly, the Superior Court affirmed.

DePrizio v. LTS Realty Co., 2008 WL 169640 (M.D.Pa. 2008, Kosik, J.)

Holding: Court finds that an arbitration agreement under a real estate construction contract was procedurally and substantively unconscionable and therefore unenforceable. As such, jurisdiction was found to continue with the Middle District Court and not arbitration.

This case arises from contracts for the sale of land and for the construction of a home. In the construction contract, drafted by LTS Builders, an arbitration clause required the homeowner to submit any disputes to arbitration arising out of the home construction. However, the contract also reserved for the LTS defendants alone the option to litigate any disputes in the Monroe County Court of Common Pleas.

Various problems arose with the construction of the plaintiff's home. The plaintiffs filed suit in the Middle District. The defendants responded by filing a motion to dismiss, arguing that the arbitration clause required the plaintiffs to arbitrate the claim. The plaintiffs argued that the arbitration provision was procedurally and substantively unconscionable.

Notably, in this case, Judge Kosik abstained his judgment until the Pennsylvania Supreme Court had responded to the same issue certified to its attention by the Third Circuit in another matter, i.e. the issue of whether such clauses were unconscionable. After the Pennsylvania Supreme Court ruled that the issue was a question of law and that the necessary inquiry is often fact-sensitive.

As stated, in the case before him, Judge Kosik found that the arbitration clause was indeed procedurally and substantively unconscionable in part because it reserved judicial remedies to the defendants alone. The clause was therefore found to be unenforceable. As such, the case proceeded in the Middle District and not by way of arbitration.

B. SERVICE OF PROCESS

Englert v. Fazio Mech. Ser., Inc., 932 A.2d 122 (Pa. Super. 2007).

The cause of action arose from a traffic accident on March 25, 2002, allegedly caused by the negligence of Timko, while in the scope of his employment with Fazio. Englert filed a praecipe of writ of summons on September 19, 2003. The address given to the Sheriff by Englert to serve the defendants was taken from the local phonebook. However, Fazio had moved from that address so service was not completed. The Sheriff's Department filed a return of service on October 23, 2003, indicating that the defendants were not found. Englert's counsel did not check with the Court to ensure that service had occurred but rather waited for the Sheriff to mail him a copy of the return. Counsel moved from his office on October 27, 2003, and was experiencing failed mail deliveries as a result.

Englert received a letter from the tortfeasor's insurance carrier on March 14, 2004, informing him that the statute of limitations was going to expire in two weeks. On March 31, 2004, Englert filed a petition to reissue the writ of summons, more than two years after the accident.

The trial court granted summary judgment for defendants and an appeal followed. The Superior Court noted that the statute of limitations is tolled only if the plaintiff makes a good faith effort to effectuate service after the action is commenced. Moses v. T.N.T. Red Star Express, 725 A.2d 792 (Pa. Super. 1999). The Superior Court also found that it is the plaintiff's burden to demonstrate that efforts to serve the opposing party were reasonable. Bigansky v. Thomas Jefferson University Hospital, 658 A.2d 423, 433 (Pa. Super. 1995). Furthermore, "once the action has been commenced, the defendant must be provided notice of the action in order for the purpose of the statute of limitations to be fulfilled." Englert, 932 A.2d at 125, citing, McCreesh v. City of Philadelphia, 585 Pa. 211, 222, 888 A.2d 664, 671 (2005).

In the case at bar, the Superior Court concluded that Englert had not demonstrated good faith in serving the defendants. The Superior Court noted that plaintiff's attorney did not inquire whether service had been completed nor did plaintiff attempt to effect service after an insurance carrier called to inform him of the impending ending of the statute of limitations. Given these facts, the Superior Court found that a grant of summary judgment was well within the discretion of the trial court and should not be disturbed.

Shipers v. Tunic, 82 Pa. D. & C. 4th 256 (C.P. Allegheny 2007).

Plaintiff sustained injuries as the result of an automobile accident which occurred on September 18, 2003. The lawsuit was instituted on April 8, 2004. Service of the complaint was initially attempted on April 8, 2004, and again on December 17, 2004, but the Sheriff could not make service. Twenty-two months later, the plaintiff reinstated the complaint on October 27, 2006, and the defendant was finally served on November 1, 2006.

The defendant sought judgment on the pleadings on the grounds that there was a 22 month period in which service was not attempted. The issue the Court considered was whether the good faith effort to effectuate service of the action in December 2004 tolled the limitations period for an additional two years or whether plaintiff's claims were barred by the statute of limitations because of plaintiff's failure to continuously seek to make service.

The trial court analyzed the Supreme Court opinion in Witherspoon v. City of Philadelphia, 768 A.2d 1079 (Pa. 2001), which had rejected the prior case law utilizing the Equivalent Period Doctrine. The Equivalent Period Doctrine provided that where a complaint was filed within the statute of limitations applicable to the cause of action.

All that was required was a single good faith effort to effect service which kept the action alive for another equivalent period (i.e., two years in a personal injury action). See, Farinacci v. Beaver County Industrial Development Authority, 511 A.2d 757, 759 (Pa. 1986). A very fractured Supreme Court majority in Witherspoon held that "process be immediately and continuously reissued until service is made." Witherspoon, 768 A.2d at 1083-1084.

In the present case, the Court reviewed a number of Superior Court cases decided since Witherspoon which have recognized the good faith effort rule and rejected the "immediate and continuous" rule. The Court concluded that the defendant's motion for judgment on the pleadings would be denied notwithstanding the 22 month delay in attempting service.

C. REMOVAL TO FEDERAL COURT

Penn Patio Sunrooms, Inc. v. Ohio Casualty Ins. Co., 2008 WL 919543 (M.D.Pa. March 31, 2008, Caputo, J.)

Holding: Although defendant properly filed notice of removal 30 days from a recognized initial pleading, the notice was filed beyond the one year exception dating from the time the state court action was originally filed by writ of summons. Plaintiff's motion to remand granted.

The plaintiff filed suit in the Luzerne County Court of Common Pleas on January 27, 2006. The Complaint was not filed until two (2) years later on January 7, 2007. The defendant filed a notice of removal within thirty (30) days of the Complaint. The plaintiff responded with a motion to remand to the state court.

Judge Caputo initially held that the defendant timely filed their Notice of Removal within thirty (30) days of the "initial pleading…from which it may first be ascertained that the case is one which is or has become removable," i.e. from which it may be determined that there is diversity and an amount in controversy greater than $75,000.

Judge Caputo noted that the courts have confirmed that a complaint and not the writ of summons is the type of pleading that will trigger the start of the 30 day time period to file the Notice. The Writ of Summons does not trigger the start of the time period as the claim for relief is not set forth therein and it only serves to identify the court and parties involved and a notification that a suit has been filed. In other words, a writ of summons, without a complaint does not state a cause of action or controversy sufficient to satisfy the requirements of federal court jurisdiction.

The Judge also rejected the plaintiff's attempt to quash the Notice of Removal under the 30 day argument by noting that, although the case was started by writ, the defendants did come to know the amount in controversy through pre-complaint

depositions. Judge Caputo noted that testimony, and letters from counsel, can not serve to trigger the 30 day time period for removal as the removal statute specifically mandates that the time period is triggered by an initial pleading. As such, the defendants were initially found to have timely removed the action within the 30 day deadline from the filing of the Complaint

Nevertheless, the Court granted the plaintiff's motion to remand under the one year exception of 28 U.S.C. § 1446(b), which provides that "a case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity jurisdiction] of this title more than one year after *commencement* of the action." [emphasis added].

Judge Caputo noted that the Writ of Summons in this matter had been filed in January of 2006 and the Notice of Removal was not filed until January of 2008, rendering the Notice as untimely under the exception to the rule.

It was noted that although a defendant may not remove a writ of summons to the federal court, with the one year time limit for removal commencing with the filing of a writ, the defendant did have the opportunity to file a Praecipe for a Rule to File Complaint to compel the plaintiff to file a Complaint that could then be removed.

Cmiech v. Electrolux Home Products, Inc., 520 F.Supp.2d 671 (M.D.Pa. 2007 Caputo J.)

Holding: (1) Defendant's did submit to jurisdiction of state court so as to trigger 30 day time limitation for removal of action to federal court, and

(2) Later-served defendant had 30 days from date of service to remove case to federal court.

The plaintiffs filed their personal injury action in state court Luzerne County Court of Common Pleas against Defendant Electrolux Home Products, Inc. and Defendant Lowe's Home Centers, Inc.

Plaintiff's counsel alleged that defense counsel agreed to accept service on behalf of both defendants. On June 21, 2007, plaintiff's counsel sent a time-stamped copy of the Complaint to defense counsel along with a form for an attorney's acceptance of service in accordance with Pa.R.C.P. 402(b).

Additionally, on June 29, 2007, the Sheriff's Department later served the Complaint on Defendant Lowes Home Centers, Inc. Although the defendants admit that this June 29, 2007 service was effective on Lowes, defense counsel denied that he had the prior authority to accept service on behalf of Electrolux as alleged by plaintiff's counsel.

Nevertheless, defense counsel continued to act as if service was effective in that defense counsel repeatedly requested extensions to file an answer and new matter.

Extensions were granted by plaintiff's counsel through to August 10, 2007. A further extension was requested on August 9, 2007 because a general counsel for Electrolux was away on vacation. Counsel for Electrolux had previously accepted service on August 7, 2007.

In any event, both defendants filed a notice of removal on August 14, 2007. The plaintiffs responded with a motion to remand the case back to the state court level.

Judge Caputo began his decision by noting that the removal statute provides that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b).

The United States Supreme Court had previously ruled that a defendant's time to remove "is triggered by simultaneous service of the summons and complaint, or receipt of the complaint 'through service or otherwise,' after and apart from the summons, but not by mere receipt of the complaint unattended by an formal service." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999)(holding that time for filing notice of removal began to run when plaintiff formally served the defendant, not at the earlier date when plaintiff attorney faxed a courtesy copy of recently filed complaint). Under this rule, defendants are guaranteed that they will not be punished for not taking steps to remove the case until it has been officially confirmed that the defendants were aware of the case, i.e. by way of formal service of the complaint.

Judge Caputo noted that the Murphy Brothers decision only addressed when the 30 day time period for removal begins, not the proper method of service. That question required Judge Caputo to review Pennsylvania law to determine whether there was service of process, or a waiver of that formality, at least 30 days before the defendants' August 14, 2007 notice of removal.

Under the Pennsylvania Rules of Civil Procedure, proper service of the initial process may be made upon the defendant by the Sheriff's Department. In the alternative, under Pa.R.C.P. 402(b), a defendant or his authorized agent may accept service by filing an acceptance of service form with the court. Judge Caputo also noted that the Pennsylvania courts have recognized that service of process may be obtained through waiver or consent, i.e. by a voluntary appearance by the defendant in the case going beyond merely entering a written appearance and evidencing an intent to forego any objection to a defective service.

As there was no dispute that Defendant Lowes had been properly served on June 29, 2007 by the Sheriff's Department, Judge Caputo summarily found that Lowes' notice of removal was obviously untimely.

With respect to Electrolux, the Court found that that defendant had not waived any alleged defective service of process by way of a voluntary appearance in the case.

Counsel for Electrolux had previously agreed to a consolidation of this case with a companion subrogation action. Additionally, the defense counsel also repeatedly sought out and secured extensions to file an answer and new matter to the complaint. Yet, Judge Caputo found that although these actions may have evidenced some intent to forego any objections to any alleged improper service, such actions by defense counsel did not amount to a submission to the jurisdiction of the court or an actual waiver of any defects.

Rather, Judge Caputo found that the plaintiffs did not make good faith efforts to complete service on Electrolux, particularly after the acceptance of service form was never returned by defense counsel. Since there was no valid service and since the receipt of a time-stamped but unserved complaint was insufficient under the Murphy Brothers to trigger the start of the time limitation of § 1446, the Court found that Electrolux was not served until defense counsel finally accepted service on its behalf on August 7, 2007.

Thus, Judge Caputo was faced with the unique scenario of an untimely filed notice of removal on behalf of Defendant Lowes but a timely filed notice on behalf of Defendant Electrolux. The general rule is that, where there are multiple defendants, all such defendants must join in the removal petition or consent to the removal. Here, both defendants joined in the petition, but were served at different times.

Judge Caputo reviewed the split of authority in the federal court system on how to address this scenario. Some courts adopted the first-served rule, some an intermediate rule, and some the last-served rule as to when the time limit begins. Prior to this decision in Cmiech by Judge Caputo, neither the Third Circuit nor the U.S. Supreme Court had weighed in on the issue.

Judge Caputo followed a prior decision of Judge Vanaskie in the case of Shadie v. Aventis Pasteur, Inc., 254 F.Supp.2d 509, 515 (M.D.Pa. 2003), and applied the "later-served defendant" rule, i.e., the last served defendant may remove within thirty days of service, and other defendants may join even if their own removal periods have expired.

Turning to the facts of this case, since the later-served Defendant Electrolux's removal was found to be timely and since Lowes had consented to the removal, the Court denied the plaintiff's motion for a remand.

REMOVAL TO FEDERAL COURT CHECKLIST

-The federal removal statute provides that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b).

-Writ of summons is **NOT** considered to be an "initial pleading" removable to federal court because it does not set forth the claim for relief. Penn Patio Sunrooms, Inc., 2008 WL 919543.

-Even if Writ of summons combined with deposition testimony or letters of counsel shows that amount in controversy in excess of $75,000, still not removable; writ of summons still does not meet definition of "initial pleading" in this context. McFarlane v. Muse, 2005 WL 2133672 (M.D.Pa. 2005 Caputo, J.).

-If state court case commenced by writ, defendant has one year overall to remove action to federal court (28 U.S.C. § 1446(b)); therefore, file Rule to File Complaint to get the necessary removable "initial pleading" setting forth the claim for relief. Penn Patio Sunrooms, Inc., 2008 WL 919543.

-Once Complaint is filed in state court and properly served, defendant has 30 days to file Notice of Removal. 28 U.S.C. § 1446(b).

-AMENDED COMPLAINT: If case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after the defendant's receipt of an amended complaint if that pleading renders the case one that is removable. 28 U.S.C. § 1446(b).

-If Complaint was the original process, time begins to run when defendant is formally served with the Complaint in accordance with the Pennsylvania Rules of Civil Procedure. Cmiech, 520 F.Supp. 671.

-If Writ of Summons was the original process, 30 day time begins to run when defendant is provided with copy of plaintiff's Complaint. Cmiech, 520 F.Supp. 671.

-LATER (LAST) SERVED RULE: Where there are multiple defendants, the last served defendant may remove within 30 days of service, and the other defendants may consent to the later-served defendant's removal even if their own removal periods have expired. Cmiech, 520 F.Supp. 671.

D. JOINDER OF SEPARATE CAUSES OF ACTION/CONSOLIDATION

Decker v. Nationwide Insurance Co., 05-CV-1863 and 06-CV-2119 (Lacka. Co. March 4, 2008, Minora, J.)

Holding: Court granted plaintiff's motion to consolidate his bad faith litigation against the carrier with the carrier's declaratory judgment action on whether plaintiff was entitled to UIM coverage.

Judge Minora reviewed the two actions before him and found that under Pa.R.C.P. 213(a), which allows for the consolidation of actions arising out of "the same transaction or occurrence," permitted consolidation of the plaintiff's bad faith action and the carrier's declaratory judgment action on the issue of coverage.

Kalker v. Moyer, 921 A.2d 21 (Pa. Super. 2007).

Kalker was involved in two separate motor vehicle accidents, several months apart. The accidents took place in two different counties, Philadelphia and Berks. Kalker filed one complaint in Philadelphia County for both accidents. Kalker argued that because she had sustained repeated injury to her right arm which required surgery and because her doctor was unable to determine which accident caused what amount of damage, she should be permitted to file both actions in Philadelphia County. The defendants in the second accident filed preliminary objections alleging improper venue. The motion was granted.

Kalker appealed and the Superior Court considered one issue, "when two accidents occur in two different counties seven months apart, are they part of a 'series of transactions or occurrences' which should be joined to be tried in one county, where plaintiff's injuries are to the same part of the body and it is difficult to say which accident caused what amount of harm?" Kalker, 921 A.2d at 22.

The Superior Court held that the two accidents were not part of a series of transactions or occurrences as there were no common facts tying the two accidents together other than the injury to Kalker's arm. Furthermore, the Superior Court noted that if Kalker had initially filed two actions in two different counties, it would be highly unlikely that the two actions would be consolidated given the fact that there are two totally different theories of liability. The Superior Court also explained that the only way for venue to be proper in Philadelphia County would be if the tortfeasor in Berks County would admit to being a joint tortfeasor which did not occur. Consequently, the trial court's order to separate the two actions was affirmed.

E. DEFAULT JUDGMENTS

Lake of Pines Community Ass'n v. Raimo, PICS Case No. 08-1052 (C.P. Monroe May 7, 2008 Cheslock, Jr.).

Holding: When a Defendant is unaware of the suit and was not actually served, there is a basis to open/strike a default judgment. The court granted the petition.

Defendant, who lived in New Jersey, inherited an unimproved lot in the Lake of Pines Community, which she never visited. The community association sued her alleging a failure to pay fees and assessments. The service was effected by registered mail, with the signature of the recipient illegible. After a few months, when the defendant made no appearance, the plaintiff took a default judgment.

Seven months later, the defendant discovered a lien on her home in New Jersey, and petitioned to open or strike the default judgment. The court heard evidence that the signature on the return receipt was not that of the defendant, her husband, or anyone else they recognized.

The court found that the delay of seven months was justified as the defendant was unaware of the judgment before that, and that the failure to answer was justifiable because she was not aware of the complaint. Further, there is meritorious defense to the underlying claim, as she stated she had never been notified of any monetary obligations to plaintiff. Therefore the court used its equitable power to open the judgment.

The court also found it appropriate to strike the default, as on its face the record showed a deficiency of service, as neither she nor her agent were served or signed the certified mail receipt.

Accordingly, the court opened and struck the judgment of default.

F. REVIEW OF DISCOVERY DECISIONS OF LACKA. CO. SPECIAL TRIAL MASTER

Decker v. Nationwide Insurance Co., 05-CV-1863 and 06-CV-2119 (Lacka. Co. March 4, 2008, Minora, J.)

Holding: Judge Minora upholds decision of Special Trial Master, Sandy Campagna, Esquire pertaining to Trial Master's review of discoverability of thousands of Nationwide documents. Court also notes that Nationwide's appeal was untimely under local rule, Lacka.Co.R.C.P. 4000.1(b), which provides the local procedure for challenging the Special Trial Master's ruling:

> An order of the Special Trial Master may be appealed *de novo* by presentation of an appeal motion to the court, together with proof of

payment of the Clerk of Judicial Records of an appeal cost of an amount to be set by the court from time to time [currently $100]. The appeal motion shall be filed within ten days of the order of the Special Trial Master and shall be considered by the court pursuant to Lacka.Co.R.C.P. 4000 [pertaining to "Motion practice for discovery and scheduling matters."].

G. PHOTOCOPYING FEES IN DISCOVERY

McCullough v. Dunnewold, No. 2006-31782 (C.P. Crawford October 10, 2007).

Defendants filed a motion to compel. At the time the motion was presented, the Court was informed that plaintiffs' counsel was to provide the defendant's counsel with copies of all previously requested documents. The issue before the Court was whether plaintiffs could require the defendants to pay the photocopy fees incurred to produce the documents. Plaintiffs cited Rule 4009.12 of the Pennsylvania Rules of Civil Procedure, asserting that the Rule did not prohibit charging a fee for reproduction of documents and therefore, charging a fee would be proper.

The Court disagreed and held that to interpret the statute in the way plaintiffs asserted would create an unworkable method of exchanging documents where one party could charge any fee in order to satisfy a documents request. The Court noted that a reasonable interpretation of the statute permitted a party, if not prepared to copy documents for opposing counsel, to simply make the subject materials available for reproduction by opposing counsel.

The Court noted that the parties may agree on a fee arrangement, but in the absence of such an agreement, the reasonable interpretation of both Rules 4009.12 and 4009.1 would be to require the responding party to make copies free of charge or to make the documents available to the requesting party.

The Court found no provision in the Rules that allowed for a fee to be demanded after compliance with the request.

H. SANCTIONS FOR SPOLIATION OF EVIDENCE

Ogin v. Ahmed, PICS Case No. 08-1145 (M.D. Pa. June 30, 2008, Conaboy, J.)

Holding: Court granted plaintiff's motion for a spoliation charge to the jury after finding that defendant had purposefully destroyed documents after defendant learned that plaintiff would seek such documents in discovery.

The plaintiff was in an accident with defendant Werner Enterprises' tractor-trailer on October 4, 2005. On December 6, 2005, plaintiff's counsel sent Werner a letter

requesting it not destroy, inter alia, the drivers' logs. The plaintiff then brought this action on January 15, 2006, and sought the drivers' logs in a request for production dated January 21, 2006.

Repeated discovery battles ensured, leading up to explicit court orders that the driver's logs for the thirty days before the accident were to be produced. Instead , on June 14, 2007, the defendants only produced "recaps" of the drivers' logs. Additionally, a defense expert the parties deposed in 2008 criticized plaintiff's trucking experts for relying on "recaps" instead of the logs themselves.

The plaintiff sought a spoliation charge from the court, which would instruct the jury at trial that the destruction of these logs was done out of a well-founded fear that the contents of the driver's logs would be damaging to defendant.

The defendant admitted it destroyed the logs, saying it had done so "inadvertently, in the ordinary course of business," as part of a retention of documents policy. The defendant did not provide any date or time frame concerning when the logs were destroyed, nor did it produce their alleged retention policy.

When defendant refused to divulge the terms of its "retention policy" or when it allegedly destroyed documents under that policy, the court found that the evidence presented established that the defendant had destroyed those documents after knowing that they would be sought by plaintiffs in this lawsuit. As such, the court granted plaintiff's motion for a spoliation charge to the jury.

In so ruling, Judge Conaboy found that this situation met all the criteria for a finding of spoliation. The defendants conceded that the documents were in their possession and control. The documents were clearly relevant to claims in the case, and their relevance was foreseeable. Most notably, it appeared there had been actual suppression or destruction of the evidence. The failure to identify the time frame for destruction of the documents suggested this destruction took place after the defendant knew they should be saving the documents, especially given that they first learned of plaintiff's request that the documents be saved a mere two months after the 2005 accident took place.

I. ARBITRATION PROCEDURE

Kopytin v. Aschinger, 947 A.2d 739 (Pa.Super. 2008)

Holding: Defendant driver's election to subpoena and cross-examine plaintiff's expert witness did not preempt plaintiff's right to submit reports in lieu of expert testimony under Rule 1311.1.

This matter arises out of a rear-end accident allegedly resulting in injuries to the plaintiff. The case initially went to a compulsory arbitration where the plaintiff was

awarded $15,000. Apparently not satisfied, the plaintiff appealed the arbitration award pursuant to Pa.R.C.P. 1311.1 under which he stipulated to damages up to $15,000 [now $25,000] as the maximum amount recoverable at the subsequent trial. By so stipulating, the parties were allowed under the Rule to proceed to the jury on reports alone and in lieu of expert testimony as a cost-saving measure. At trial, the plaintiff was only awarded his alleged out-of-pocket expense of $2,540.92 by a Bucks County jury.

As part of his appeal to the Superior Court, the plaintiff argued that the trial court erred in its construction of Pa.R.C.P. 1311.1. More specifically, as stated this rule allowed the parties to proceed to trial by reports alone and the plaintiff in this matter chose to proceed in that fashion. The defense, on the other hand, did not present any of its own expert medical evidence but instead chose to subpoena the plaintiff's medical expert to appear at a trial deposition and be subjected to a cross-examination.

At the trial deposition of the plaintiff's expert set up by the defense, the plaintiff chose not to conduct a direct examination of the expert and instead rested on the doctor's report and elected to pursue a re-direct examination of the expert after the cross-examination. At trial, the court regarded the plaintiff's move as a strategic decision, and refused to allow the plaintiff's expert's report to be published to the jury before the videotaped cross-examination was played to the jury.

The Superior Court agreed with the plaintiff that the trial court erred and interfered with the proper conduct of the trial by refusing to allow the plaintiff to read or otherwise publish the plaintiff's expert reports to the jury before the defense's proposed cross-examination of the plaintiff's expert. In other words, the Superior Court found that the trial court's interpretation of Rule 1311.1 was faulty in that it distorted the normal course of trial order by precluding the plaintiff from presenting his case-in-chief prior to the defendant's attempts to subvert the case by way of cross-examination.

The erroneous trial court procedure of not first presenting the plaintiff's expert's opinion to the jury was also found to leave the jury with no basis upon which to assess the defendant's cross-examination of the expert.

Accordingly, the Superior Court concluded that the expert's report should have been published to the jury prior to the cross-examination. For this reason and for other reasons noted in the opinion, the case was remanded for a new trial.

J. JURY OF TWELVE

Gianni v. Phillips, 933 A.2d 114 (Pa. Super. 2007).

Gianni sustained injury as the result of a fall at the construction site. He brought an action for negligence against the contractor of the site and the property owner. In his complaint, Gianni designated the action as a major non-jury matter. Subsequently, Gianni filed a praecipe to perfect a jury demand and demanded a trial by jury of twelve

persons. At a pre-trial conference, the judge asked the parties to proceed with a jury trial of only eight persons. Defendants did not object but Gianni did. The judge ordered that the trial proceed with eight jurors. The jury returned a verdict for the defendants and, after a post-trial motion for a new trial was denied, Gianni appealed.

Gianni's issue on appeal was if the trial court erred in denying him the constitutional right to a trial by a jury of twelve. Gianni contended that because a demand was made for twelve jurors, the case could not have properly proceeded to trial without his consent.

The Superior Court agreed. "A party who properly demands a twelve-person jury is entitled to a verdict from a jury of twelve persons. . ." Gianni, 933 A.2d 116, citing, Blum v. Merrell Dow Pharmaceuticals, Inc., 534 Pa. 97, 99, 626 A.2d 537, 538 (1993). In addition, once a demand for trial by jury has been made, it may not be withdrawn unless there is the consent of all parties who have appeared in the action. Pa. R.C.P. 1007.1(c).

In the case at bar, Gianni requested a trial by jury which could not be withdrawn without his consent. Gianni had not consented to the jury of eight and as such, the trial court committed an error to allow the trial to proceed.

The judgment of trial court was reversed and the case was remanded for a new trial.

K. NOTE-TAKING BY JURORS

On July 31, 2008, the Pennsylvania Supreme Court issued an Order suspending the sunset provision contained in a rule that sanctioned juror note-taking in certain criminal trials. See Pa.R.Crim.P. 644.

This action by the Pennsylvania Supreme Court evidences its approval of note-taking during trials, including civil trials. In the civil context, juror note-taking is allowed under Pa.R.C.P. 223.2. That Rule was adopted in 2003 and its sundown provision was rescinded in July of 2005 when it was found that the Rule was held in "overwhelming favor with the bench and bar," according to a Note under the Rule.

Pa.R.C.P. 223.2 provides, in pertinent part, that whenever a jury trial is expected to last for more than two days, jurors may take notes during the proceedings and use their notes during deliberations. A note to the Rule indicates that a judge, in his discretion, may permit jurors to take notes even in matters not expected to last for more than two days.

Under the Rule, neither the court nor counsel may suggest to the jurors to take notes at certain times, may not comment on their note-taking, and may not attempt to read the jurors' notes. The jurors notes are to be kept confidential during the proceedings

but may be displayed to other jurors during the deliberations. Strangely, the Rule also specifically states that jurors are not permitted to take notes during the Closing Charge of the court.

As per the Rule, once the trial is completed the jurors notes are to be collected by the court and destroyed. Rule 223.2 specifically states that juror notes may not serve as a basis for any party to request a new trial in any event.

L. NEW TRIAL

Sadoski v. Regula, PICS Case No. 08-1090 (Lacka. Co., June 4, 2008, Nealon, J.)

Holding: New trial granted for a plaintiff who was struck by a car after a jury found the defendant was not negligent even though defendant had testified that he was driving above the speed limit when the accident happened.

In Sadoski, while the defendant admitted that his vehicle was traveling at about 30-35 mph at the time of the accident, there was an issue as to whether the scene of the accident was in a 35 mph zone or a 25 mph zone. By statute the speed limit on the subject road was set at 35 mph. However, the plaintiff presented evidence at trial that the particular stretch of road may have been covered by a 25 mph speed limit. Yet, the plaintiff was allegedly unable to prove that the reduced speed limit had been posted back at the time of the accident.

The plaintiff was struck when he entered the road between two vehicles on Davis Street in Scranton, Pennsylvania. During a two day bifurcated trial on liability, two investigating police officers testified that the speed limit at the site of the incident was 25 mph, which testimony was corroborated by the plaintiff. As stated, the defendant testified, along with two other witnesses, that his speed was in the range of 30 mph.

The jury returned a verdict in favor of the defendant. In response, the plaintiff filed post-trial motions requesting a judgment notwithstanding the verdict and/or a new trial on the grounds that the verdict was against the weight of the evidence.

The court found that, under the Rules, the plaintiff waived the right to request a judgment notwithstanding the verdict when he did not request a directed verdict on the issue of negligence based upon the defendant's allegedly excessive speed and when he did not file, in the alternative, a point for charge of a binding instruction in favor of the plaintiff. As such, the court turned to the plaintiff's motion for a new trial on the grounds that the verdict was against the weight of the evidence.

In his opinion, Judge Nealon surmised that the jury could have believed the sudden emergency doctrine excused the defendant from compliance with the assured clear distance ahead rule or that the defendant's negligence was not a factual cause of the accident.

However, the Judge also found that there was no competent evidentiary basis for the jury to conclude that the defendant was not negligent for exceeding the speed limit. Finding that the evidence of the defendant's excessive speed rendered him negligent per se, Judge Nealon ruled that the jury's finding that the defendant was not negligent for speeding in a 25 mph zone "defie[d] logic and shocks our sense of justice."

In so ruling that the plaintiff was entitled to a new trial, the court also noted that while the sudden emergency doctrine may have been applicable, the doctrine did not excuse a driver's responsibility to obey the speed limit.

M. POST-JUDGMENT INTEREST

Hutchinson v. Luddy, 946 A.2d 744 (Pa.Super. April 2, 2008, Panella, J.)

Background: Male minor, through his mother as parent and natural guardian, sued Church officials, including priest who allegedly molested minor on non-churched owned property. Minor appealed to the Superior Court on a verdict in his favor in the amount of $1.569 million dollars and the case went up and down the appellate levels on various issues before reaching this particular decision. The issue at hand in this matter was the defendants' motion for a determination of interest on the punitive damages award

Holding: Judge Panella held that minor was entitled to post-judgment interest on punitive damages awards he had obtained as of date verdict was entered.

The central issue before Judge Panella was whether the entry of JNOV by the Superior Court on two prior occasions during the lengthy appellate battles, both of which were subsequently vacated by the Supreme Court served to deprive the minor plaintiff of post-judgment interest on his claim for punitive damages for the time period that the JNOV was in effect when the damages award was ultimately affirmed.

The Superior Court ruled that the erroneous entry of a JNOV did not preclude the minor from collecting post-judgment interest dating back to the date of the original verdict by the jury back in April of 1994, i.e. 14 years ago. The defendant sought to have the three (3) year time period excluded from the interest calculation as that was the time when the JNOV was in place, which JNOV was adverse to the plaintiff.

As such, the defendants argued that the interest should only be in the amount of $202,191.78. The minor plaintiff asserted that all of the time back to the jury's verdict should be included in the calculations for an interest award of $720,000.00.

Judge Panella sided with the minor plaintiff's position based upon the clear wording of the applicable statute, 18 Pa.C.S.A. § 8101 of the Judicial Code, which

controls the imposition of interests on judgments and provides, in pertinent part, that with few exceptions not applicable to this matter, "a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award."

The Pennsylvania courts have held that "for purposes of computing interest, judgment and verdict are synonymous, and the date from which interest accrues is the date of the verdict, not the date judgment is finally entered." Incollingo v. Ewing, 379 A.2d 79, 84 (Pa. 1977).

In so ruling, Judge Panella respectfully refused to follow the case of Green Valley Dry Cleaners, Inc. v. Westmoreland Co. Industrial Dev. Corp., 861 A.2d 1013 (Pa.Cmwlth. 2004), a contrary ruling of the Commonwealth Court offered by the defendants. That decision held that interest accrues on a verdict only when that verdict has not been vacated during the appellate process. That court also specifically held that the time period for the interest calculation should not include the time period that a JNOV adverse to the plaintiff was in effect.

Rather, as stated, Judge Panella chose to follow the plain wording of the applicable statute which expressly mandated that post-judgment interest should be calculated as of the date the verdict was entered. As a further rationale for his ruling, Judge Panella also noted that the "purpose of post-judgment interest is to compensate a successful plaintiff for being deprived of compensation for his or her loss during the time between ascertainment of the damage and payment by the defendant." [Citation omitted].

As such, Judge Panella wrote that "giving [a defendant] the benefit of an *erroneous* ruling, during which time [the defendant] is relieved from paying post-judgment interest, hampers the very purpose behind such a policy. Such a construction needlessly and, we find, unjustly benefits the recipient of an erroneous ruling, while depriving an innocent plaintiff of his or her rightful award." 946 A.2d 754 [citations omitted].

RULES OF APPELLATE PROCEDURE

A. RULE 1925: CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Tucker v. R.M. Tours, 939 A.2d 343 (Pa. Super. 2007)

Background: After judgment was entered for appellees, and appellants filed notice of appeal, the Court of Common Pleas of Philadelphia County, Civil Division, Allen, Jr., concluded that appellants' statements of matters complained of an appeal were not concise where it noted eleven detailed issues for review.

Holding: The Superior Court, Stevens, Jr., held that:

(1) appellants waived all of their issues on appeal, when their statement of matters complained of consisted of 16 pages with 76 paragraphs, plus exhibits, and

(2) trial court did not have the discretion to sua sponte allow appellants to file a second statement.

Affirmed.

Judge Stevens of the Superior Court held that an order to file a statement of matters complained of on appeal is not satisfied by simply filing any statement; rather, the statement must be concise and coherent as to permit the trial court to understand the specific issues being raised on appeal. Rules App.Proc., Rule 1925(b) 42 Pa. C.S.A.

Thus, appellants waived all of their issues on appeal when they filed their statement of matters complained of on appeal, as appellants engaged in misconduct by attempting to overwhelm the trial court; in response to the trial court's order for the statement, appellants file a statement, appellants filed a statement that consisted of 16 pages, containing 76 paragraphs, plus exhibits, and thereby raised a voluminous number of lengthy issues that created confusion for the trial court. Rules App.Proc., Rule 1925(b), 42 Pa. C.S.A.

Judge Stevens stated that the rule on statements of matters complained of on appeal was intended to create a bright-line test, and allowing trial courts the discretion to sua sponte permit appellants to refine their appellate issues in a second court-ordered statement would result in inconsistencies.

Thus, the Superior Court additionally held that the trial court did not have the discretion to sua sponte allow appellants to file a second statement of matters complained of on appeal.

Ferris v. Harkins, 940 A.2d 388 (Pa.Super. 2007)

Holding: Defendant's attempt to incorporate his brief in support of his statement of matters complained on appeal into the actual statement did not result in a waiver of the claims in the statement; Defendant's statement of matters complained of on appeal were not so vague as to constitute a waiver of the claims particularly where the trial court's underlying order did not clearly set forth its rationale.

In Ferris, a patient who sustained a work-related injury brought an action against a doctor, alleging that the doctor committed and conspired to commit various torts against the plaintiff resulting in a delay of a settlement of the patient's underlying personal injury litigation against the employer and the employer's carrier.

More specifically, prior to filing a Complaint in the underlying trip and fall action against a defendant landowner, the plaintiff's attorney requested the defendant doctor to issue a narrative report. The plaintiff's doctor issued an unfavorable report in which stated that the plaintiff "might be malingering."

During discovery in the underlying matter, it came to light that the doctor was a friend of the defendant landowner. It was also discovered in an e-mail from one employee of the defendant landowner's liability carrier to another that in which it was indicated that the information was that the doctor felt that the plaintiff was not in much pain. According to the e-mail, the insurance company employee had told the landowner defendant that the doctor would need to put his findings into a report.

After learning of the e-mail, the plaintiff filed this separate suit against the defendant landowner, the carrier (Selective) and the doctor (Dr. Asit Patel) setting forth 15 counts of various torts related to delaying the settlement of the underlying matter.

After the jury returned a verdict finding that the plaintiff had met her burden of proof on various claims but that the defendant doctor's conduct was not the factual cause of the plaintiff's damages. The jury awarded zero damages. Judge Conahan in the Luzerne County Court of Common Pleas granted the plaintiff's motion for judgment notwithstanding the verdict and awarded compensatory and punitive damages totaling $1,000,000.00.

When the defendant doctor appealed to the Superior Court, Judge Conahan first ruled that the defendant had waived all of his claims on appeal for failing to file a timely Rule 1925(b) statement.

On the issue of the sufficiency of the Rule 1925(b) statement, the Superior Court found that the defendant doctor filed a timely statement but in that statement incorporated arguments that would be found in his appellate brief which had not yet been filed as of the filing of the statement of matters complained of on appeal. The Superior Court found that the defendant doctor's attempt to incorporate his brief in support of his statement of

matters complained on appeal into the actual statement did not result in a waiver of the claims in the statement.

The court found that while this attempt to incorporate the brief was not proper under the rules, in essence, the defendant doctor was attempting to properly incorporate further details from the brief to what he had already raised in his timely filed statement. As such, no waiver was found in this regard.

The Court also held that the defendant doctor's statement of matters complained of on appeal were not so vague as to constitute a waiver of the claims particularly where the trial court's underlying order, issued without an opinion, did not clearly set forth its rationale.

As such, the defendant doctor's appeal was allowed to stand. Turning to the merits, the Superior Court reversed finding conflicts in the evidence prevented the entry of a JNOV and also noting that there was sufficient evidence to support the jury's verdict in any event. The Superior Court therefore remanded the case with instructions to the trial court to reinstate the jury's verdict awarding the plaintiff zero damages.

Jiricko v. Geico Insurance Co., PICS Case No. 08-0568 (Pa. Super. April 4, 2008 Stevens, J.)

Holding: When a rule 1925(a) statement is incoherent, confusing, redundant, and defamatory, the court may find it is not a good faith attempt to provide notice of the matters complained of on appeal and may find the appeal waived. The Superior Court affirmed the decision of the trial court to grant summary judgment to the defendant.

The appellant, acting pro se, sued Geico, claiming it should have paid him under his UIM insurance for his pain and suffering arising from an automobile accident. The matter was sent to arbitration, and after much resistance by appellant, the arbitration was held but appellant failed to appear. The arbitrators held for the insurer, and the trial court confirmed the award. It then granted summary judgment to the insurer on counts that had been stayed pending the arbitration.

Appellant filed a notice to appeal, and after being instructed to file a rule 1925(a) statements of matters complained of on appeal, filed such a statement. It was voluminous, rambling, incoherent, and largely taken up with a "defamatory rant" against the trial court and opposing counsel.

While the Supreme Court in *Eiser v. Brown v. Williamson Tobacco Corp.*, 938 A.2d 417 (Pa. 2007), held that voluminous and difficult to follow 1925(a) statements do not give rise to a waiver of the matters on appeal, it also stated that such statements made in bad faith do result in waiver. An inquiry into a party's good faith need not be a matter of gauging subjective intent but can turn on the objective character of the filing. This

rule 1925(a) letter is a prime example of such bad faith in its defamatory and incoherent nature, said the court. Accordingly, the court found the issues on appeal were waived.

Morris v. DiPaolo, 930 A.2d 500 (Pa. Super. 2007 Panella, J.)

Background: After attorney representing township police officer in underlying wrongful termination dispute initiated federal civil rights action against township's attorney, the township's attorney brought action against officer's attorney for wrongful use of civil proceedings, and sought damages, sanctions, and attorney fees. The Court of Common Pleas, Philadelphia County, Watkins, Jr., entered summary judgment in favor of township's attorney. Following a trial on damages, the Court of Common Pleas, Philadelphia County, Civil Division, John Milton Younge, J., entered judgment on jury verdict for $47,000 in damages, then added additional sanctions. Officer's attorney appealed.

The trial court concluded, and appellee argued on appeal, that the appellant's statement of matters complained of on appeal failed to succinctly apprise the trial court of the issues the appellant desired to pursue on appeal, and resultantly all of appellant's issues on appeal should be considered waived.

Holding: Judge Panella held that the fact that appellant raised 29 issues in his statement of matters complained of on appeal did not require appellate court to quash all of appellant's issues on appeal as waived for failure to succinctly apprise trial court of the issues raised, where many of the issues were redundant and a careful reading of the statement revealed far fewer than 29 issues.

CHECKLIST ON RULE 1925(b) CONCISE STATEMENT

-Pa.R.A.P. 1925(b) allows trial judge to direct appellant "to file of record…a concise statement of the errors complained of on appeal."

-Statement shall "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. Pa.R.A.P. 1925(b)(4).

-Citations to authorities not required, but may be included. Id.

-"Statement should not be redundant and should not provide lengthy explanations as to any error." Id.

-If Statement sets forth non-redundant and non-frivolous issues concisely, the number of errors raised will not alone be grounds for finding waiver. Id.

-"Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court…" Id.

-If appellant can not readily discern basis for judge's decision, the appellant shall state in the Statement an explanation as to why errors are identified in general terms. In this case, issues will not be found to have been waived for failure to specify. Id.

-Issues not included are waived. Id.

B. RULE 2116: STATEMENT OF QUESTION IN APPELLATE BRIEFS

In recognition of the practice of lawyers utilizing font changes so as to fit information in their briefs in compliance with limitations imposed in the Rules of Appellate Procedure, the Pennsylvania Supreme Court has changed its strict guidelines for the "statement of questions" portion of briefs.

Up to recently, counsel were limited to one page, or 15 lines, to frame the question(s) presented. Under the old Rule, attorneys were also subjected to strict language requiring the questions to be presented in the "briefest and most general terms, without names, dates, amounts or particulars of any kind."

The new Rule was adoped on July 11, 2008 and became effective on August 11, 2008 and is now in effect. Under the new Rule 2116, attorneys are now allowed up to two (2) pages to spell out the issue(s) presented. Additionally, the strict language regarding the content of the question(s) was replaceed with a mandate that attorneys must now attempt to express the issues concisely and without any unnecessary details.

EVIDENCE

A. MEDICAL EXPENSES EVIDENCE AT TRIAL

Orzel v. Morgan, No. 03 CV 4929 (Lack. Co. Feb. 4, 2008 Nealon, J.)

Holding: Jury award for future medical bills should be molded to reflect the amount of medical coverage which may still be paid by first party insurance carrier.

On December 24, 2001 the Plaintiff, Deanna Orzel ("Orzel"), was injured in a car accident while a passenger in a car was being operated by her husband. She filed a lawsuit against the other driver Kenneth Morgan ("Morgan") for her injuries sustained in the accident. At the time of the accident, Orzel was insured for $100,000 in first party medical benefits and at the time of trial only $14,577.61 had been paid by the carrier for first party medical benefits. There was evidence represented at the trial about future medical expenses and the jury rendered a verdict which included an award of future medical expenses in the amount of $125,000.

On post trial motions the defendant sought to reduce the award for future medical bills to zero by arguing that the future medical bills should be subject to Act 6 reductions and then offset from the award since the plaintiff had $100,000 in first party medical coverage and there were still $85,422.39 in benefits remaining. Also, the remainder would be paid by Health insurance and then the amount of future medical bills would be zero. The plaintiff sought to recover the full amount of the future medical bills by arguing that the future bills were not "payable" under the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL").

The trial court denies that the defendant's attempt to reduce the award to zero and denies the plaintiff's motion for the full amount of the award. The decision molds the future medical benefits, but only to reflect an offset for the remaining first party medical benefits.

The court first holds that the bills were "capable of being paid" under the remaining first party coverage. Thus, they may be "payable" and cannot be recovered since the first party carrier cannot subrogate. The court denies the defendant's Motion to mold the verdict to zero by (1) finding that the Pittsburgh Neurosurgery Associates, Inc. v. Danner, 733 A.2d 1279 (Pa. Super. 1999), appeal denied, 751 A.2d 192 (Pa. 200__) and Moorhead v. Crozer Chester Medical Center, 765 A.2d 786 (Pa. 2001) decisions are not directly on point and (2) relying upon the Pennsylvania Suggested Standard Civil Jury Instruction 6.14 (Auto Negligence: Medical Expenses) to hold that future medical expenses should not be adjusted under Section 1797 of the MVFRL.

The defense did not offer any evidence on the Act 6/cost contained figures for future medical bills and these amounts are not generally known in the community. Thus, it would be "pure conjecture" to reduce the bills by Section 1797. The Plaintiff presented testimony on the cost of future care and the defense never cross examined the expert physician on the statutory requirements of Section 1797. Thus, the remaining medical benefits of $85,422.39 are offset against the full award rather then reduced under Section 1797. The award for future medical bills is now molded to $39,577.61. It is not reduced future event if paid by health insurance since the health insurance plan was an HMO/ERISA plan and would pre-empt any state laws.

CHECKLIST FOR FUTURE MEDICAL EXPENSES EVIDENCE AT TRIAL

-Future medical expenses will be considered to be "payable" under the MVFRL

-"Payable" in this regard refers to a plaintiff's entitlement to future payments and "is generally defined as capable of being paid." Orzel v. Morgan.

-Past and future medical expenses presented at trial that did not exceed the PIP medical benefits coverage available under the plaintiff's own automobile insurance coverage are not recoverable by the plaintiff in the end. Orzel v. Morgan.

-Where past and future medical expenses alleged by plaintiff do NOT exceed the amount of the medical benefits limit under the plaintiff's own policy, evidence of those expenses will not be allowed at trial. 75 Pa.C.S.A. §§ 1720, 1722.

-Where plaintiff asserts past and future medical expenses up to an amount that exceeds the PIP medical benefits coverage available under the plaintiff's own automobile insurance coverage, the court will allow the plaintiff to put in all of the evidence regarding medical expenses at trial. Orzel v. Morgan; Pittsburgh Neurosurgery Assoc., Inc. v. Danner, 733 A.2d 1279 (Pa.Super. 1999) *appeal denied* 751 A.2d 192 (Pa. 2000); Subcommittee Note to Pennsylvania Suggested Standard Civil Jury Instruction § 6.14.

-At trial the plaintiff will be permitted to present all of the future medical expenses in their full amount and not subject to any Act 6 reduction. Id.

-However, during the trial, the defense is allowed to "cross-examine[] [the plaintiff's] treating physicians concerning the statutory requirement that healthcare providers accept a reduced sum as full payment under Section 1797 of MVFRL." Orzel v. Morgan.

-In the alternative, to avoid the Act 6 issue, the plaintiff could have his or her expert apply the Act 6 reduction to the alleged future medical expenses (if that is even possible) and testify that the opinion on the cost of future medical expenses is provided in an Act 6 reduced amount.

-After the jury returns its verdict, the trial court will then hold a post-verdict molding proceeding to apply the offset of the PIP benefits remaining under the plaintiff's own automobile policy as allowed by 75 Pa.C.S.A. §§ 1720, 1722 and to address any Act 6 reduction argument by the defense under 75 Pa.C.S.A. § 1797 through the presentation of testimony of a PIP insurance claims representative or otherwise. Orzel v. Morgan.

-As to any remaining alleged future medical expenses remaining after the PIP offset, arguably the plaintiff bears the burden of proving that those expenses are likewise not "payable" under any other applicable insurance coverage, i.e. health insurance, and therefore are recoverable. Grant v. Baggott, 36 Pa.D.&C.4th 298 (Del.Co. 1997) *aff'd* 723 A.2d 240 (Pa.Super. 1998) *appeal denied* 734 A.2d 394 (Pa. 1998).

Compton v. Schweikhard, 3:06-CV-78 (M.D.Pa. 2007 Nealon, J.)

Holding: Despite Pennsylvania law prohibiting first party benefits carriers in Pennsylvania from recovering amounts paid out, an out-of-state insurer may recover on first party benefits subrogation rights in Pennsylvania if that foreign state's law allows such recovery; therefore, evidence of such medical expenses are admissible at trial.

In Compton, a Maryland resident tractor trailer driver was allegedly injured during an accident that occurred on Interstate 81 in Luzerne County, Pennsylvania. Some of the plaintiff's medical expenses were paid by the plaintiff's disability insurance carrier from Maryland and some of the expenses were paid by his health insurance carrier which was situated in South Carolina.

When the plaintiff advised that he intended to seek the recovery of his medical expenses at trial, the defense filed a motion in limine to preclude the introduction of such evidence under the Pennsylvania MVFRL, 75 Pa.C.S.A. 1720, 1722, which precludes the recovery of first party benefits and certain other forms of insurance benefits. In the alternative, if such recovery was allowed, the defense sought to have any recovery of medical expenses reduced in accordance with Act 6.

Judge William Nealon provided a detailed summary of the applicable law and the exceptions thereto. Additionally, after reviewing other court decisions addressing liens asserted by carriers from Virginia, New Jersey, New York, and Oregon, the Court held under a choice of law analysis that, "[i]n Pennsylvania, when dealing with an out-of-state insurer with regard to subrogation rights in a motor vehicle accident, the state law of the out-of-state plaintiffs and insurers applies."

That is, if the law of the out-of-state plaintiff or insurer allows the carrier to recover the amounts it paid out to the plaintiff as a result of an accident, the plaintiff in turn will be permitted to plead, prove, and attempt to recover the same in his or her lawsuit.

In this matter, since Maryland and South Carolina law allowed carriers to recover such benefits, the plaintiff in this matter was allowed to present evidence of the expenses at his Pennsylvania trial. The defendant's motion in limine was therefore denied.

The Compton decision is also noteworthy for the fact that Judge Nealon upheld the long-standing rule that evidence of a traffic citation issued to a defendant in a motor vehicle case was inadmissible under 42 Pa.C.S.A. 6142 and by virtue of the fact that, under F.R.E. 403 any probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

B. LAY WITNESS TESTIMONY ON SPEED

Fisher v. Central Cab Company, 945 A.2d 215 (Pa. Super. 2008)

The Fisher family, Michele, Lane, and their minor son, were injured in a motor vehicle accident. Mr. Leach, while in the scope of his employment with Central Cab Company, was driving a bus and was in the process of making a left turn. At that time, the Fishers were traveling on the same road toward the bus and the two vehicles collided. A witness who was riding in the bus testified that she had observed the Fisher vehicle prior to the collision. She testified that she observed the vehicle when it was "about 50 to 100 feet away" from the bus and that the vehicle was traveling at about 40 to 45 miles an hour at the time of the collision. In addition, the witness noted that the Fisher vehicle had not reduced speed at all prior to the collision. Other witnesses, both on and off the bus, testified that the Fisher vehicle had not reduced speed prior to the collision.

The Fishers brought a negligence claim against Central Cab Co. and Mr. Leach. In response, the defendants filed an answer with new matter, asserting that Michele Fisher was operating the vehicle at an unsafe rate of speed. At trial, the witness was permitted to testify regarding the approximate speed of the Fisher vehicle. The jury found that the defendants were not negligent. The Fishers, in their post-trial motion, asserted that the trial court erred in allowing a lay witness to testify about the approximate speed of the vehicle. The post-trial motion was denied and an appeal followed.

On appeal, the Fishers asserted that the trial court abused its discretion in permitting lay witness testimony regarding the speed of their vehicle. The Fishers argued that the witness could not provide a reliable estimate of speed because their vehicle was driving directly towards the witness and the witness could not have seen the vehicle for more than one second.

The Superior Court held that the lay witness testimony was admissible. The Superior Court followed the 1948 Pennsylvania Supreme Court opinion in Shaffer v. Torrens, 359 Pa. 187, 58 A.2d 439 (1948), setting forth a two-prong test for the admissibility of a lay witness' estimation of speed: (1) an observation of the vehicular movement in question; and (2) a recognition of impressions of like vehicles at relative speeds. See also, Radogna v. Hester, 388 A.2d 1087, 1088 (Pa. Super. 1978). The Superior Court also noted that the Supreme Court had never established a minimum distance that the lay witness must observe the vehicle in order for testimony regarding speed to be admissible.

The Superior Court found that the witness in the bus had an adequate opportunity to observe the Fisher vehicle. The witness had an unobstructed view through the front windshield of the bus. In addition, the witness had even remarked during her observation that she did not think that the Fisher vehicle was going to slow down, a remark caused other passengers on the bus to turn in time to observe the accident. The Superior noted that the witness had more than just a "fleeting glimpse" of the oncoming vehicle and was

sufficient to establish that the witness had observed the vehicle for an adequate amount of time. See, Rodogna.

The Superior Court held that the trial court had not abused its discretion and the judgment was affirmed.

C. PHOTOGRAPHS OF PROPERTY DAMAGES IN MVA CASE

Yocum v. Lightcap, 2006 Pa. Dist. & Cnty. Dec. LEXIS 301 (C.P. Chester October 10, 2006).

The issue in this case arose from injuries Yocum sustained in a rear-end motor vehicle collision caused by Lightcap. Prior to the accident, Yocum had back surgery to treat long-standing back problems. Consequently, one of the issues at trial was how much of Yocum's post-accident back pain could be attributed to the accident. Both parties presented conflicting expert testimony regarding Yocum's back pain.

The jury subsequently returned a verdict for the defendant and Yocum filed a motion for new trial. Yocum alleged that the Court erred in permitting the defense to introduce several photographs of Yocum's automobile depicting little or no damage as a result of the collision.

Prior to the commencement of trial, Yocum filed a motion in limine to preclude the introduction of the photographs into evidence. Yocum argued that absent a scientific foundation, the photographs were not reliable to prove a correlation between the amount of vehicle damage to the amount of bodily injury sustained. The outcome of the motion in limine was that both sides agreed not to introduce the photographs into evidence. However, Lightcap's counsel further explained that he planned to question the defendant about the nature of the accident and the impact of the vehicles without the use of the photographs. In response, Yocum's counsel explained that if that happened, photographs would be introduced showing extensive damage to the front of the Lightcap's vehicle. Lightcap's counsel then stated that if those photographs were admitted, then the photographs of Yocum's vehicle, showing little damage, would be offered as well.

At trial, Yocum's counsel questioned Lightcap on cross-examination and offered the photographs of Lightcap's vehicle into evidence. Lightcap's counsel then introduced the photographs of Yocum's vehicle into evidence. The Court found that Yocum had waived her objection to the photographs because her counsel precipitated the photograph introduction exchange. The Court held that it would be unreasonable to expect Lightcap to hold to the agreement to refrain from introducing photographs when Yocum had broken the agreement. The Court noted that "photographs of damage to a vehicle can be used to refute the severity of damages to a plaintiff." Slip Op. at p. 10, citing, Cree v. Horn, 372 Pa. Super. 296, 539 A.2d 446 (1988). Furthermore, the Court noted that the jury could not be expected to decide the case in a "theoretical vacuum." When Yocum

introduced photographs of Lightcap's vehicle, it was necessary for Lightcap to do likewise in order to present a complete picture of the accident.

The post-trial motion was denied.

D. PRIOR SIMILAR ACCIDENTS

Houdeshell v. Rice, PICS Case No. 08-0109 (Pa. Super. Dec. 31, 2007)

In this negligence action, admission of evidence related to a prior accident with a sliding glass door on defendants' property was relevant to the issue on defendants' constructive notice of a dangerous condition. Vacated and remanded for new trial.

Plaintiff suffered facial injuries after she walked into a sliding glass door located in the rear areas of the breezeway on defendants' property, and the glass in that door shattered into large shards. The door in question, which was installed in 1958, had plate glass.

Plaintiff brought suit, and the jury returned a defense verdict. Plaintiff appealed, challenging certain evidentiary rulings.

The trial court refused to admit evidence of a prior accident relating to the sliding glass door located in the front area of the breezeway. In that accident, a visitor dropped a television set that crashed through the door. Defendants replaced the shattered plate glass in that breezeway door with safety glass.

Under Pennsylvania law, evidence of a prior accident similar to the accident at issue in the cause of action is permitted if the prior accident proves constructive notice of a dangerous condition likely to cause injury to persons on the defendants' property.

Here, defendants' liability was premised upon Section 342 of the *Restatement (Second) of Torts*. "In this case, we agree with [plaintiff's] contention that the breakage of the front door tended to establish that [defendants] knew or should have known of the dangerous properties of the plate glass remaining in their other sliding glass door[,]" the Superior Court said. It determined that the trial court erred in refusing to admit this evidence, that the omission of this evidence prejudiced plaintiff, and that a new trial was necessary.

The court affirmed the other challenged evidentiary rulings, but vacated the judgment and remanded for the new trial.

E. INTOXICATION

Kuna v. Lake Sheridan Cottagers Association, 2 Pa.D.&C.5th 290 (Lacka. Co. 2007, Minora, J.)

Holding: Defendants may present evidence of intoxication on part of plaintiff in a civil case where the defendants presented sufficient corroborating evidence in addition to plaintiff's heightened blood alcohol content.

In **Kuna**, the trial court was faced with a motion in limine to preclude evidence of alchohol consumption and/or blood alchohol content test results in case in which an allegedly intoxicated plaintiff dove off a dock and into a shallow area of a lake and sustained a severe neck injury that left him wheelchair bound.

The plaintiff argued that there was no evidence corroborating the allegation of intoxication such as slurred speech or a staggering gait and, as such, evidence of both the plaintiff's alcohol consumption as well as his BAC should be precluded.

The defendants countered with the argument that the plaintiff's deposition testimony contained admissions that he was drinking alcohol during the night before the incident as well as on the day of the incident. In addition, a fellow party invitee who assisted the plaintiff in the water immediately following the incident testified that she smelled alcohol when helping the plaintiff. The defendants also established that the plaintiff was found to have a heightened BAC test result when he was treated at the hospital. Finally, the defendants also offered evidence through two experts to establish that, given the blood test results, the plaintiff's judgment and motor coordination would have been severely impaired at the time of the incident.

After providing a thorough review of Pennsylvania case law on the issue, Judge Minora found that the defendants had offered sufficient corroborating evidence of the plaintiff's intoxication to allow the evidence to be admitted.

F. SURVEILLANCE

Kopytin v. Aschinger, 947 A.2d 739 (Pa.Super. 2008)

Holding: Surveillance tape depicting injured plaintiff's activities was ruled inadmissible where tape was not authenticated by investigator who shot the video and where plaintiff was deprived of an opportunity to view the 16 minute edited version against the entire 101 minute surveillance tape given that he was provided with the tape on the day before trial.

This matter arises out of a rear-end accident allegedly resulting in injuries to the plaintiff. At trial, the jury only awarded the plaintiff his out-of-pocket medical expenses

in the amount of $2,540.92. The plaintiff appealed on various grounds, including the assertion that the trial court had erred in allowing the defense to utilize a surveillance tape.

During the trial, the court had allowed the defense to play an edited 16 minute edition of a 101 minute surveillance tape. The plaintiff's objections on authentication grounds and that the prejudicial effect of the tape were overruled. The Superior Court found that the trial court erred in admitting the tape.

First of all, the Superior Court agreed with the plaintiff that the defense failed to properly authenticate the tape under Pa.R.E. 901(a). At trial, the defense offered the owner of the investigative service as a witness to authenticate the tape and not the two former employees who actually taped the plaintiff's activities and left their handwritten notes to accompany the tape. The court noted that the witness was neither present during the taping nor had any personal knowledge of the circumstances surrounding it. As such, the owner of the investigative agency could only testify from his viewing of the video and his review of the handwritten notes. He was therefore found to be unable to provide the requisite authentication testimony that the video was in fact a fair and accurate depiction of the plaintiff at the time of the taping.

The Superior Court also agreed with the plaintiff's argument that the edited version of the tape was misleading and that, because it was produced only one day prior to trial, the plaintiff had insufficient time to prepare a cross-examination as to the differences between the edited version and unedited versions.

For these reasons, and for other reasons noted in the opinion, the Superior Court remanded the case for a new trial.

G. SUMMARY CRIMINAL CONVICTIONS

Stumpf v. Nye, 950 A.2d 1032 (Pa.Super. June 3, 2008, Stevens, J.)

Holding: Evidence that defendant had pled guilty to summary offense of disorderly conduct in connection with the incident at issue was not admissible; testimony from plaintiff and plaintiff's wife that defendant allegedly physically assaulted two individuals was not admissible to establish defendant's reputation for violence.

In this matter, a boxer's manager filed a lawsuit alleging claims of intentional assault and negligence against a boxing ring owner, and the boxing ring owner counter-sued with essentially the same allegations all as a result of a fight between the parties.

On appeal from a jury verdict in favor of the defendant boxing ring owner, the plaintiff alleged that the trial court erred in excluding evidence of the boxing ring owner's guilty plea to the summary offense of disorderly conduct arising out of the same matter.

Judge Stevens disagreed and found no error in this regard. The Superior Court noted that Pennsylvania law holds that guilty pleas to summary offenses remain generally inadmissible in subsequent civil proceedings arising out of the same incident. Id. at 1039-1040 citing Folino v. Young, 568 A.2d 171 (Pa. 1990), Loughner v. Schmelzer, 218 A.2d 768 (Pa. 1966), and Hurtt v. Stirone, 206 A.2d 624 (Pa. 1965). The policy behind the rule is that convenience, rather than guilt, often controls the defendant's trial technique in that summary criminal matter.

The exception to that rule, which was not applicable in this matter, is when the summary offense is an operative fact in a non-summary criminal offense, as occurred in the Folino case. In this matter, Judge Stevens found that the disorderly conduct offense was a relatively minor matter akin to a traffic violation and there was no evidence that it was an operative fact in a non-summary criminal offense. Therefore, this guilty plea was correctly found by the trial court to be inadmissible.

Judge Stevens also upheld the trial court's finding that testimony from plaintiff and plaintiff's wife that defendant allegedly physically assaulted two individuals was not admissible to establish defendant's reputation for violence. The Superior Court questioned whether the plaintiff followed the proper procedure for the admission of such evidence and also agree with the trial court's finding that any probative value of this character evidence was outweighed by the danger of unfair prejudice, confusion of issues, and misleading to the jury in any event.

EXPERT WITNESSES

A. DISCOVERY OF FINANCIAL BACKGROUND OF EXPERTS

Covals v. Mehlig, PICS Case No. 08-0104 (C.P. Monroe Nov. 13, 2007 Zulick, J.)

This action arose out of the complaint that Mehlig, as agent of J.M. Brennan and Sons, Inc., negligently struck the vehicle in which the plaintiffs were riding. The complaint alleged mental anguish and physical injury to Faemarie Covais. The Court granted the defendants' motion to compel a mental and physical examination of Ms. Covais. The examination was performed by Dr. O'Leary.

The Court ruled that plaintiffs, who contended that the defense expert was a "professional witness," were not entitled to the supplemental discovery that they sought because the answers that defendants had already provided in response to plaintiffs' IME interrogatories provided plaintiffs with enough information to impeach the defense expert for possible bias. Motion to dismiss objections and to compel more specific answers denied.

Physician Robert T. O'Leary gave plaintiff-wife an independent medical examination (IME). After receiving Dr. O'Leary's findings, plaintiffs served defendants with IME interrogatories and objected to others. Defendants objected, inter alia, to plaintiffs' request to produce O'Leary's 1099 tax forms for the past three years.

Defendants had objected to request for information regarding other cases where Dr. O'Leary had evaluated parties. Specifically, the plaintiffs interrogatories requested the following:

1. The Court term and number of all cases in which Dr. O'Leary provided a deposition or trial testimony.

2. The name of each plaintiff who was evaluated by Dr. O'Leary.

3. The name and address of each plaintiff's attorney in the prior cases and the name and address of the person who requested the evaluation.

4. A copy of the reports produced by Dr. O'Leary after those evaluations.

Additionally, plaintiffs requested that Dr. O'Leary produced his 1099 tax forms for the past three years.

Contending that O'Leary was a "professional witnesses," plaintiffs moved to dismiss the objections and to compel more specific answers to their IME interrogatories.

The court denied the motion. The answers already provided informed plaintiffs of the amount of compensation O'Leary was likely to receive from the instant case; the number of IMEs and depositions O'Leary performed in a given year; the portion of those examinations that were requested by plaintiffs' counsel and the portion requested by defense counsel; the approximate portion of O'Leary's practice related to litigation work; and the approximate amount of income O'Leary receives each year for litigation work. "The above answers, then already provide [plaintiffs] with all of the information that *Cooper [v. Schoffstall,* 905 A.2d 482 (Pa. 2006)] allows parties to obtain from expert witnesses[,]" the court observed.

The court also noted that in light of the information already in plaintiffs' possession, there were no compelling circumstances to justify requiring O'Leary to reveal his total income. Plaintiffs already had enough information to impeach O'Leary for possible bias, so his 1099 tax forms and information related to O'Leary's other patients were not necessary to the instant case, the court said.

B. ADMISSION OF MEDICAL RECORDS UNDER RULE 1311.1 (pertaining to Arbitrations)

Gatson v. Minhas, 938 A.2d 453 (Pa. Super. 2007)

Gaston was injured in a motor vehicle accident. Gaston brought an action against Minhas. An arbitration panel issued an award in Gaston's favor for $10,000. Minhas appealed and Gaston, per Rule 1311.1, provided notice to the parties of his intention to introduce medical records and treatment notes of Dr. Walinsky. The Rule also required Gaston to stipulate that his damages did not exceed $15,000.

The case went to trial. Pursuant to Rule 1311.1, Minhas subpoenaed Dr. Walinsky to testify at trial. However, Dr. Walinsky invoked the Fifth Amendment and refused to testify. Based on his refusal to testify, Minhas objected to the introduction of Dr. Walinsky's records. The trial court overruled the objection and admitted the records into evidence. The jury returned a verdict in favor of Gaston for $40,000 which was molded to the stipulated amount of $15,000. Minhas filed a post-trial motion for judgment notwithstanding the verdict. The trial court denied the motion and an appeal followed.

The issue on appeal was whether the trial court erred in refusing to exclude the medical records where the doctor who had produced the records invoked the Fifth Amendment and refused to testify at trial. Minhas argued that the trial court's failure to exclude Dr. Walinsky's records violated the intent to spirit of Rule 1311.1. The Superior Court agreed.

The Superior Court first noted that the admission or exclusion of evidence is within the sound discretion of the trial court. Capoferri v. Children's Hospital of Philadelphia, 893 A.2d 133, 143 (Pa. Super. 2006). The Superior Court considered the language of Rule 1311.1 which allows the admission of certain types of documents into evidence without authentication. The Rule, as well as an identical section of Rule 1305, also permits the defendant to subpoena the doctor to trial and be subjected to cross-examination. The Superior Court noted that the Rule did not specify what could be done in the event the subpoenaed party refused to testify. The Superior court cited the Explanatory Comment to Rule 1305, providing:

> The . . . provisions of [Rule 1305] apply . . . only to documents which are prepared by a person who is within the subpoena power of the court in which the action is pending. The special relaxation of the rules of evidence is conditioned on the power of the opponent to subpoena the person whose testimony is waived; if that is not possible, . . . the foundation for the special rule disappears, and the proponent must follow the normal rules of evidence.

The Superior Court found that if the person whom offers the documents could simply elect not to testify, the non-offering party would be powerless to combat the evidence and the basis for the special rule would be nullified. Gaston, 938 A.2d at 456.

The Superior Court concluded that the trial court erred in admitting Dr. Walinsky's reports without the defendants having the opportunity to cross-examine Dr. Walinsky. This refusal clearly caused prejudice to Minhas because the reports were admitted into evidence and presented to the jury unchallenged. As a result, the case was reversed and remanded for a new trial on damages only.

C. VOCATIONAL EXPERT WITNESS

Novitski v. Rusak, 941 A.2d 43 (Pa. Super. Jan. 4, 2008 Stevens, J.)

Holding: When an expert witness has any reasonable pretension to specialized knowledge on the subject under investigation, he may testify and the weight to be given such testimony is for the trier of fact to determine. The Superior Court affirmed the judgment entered in favor of plaintiff.

Plaintiff and defendant were in an automobile accident. Defendant stipulated to negligence but contested damages. The trial court denied defendant's motion in limine to exclude a vocational rehabilitation expert and an expert in the field of economic losses. The case proceeded to jury trial, and the jury awarded the plaintiff substantial damages, in part representing loss of future earning capacity.

On appeal, the defendant argued that the trial court erred in allowing the vocational expert to testify that plaintiff would need to reduce his work schedule, as

defendant contended there was no competent medical evidence to support that position. As the economist based his testimony on the vocational rehabilitation expert, the defendant argued that testimony was improper as well.

The vocational expert, however, had reasonable pretension to specialized knowledge in the field and was qualified to render an opinion about the degree to which the plaintiff's herniated discs and pinched nerve affected his ability to work. Further, the court found there was clear and concise medical testimony linking all of plaintiff's injuries to the accident and that testimony indicates that his injuries would impact on his ability to work.

Accordingly, the court affirmed the trial court.

D. SUFFICIENCY OF TESTIMONY

Griffin v. Univ. of Pittsburgh Medical Center, 950 A.2d 996 (Pa.Super. May 19, 2008)

Holding: An expert's testimony may be found to be insufficient even though the doctor utters the so-called "magic words," "reasonable degree of medical certainty" during his testimony, as such language, in and of itself, did not serve to render valid an otherwise invalid opinion.

The Plaintiff, Rita Griffin, presented to the hospital complaining of abdominal discomfort and with a prior history of Crohn's Disease. She was admitted for a work-up and possible treatment. Testing revealed a mass involving the terminal ileum.

An exploratory surgery was performed on the plaintiff's abdominal area. On the day after the surgery, the plaintiff exhibited some confusion and agitation. Later that same day, the plaintiff began to complain of right shoulder pain. Upon examination, a right shoulder fracture/dislocation was diagnosed, which required additional surgery in the form of an open reduction and internal fixation. The plaintiff would later require three additional surgeries thereafter, including a shoulder replacement and a later revision thereof.

The plaintiff later filed suit against the hospital alleging that her right shoulder injury could not have occurred absent negligence on the part of the agents, servants, or employees of the hospital.

At trial, the plaintiff presented the videotaped testimony of her expert witness, Dr. Kevin P. Speer, an orthopedic surgeon and shoulder specialist. Unable to point to any specific acts of negligence, this expert supported the plaintiff's *res ipsa loquitur* theory of liability by opining, with "49%" certainty, that the plaintiff's shoulder injury was caused by a grand mal seizure or, with 51% certainty, by forcible restraints, the latter of which would constitute negligence on the part of the defendants.

In contrast, the defense expert, also an orthopedic surgeon with additional training in shoulder surgery, testified, to a reasonable degree of medical certainty, that the plaintiff's injury was caused by a grand mal seizure and not by forcible restraint.

The jury returned a verdict in favor of the plaintiff in the amount of $2,277,131.00. The defendant hospital filed a motion for post-trial relief, which was denied, followed by this appeal to the Superior Court. The defendant's main issue on appeal was whether it was entitled to a judgment notwithstanding the verdict where the plaintiff's expert offered his causation opinion with only 51 % certainty, thus failing to provide the requisite degree of medical certainty.

After completing a review of the caselaw regarding the sufficiency of an expert's opinion, the court found that the plaintiff's expert's opinion was insufficient. The court emphasized that the best the plaintiff's expert could offer was that, of the two scenarios noted, the expert thought that, in the absence of any direct evidence, "the most likely" or "least implausible" mechanism of injury would have been a negligent forcible restraint. The expert also stated that he was 51% certain that the cause of injury was by forcible restraint.

The Superior Court ruled that this testimony was insufficient even though the doctor did utter the so-called "magic words," "reasonable degree of medical certainty" during his testimony, such language, in and of itself, did not serve to render the opinion valid. Rather, in looking at the totality of the opinion testimony, it was apparent to the court that the expert could only testify as to the two potential causes of injury, i.e. the negligent cause and the non-negligent cause, on a 51-49% basis, i.e. a nearly equal basis. The court held that this opinion did not meet the requisite degree of medical certainty test.

Accordingly, the Superior Court reversed the judgment entered in favor of the plaintiff, and remand to the trial court to enter a judgment notwithstanding the verdict in favor of the hospital as the hospital was entitled to judgment in light of the lack of sufficiently competent expert medical evidence on the critical element of causation in the plaintiff's *prima facie* case of medical malpractice.

E. SCOPE OF CROSS-EXAMINATION OF EXPERT

Talarico v. Magalski, 2007 WL 5003817 (Lacka. Co. July 17, 2007)

Holding: Defense expert could not be cross-examined concerning a possible theory of malpractice that had not been asserted by plaintiff's own expert or raised by the defense expert in his report or direct testimony; NOTE: Appeal pending before Superior Court)

Following a defense verdict in this dental malpractice action, the plaintiff filed post-trial motions raising a single evidentiary issue as a basis for a new trial: whether the

defense liability expert may be cross-examined regarding a potential theory of professional negligence that was not asserted by the plaintiff's own expert and that was not raised or discussed by the defense expert in his report or during direct examination.

More specifically, during trial, plaintiff's counsel attempted to cross-examine the defense expert as to whether a negligent and excessive amount of force had been used by the defendant dentist in extracting the tooth. Plaintiff's attorney attempted this line of questioning even though the plaintiff's expert had not criticized the degree of force used by the defendant dentist to remove the tooth and did not opine that the defendant dentist had deviated from any standard of care in that regard.

Additionally, the defense expert did not offer any criticism in this regard in his pre-trial report or during his trial testimony. Rather, the defense expert merely testified that certain damages, as alleged in this matter, were recognized and accepted complications of a tooth extraction and can occur even with the best dental care.

When plaintiff's counsel attempted to cross-examine the defense expert regarding the force used during the extraction, defense counsel objected to this line of questioning as being beyond the scope of the direct examination and in light of the fact that the plaintiff had not presented any expert evidence that such force was either negligence or the cause of the plaintiff's injury. After the trial court provided plaintiff's counsel time to locate any reference in any of the reports to support the use of excessive force theory. When plaintiff's counsel failed to do so, the court sustained the objection and precluded the questioning.

Judge Nealon held that since the scope of cross-examination should generally be limited to the subject matter of the direct examination (Pa.R.E. 611(b)), and since neither the defense expert being cross-examined nor the interrogator's own expert had expressed opinions regarding the newly proffered theory of malpractice in his pre-trial reports or during his trial testimony, it was not an abuse of the wide and sound discretion of the trial court, or error of law, to sustain the defense's objection to that line of questioning. As such, the judge denied the plaintiff's motion for a new trial. As stated, plaintiff's appeal on this issue is still pending before the Superior Court.

Judge Nealon differentiated this case from the case where an expert mentioned and/or analyzed a theory of liability in his report but was not questioned regarding that theory at trial. In that separate scenario, by virtue of the fact that the theory appears in the expert's report, the expert could be cross-examined at trial on that theory even if he did not testify as to it at trial. Chicchi v. SEPTA, 727 A.2d 604, 607-608 (Pa.Cmwlth. 1999) appeal denied 747 A.2d 371 (Pa. 1999).

Conversely, Judge Nealon noted that if the expert had mentioned a theory during his direct examination which did not appear in his report, the expert would be subject to cross-examination on the theory due to the fact that the expert had mentioned it on direct. See Rittenhouse v. Hanks, 777 A.2d 1113, 1117-18 (Pa.Super. 2001); Foster v. City of Pittsburgh, 639 A.2d 929, 932 (Pa.Cmwlth. 1994)[other citations omitted].

As stated, in this case, the defense expert neither referred to the proposed theory in his report nor mentioned it during his direct examination.

INSURANCE

A. PERSONAL INJURY CLAM ARISING FROM ISSUANCE OF RESERVATION OF RIGHTS LETTER BY CARRIER

Smalanskas v. Indian Harbor Insurance Co., No. 04-CV-2394 (Lacka. Co. Feb. 15, 2008, Nealon, J.)

Holding: Summary judgment granted in favor of carrier and plaintiff's claims for breach of contract, negligence, breach of fiduciary duties, breach of duty of good faith/fair dealings, negligent misrepresentation, bad faith, and violations of Unfair Trade Practices/Consumer Protection Law arising out of an heart attack allegedly brought on by the carrier's issuance of a reservation of rights letter are all dismissed. NOTE: Appeal pending before Superior Court.

After Robert Smalanskas secured ownership over Long Pine Inn, a bar and restaurant, he presented himself to an insurance agent on June 15, 2001 to purchase a commercial general liability insurance policy for the property. The plaintiff paid the initial premium on that date and was provided with a binder reflecting an effective date of June 16, 2001. The record before the court confirmed that there was no dispute that the effective date of coverage was June 16, 2001.

Four months later, in October of 2001, a Randy Everetts instituted a lawsuit against Smalanskas and Long Pine Inn alleging that he was injured while moving a freezer on the premises under the direction of Smalanskas on June 15, 2001, i.e. the day before the effective date of the commercial general liability policy secured for the property.

Shortly after the suit was filed the commercial general liability carrier secured a recorded statement from its insured, Smalanskas, who stated that he had witnessed Mr. Everetts injure his foot while moving the freezer on June 16, 2001, and not June 15, 2001 as alleged in the Complaint. Based upon Smalanskas representation, the carrier retained the law firm of O'Malley, Harris, Durkin and Perry, P.C. to defend Smalanskas and the Long Pine Inn in the Everetts litigation.

During the course of the litigation, Smalanskas wrote to the carrier's investigator and again confirmed his assertion that the incident occurred on June 16, 2001. However, Everetts counsel later served discovery responses and produced Everetts medical records which clearly reflected a date of injury of June 15, 2001.

As such, the carrier forwarded a "Reservation of Rights" letter to Smalanskas. Despite reserving its rights to deny coverage under the circumstances, the carrier nevertheless continued to provide defense counsel for Smalanskas in the underlying Everetts case and provided Smalanskas with counsel at no expense. The law firm

retained by the carrier to defend Smalanskas ultimately succeeded in having the Everetts case dismissed.

Thereafter, Smalanskas filed his own suit against the carrier, its adjustment service company, and the insurance agent for an alleged heart attack brought on by the issuance of the Reservation of Rights letter. The attack allegedly occurred on the day he received the letter and while he was on the phone discussing the import of the letter with his attorney at O'Malley, Harris, Durkin & Perry.

Significantly, in his Complaint, Smalanskas again confirmed that the effective date of coverage on the subject policy was June 16, 2001, but now changed from his previous representations by specifically alleging in his Complaint that Everetts injury occurred on June 15, 2001, i.e. the day before the effective date of coverage.

The carrier and the other defendants filed for summary judgment essentially on the grounds that Smalanskas could not identify a cognizable duty owed by the defendants, the breach of which caused recoverable damages under Pennsylvania law. It was more specifically argued by the defendants that they never even denied coverage or benefits to Smalanskas.

Smalanskas opposed the motion for summary judgment by arguing that the defendants breached their duty to conduct a timely and proper investigation of Everetts' incident so as to have been able to confirm or deny coverage sooner.

Judge Nealon essentially ridiculed Smalanskas' theory of liability in a detailed opinion. With regards to Smalanskas theory that the carrier should have done a more thorough and prompt investigation and thereby issued its Reservation of Rights letter sooner, taking this argument to its conclusion would have allegedly only resulted in an earlier issued letter and, presumably, Smalanskas having a heart attack sooner. In any event, Nealon also noted that Smalanskas had offered no expert medical witness to substantiate his claim that the heart attack was brought on by the Reservation of Rights letter.

Additionally, to accept Smalanskas' theory regarding the alleged need for a more thorough investigation would also mean that the carrier would have had to disbelieve the repeated assertions of its own insured as to the date of the underlying incident. Nealon noted that, if the carrier had chosen to reject its own insured's version and issue the Reservation of Rights letter on that basis, the carrier could have arguably been charged with bad faith for refusing to accept the veracity of their insured's statements as to the date of the loss.

Nealon also emphasized the fact that the defendants continued to provide Smalanskas with defense counsel at no cost even after the carrier had learned that the date of injury pre-dated the effective date of coverage. It was also emphasized that the assigned defense counsel secured a favorable result for Smalanskas in the form of a dismissal of the underlying action.

Accordingly, Judge Nealon granted summary judgment in favor of the defendants and dismissed the plaintiff's claims for breach of contract, negligence, breach of fiduciary duties, breach of duty of good faith/fair dealings, negligent misrepresentation, bad faith, and violations of Unfair Trade Practices/Consumer Protection Law. As noted, there is an appeal pending before Superior Court in this matter.

B. DEFENSE AND INDEMNITY – RESERVATION OF RIGHTS – REIMBURSMENT OF DEFENSE COSTS

American and Foreign Ins. Co. v. Jerry's Sport Center, 948 A.2d 834 (Pa. Super. May 5, 2008 Bender, J.)(Sal Cognetti, Jr., Esq. – attorney for prevailing party)

In a matter of first impression in Pennsylvania, the Superior Court held that insurers cannot receive reimbursement for defense costs paid under a reservation of rights absent an express provision allowing them to do so. The Court reversed the court below, which granted the insurer's request for reimbursement of fees it had paid.

Jerry's Sport Center is a firearm wholesale-distributor. It, along with other such distributors, was sued by the NAACP and the National Spinal Cord Injury Association for injunctive relief. The plaintiff insurers provided a defense under a reservation of rights. The insurers also began this declaratory judgment action arguing they owed no coverage because the underlying case did not allege or involve "bodily injury" as defined in the policy.

The underlying action terminated as to Jerry's Sports with a termination of dismissal. The declaratory judgment court then granted summary judgment to the insurers. The Superior Court affirmed.

Although the Superior Court did not expressly remand for further proceedings, the trial court entertained a motion for reimbursement of defense costs, and granted it.

The Superior Court, on appeal from that decision, recognized that some jurisdictions have held that a right of reimbursement can be created by way of implied contract between the insurer and insured in a reservation of rights letter. However, other jurisdictions have not allowed reimbursement unless the policy expressly provides for it. The Superior Court adopted the latter view. The court reasoned that the duty to defend is always broader than the duty to indemnify, and thus the insurer must always make a determination of whether a claim is potentially covered, and not wait for the result for a declaratory judgment action. The insurers also have not only a duty but a right to defend, which gives power to control the defense which may inure to the insurer's ultimate benefit. When an insurer sees potentially covered claims, its duty is triggered, and when it exercises its right to defend, it cannot expect reimbursement without express agreement from the insured.

Here, the policy was silent about a right to reimbursement, so the Superior Court reversed the trial court's ruling.

C. COVERAGE ISSUES

Wall Rose Mutual Insurance Company v. Manross, 939 A.2d 958 (Pa. Super. 2007)

Background: Declaratory judgment action was brought, seeking determination as to whether homeowner's grandson was an "insured" under homeowner's policy issued by insurer in regard to incident that occurred at homeowner's home whereby grandson allegedly threw ornamental dagger at victim, thereby injuring him, while victim was visiting the residence. The Court of Common Pleas, Crawford County, Civil Division, Spataro, Jr., entered summary judgment for insurer, and victim appealed.

Holding: The Superior Court, Hudock, Jr., held that homeowner's grandson was not a "resident" of homeowner's household, and thus, he was not an "insured" under homeowner's policy which defined "insured" as policy holder's relatives who were "residents" of the household. Judgment for insurer affirmed.

The Court stated the general rule that a policy of insurance is a contract, and the interpretation of a contract is a question of law for which appellate court's standard of review is de novo. When construing the written contract that embodies the terms of a policy of insurance, courts must look to the intent of the parties as expressed in the writing itself.

Judge Hudock noted that where the words of insurance policy are clear and unambiguous, the intent is to be gleaned exclusively from the explicit language of the agreement, and the focus of any such interpretation is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended. He also noted that words of "common usage" is an insurance policy are to be construed in their natural, plain, and ordinary sense, and a court may inform its understanding of these terms by considering their dictionary definitions.

The general rule that courts must construe the terms of an insurance policy as written and may not modify the plain meaning of the words under the guise of interpreting the policy was also recognized.

Thus, if the terms of insurance policy are clear, appellate court cannot rewrite it or give it a construction in conflict with the accepted and plain meaning of the language used.

The Superior Court also restated the general rule that when an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such a defense.

The insurance company, being the one who selects the language in a contract, must be specific in its use. When a provision of a policy of insurance is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer.

Accordingly, an exclusion from liability in insurance policy must be clear and exact and unambiguous in order to be given effect. If exclusionary clause in insurance policy is ambiguous, appellate courts construe it in favor of the insured; however, if the language is not ambiguous, courts must enforce the exclusion.

In this case, the Court found that the homeowner's grandson, who allegedly injured victim at homeowner's residence, was not a "resident" of homeowner's household. Therefore, the grandson was not an "insured" under homeowner's policy which defined "insured" as policy holder's relatives who were "residents" of the household.

The Court noted that the grandson was a drifter whose visits at homeowner's residence did not occurred with any regularity. The grandson did not have a key to the residence nor did he have bedroom. Additionally, while he received some mail at homeowner's residence over the years and kept some personal items there, this course of conduct was for grandson's convenience and did not evidence that he physically lived on the premises.

The Court also stated that residency was a question of physical fact, and intentions or beliefs of the grandson were not relevant considerations. Thus, statements by homeowner's grandson that he guessed homeowner's residence would be where he would call home, in and of itself, was not sufficient to establish residency for purposes of making grandson an "insured" under homeowner's policy which defined "insured" as policy holder's relatives who were "residents" of the household.

D. JURISDICTION OVER INSURANCE MATTERS

Howell v. State Farm Mutual Auto. Ins. Co., 2007 U.S. Dist. LEXIS 64639; Civil Action No. 3: CV-07-0775 (Caputo, J., M.D. Pa. Aug. 31, 2007)

Holding: Motion to Remand granted in underinsured motorist case**.**

Gary Howell ("Howell") initially filed a claim in Luzerne County against State Farm Insurance (and the adjuster who handled the claim) for underinsured motorist ("UIM") benefits. Five (5) months after being served State Farm removed the case to federal court after the agent was dismissed from the state court action by Preliminary Objections. Howell filed a Motion to Remand.

State Farm alleged that the case could be removed since the removal took place within thirty (30) days after the Preliminary Objections were granted dismissing the agent from

the case and that the agent should never have been included since it was a fraudulent joinder. Howell countered that the removal was not proper since it was more than thirty (30) days after the initial pleading was served. Judge Caputo grants the Motion to Remand noting that the rules require the removal to be within thirty (30) days after service and if State Farm believed there was a fraudulent joinder it had the obligation to act immediately and not wait.

Progressive Northwestern Insurance Company v. Sczyrek, 2008 WL 170588, 3:08-CV-00106 (M.D. Pa. 2008 Munley, J.)

Holding: Middle District of Pennsylvania exercises discretionary jurisdiction power to dismiss declaratory judgment action.

Immediately upon the filing of a Declaratory Judgment Action the District Court for the Middle District of Pennsylvania issued a Memorandum Order sue sponte declining to exercise jurisdiction. The central issue presented in the case was an exclusionary clause in the Progressive policy and whether it absolved the company from liability in relation to a motor vehicle accident.

The Court writes that, even though diversity jurisdiction applies, the case is in the form of a declaratory judgment action and these actions in federal court are procedural rather than substantive. Thus, the District Court is allowed to decline to exercise jurisdiction. It finds that the "matter before this court is one of contract interpretation under Pennsylvania law. In addition, we would be required to determine whether tort claims of individual liability against an insured that was not operating a motor vehicle can provide liability and a duty to defend outside of exclusions in the insurance policy." Since all are questions of state law and no unique question of federal law exists the case is dismissed.

Ketz v. Progressive Northern Insurance, 2007 U.S. Dist. LEXIS 43245 (M.D. Pa. Munley, J., June 4, 2007)

Holding: Motion for Remand of breach of contract and bad faith action denied

A Motion for Remand was filed in an underinsured motorist ("UIM") case which was filed originally in Lackawanna County where the insured and company could not agree on arbitration and Progressive was making repeated and ongoing requirements before agreeing to arbitration. Thus, the insured filed a breach of contract and bad faith claim in the state trial court. The case was removed and the motion to remand filed.

The decision to deny the motion to remand finds that the two counts for breach of contract and bad faith can be aggregated for diversity purposes and both counts sought more than $50,000. The court found that they could be aggregated since the two counts were not alternate basis for recovery. The court also stated since the complaint did not

limit its request to a precise monetary amount, it could make an independent appraisal of the claim and looked to the settlement demand which was $200,000 as also meeting the jurisdictional amount.

E. PERMISSIVE USE

Erie Insurance Exchange v. Frey, No. 10689-2005 (C.P. Beaver December 27, 2007).

Holding: Trial court finds no coverage where driver substantially deviated from scope of permission to drive vehicle to a certain place and back.

Erie insured an automobile owned by Timothy Edinger which was being operated by his girlfriend, Rebecca Curzi, at the time of the accident. Rebecca Curzi died as a result of the accident. John Frey was injured in the automobile accident. Frey brought suit against both Timothy Edinger and Curzi's Estate for personal injuries. Erie then commenced a declaratory judgment action to determine if it had an obligation to provide coverage for Frey's injuries.

The issue to be determined in the declaratory judgment action was whether Curzi had permission from Edinger to operate his vehicle. Prior to trial, the parties entered into a "high/low agreement" where Erie agreed to pay the policy limits of $50,000 if the Court found there was coverage and $15,000 if the Court found there was no coverage.

At trial, it was found that Edinger had given permission for Curzi to operate the vehicle to and from a job interview. However, at the time of the accident, Curzi was on her way to Edinger's home rather than to where she was staying and consequently, she was found to have "substantially deviated from the scope of the permission which had been granted to her." Slip Op. at p. 3. The Court concluded that Erie need not provide any coverage for Frey's injuries. Frey filed post-trial motions which were denied and appeal followed. The trial court wrote an opinion to explain why the post-trial motions were denied. Pa. R.A.P. 1925(a).

The trial court ruled, based on testimony by several witnesses, that Curzi had indeed exceeded the scope of the permission given by Edinger. The trial court specifically cited the testimony of Curzi's parents and found that Edinger had given permission to use the car to go to the interview but had exceeded the scope of that permission by driving to Edinger's home after the interview was completed. The Court noted that neither party had asserted any sort of argument regarding the scope of the permission but that such an omission was not relevant as the only issue was if Curzi had permission to operate the vehicle at the time of the accident.

The Court found no merit in Frey's second argument that there was no evidence upon which the Court could have determined that Curzi had exceeded the permission to use the vehicle.

The Court also ruled that there was no error in admitting the insurance policy into evidence. The Court noted that in the Commonwealth, "authentication of a writing is not required if the adversary had admitted to its genuineness in open court or in his pleadings." Slip Op. at pp. 7-8, citing, Commonwealth v. Brooks, 352 Pa. Super. 394, 397, 508 A.2d 316, 318 (1986). The Court ruled that there was no mention made of the policy in the general findings nor had Frey raised the issue at the end of the hearing. Therefore, the insurance policy was properly admitted. Frey's motion for post-trial relief was properly denied.

NEGLIGENCE

A. DOG BITE

Duncan v. Miller, PICS Case No. 08-0668 (C.P. Armstrong April 8, 2008)

Holding: A law suit may proceed against landlords over a dog bite caused by their tenant's dog, because the facts tended to support a claim of liability by a landlord out of possession. Motion for summary judgment denied.

Plaintiff was bitten by a dog owned by the tenant leasing property from Edward and Judith Germy. Plaintiff filed suit against both the tenant and the Germys. The Germys moved for summary judgment.

The court denied the motion. As the Superior Court has held in *Palermo v. Nails,* 483 A.2d 871 (Pa. Super. 1984), a landlord out of possession may be held liable for injuries caused by an animal owned by a tenant where the landlord knows of the presence of the dangerous animal and has the right to control or remove the animal by retaking possession of the premises.

The court determined the Germys fit the *Palermo* definition. The court cited evidence that Edward Germy had been to the property several times before the dog-bit incident and had seen the dog and heard the dog barking aggressively. Both defendants also had either driven by or visited the premises after the tenant had posted several "Beware of Dog" signs on the property.

B. BREACH OF FIDUCIARY DUTY

Decker v. Nationwide Insurance Company and Turano, 2008 WL 4593326 (Lacka. Co. March 7, 2008 Minora, J.)

Holding: Insurance agent may be liable to insured for breach of fiduciary duty.

John Decker ("Decker") filed a lawsuit against Nationwide Insurance Company and his insurance agent after he was denied underinsured motorist benefits arising from a car accident. The claims raised included breach of fiduciary duty and bad faith. The insurance agent filed Preliminary Objections arguing that the agency may not be held liable for breach of fiduciary duty.

The trial court denied the Preliminary Objections and relies upon the Court of Common Pleas decision from Erie County in Swantek v. Prudential Prop. & Cas. Ins. Co., 48 Pa. D & C 4th 42 (Erie Co. 1988) where the trial court denied a motion for summary judgment on a similar claim when the relationship between the insurance

company and agent was not clear. In this, case, the trial court finds that the insurance company and agent may be considered separate entities for a breach of fiduciary duty clam under the facts alleged. The court also denies the Preliminary objection of Nationwide on the bad faith claim.

C. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Cherry v. Hendricks, PICS Case No. 08-1027 (C.P. Centre June 11, 2008)

A student who escaped a burning building and later learned his roommate died in that fire does not have a claim for negligent infliction of emotional distress. The court granted summary judgment to the defendant landlord.

A fire occurred in an apartment where plaintiff and his roommate were living. Plaintiff jumped out the window onto the awning to escape. He later learned his roommate had died in the fire. Plaintiff left school and never returned, suffering a great deal of trauma.

Plaintiff sued the landlords for negligence and negligence infliction of emotional distress. The landlords moved for summary judgment.

To recover for negligence, plaintiff must suffer an injury. He contended he suffered a back injury, but there was no such evidence on the record. The only witness to treatment was a psychologist, not a physician.

To recover negligent infliction of emotional distress, plaintiff must meet at least one of three different tests, the "impact" test, the "zone of danger" test, or the "bystander" rule. The court stated there was some confusion about the applicable test in Pennsylvania, so it applied them all. Under the impact rule, a plaintiff himself must have suffered physical impact or injury with the emotional distress as an associated injury, but here there was no evidence of physical injury to serve as the basis of damages.

Under the zone of danger test, the plaintiff must himself suffer emotional distress from a reasonable fear of injury, and have been in personal danger of impact from a negligently created force. Here, the plaintiff escaped without witnessing his roommate's death and without finding himself subjected to a degree of danger that led him to suffer his emotional distress. Rather, he suffered distress from what he learned later.

Finally, under the bystander rule, the court found that the plaintiff failed to meet any of the three requirements, as he was not near the roommate's death, did not witness the death, and was not closely related to the roommate.

Accordingly, the court granted summary judgment to the defendant.

D. DEFAMATION

Lawrence v. Walker, PICS Case No. 08-0992 (C.P. Centre June 12, 2008)

Holding: A plaintiff's defamation claim need not plead that the audience believed the defamatory statement.

E. NEGLIGENT SUPERVISION

Evanko v. Management & Training Corp., 546 F.Supp.2d 188 (M.D.Pa. 2008, Conaboy, J.)

Holding: (1) Absent evidence that trainee had a tendency to act injuriously which operator knew or should have known about or that its minor trainees as a class had such a tendency, operator owed no duty to third party to supervise trainee, and

(2) Operator was not liable for third party's injuries based on its alleged in loco parentis status.

The plaintiff alleged that the defendant job training facility acted negligently in the supervision of three of its students who had left its facility without permission and traveled to another town, for unrelated reasons, where the trio threatened and demanded money from a third party (the plaintiff) and one of the students struck and injured the plaintiff.

The plaintiff sued the facility arguing that the defendant neglected its supervision duties by failing to supervise the minor assailants and/or by breaching their duties *in loco parentis* supervision of the minors.

Judge Conaboy granted summary judgment in favor of the defendant facility finding that there was no genuine issue of material fact that the plaintiff failed to show any special relationship between himself and the facility so as to create a duty of care on the part of the facility to the plaintiff.

Under Pennsylvania law, there is no duty to control the acts of a third person unless the defendant stands in some special relationship with either the person whose conduct needs to be controlled or the person who was injured, such that the intended victim has a right of protection. The types of relationship recognized under the Restatement (Second) of Torts Section 316-319 in this regard include (1) a parent's duty to control a child; (2) a master's duty to control a servant; (3) a possessor of land's duty to control a licensee; and (4) the duty of those in charge of individual's with dangerous propensities to control the individuals.

As there was no proof that the defendant facility had any knowledge of the allegedly dangerous propensities of the minor assailants, the court granted summary judgment in favor of that defendant.

Judge Conaboy also rejected the claim of liability under the *in loco parentis* theory, i.e., that the facility assumed the parental role with respect to the minor assailants, as there was no evidence that the defendant facility could foresee that the minor assailants would act in the manner that they did.

F. CONSTRUCTION LITIGATION

Moses Taylor Hospital v. Sordoni Construction Services, Inc., 2007 WL 4622439 (Lacka. Co. Dec. 15, 2007 Nealon, J.)

Holding: Summary judgment granted in favor of construction manager based upon "contract specifications defense."

Moses Taylor Hospital sued several construction companies seeking to recover damages allegedly related to prefabricated, exterior wall panels that were installed during a hospital expansion project which cracked and reportedly caused wind and water damage.

The hospital asserted that the composition of the panel material and the manner in which the panels were attached to steel studs compromised the panel's flexibility and their ability to accommodate thermal movements, and thereby caused the panels to crack. The hospital sustained damages in the amount of over $2.6 million dollars.

The construction manager for the expansion project filed a motion for summary judgment arguing that the "contract specifications defense," a defense that was articulated in United States v. Spearin, 248 U.S. 132 (1918) and its progeny (the "Spearin doctrine), insulated it from liability. Judge Nealon also reviewed Pennsylvania case law dating as far back as 1910, adopting the same rule of law.

The record before the court on the summary judgment proceedings, including the hospital's own expert testimony, confirmed that the project architect's specifications prescribed the exact panel material to be used and the method of attaching the panels to the studs. The record also established that the construction manager further complied with the specifications by awarding the prefabricated wall panels sub-contract to the only authorized manufacturer.

Judge Nealon followed the long established "contract specifications defense" and held that since a contractor who performs work according to the design specifications of an architect cannot be liable for any unsatisfactory results, the construction manager's motion for summary judgment would be granted.

G. IMMUNITY FROM LIABILITY BY INDEMNIFICATION CLAUSE

Orazi v. DeFazio, 2007 WL 5156199 (Lacka. Co. Sept. 18, 2007, Nealon, J.)

Holding: Commercial tenants granted summary judgment, on the basis of an indemnity clause in lease, against landowners joinder of them as additional defendants in personal injury case brought by tenant's employee.

The plaintiff filed suit to recover damages for injuries she sustained in a fall down stairs while employed at the State Street Restaurant in Clarks Summit. The plaintiff sued the property owners, who in turned joined the property's tenant as additional defendants.

The record before Judge Nealon on summary judgment confirmed that the property owners and the tenant had executed a lease which contained an indemnity provision under which the tenant agreed to indemnify and hold harmless the property owner for all lawsuit claims arising from the tenant's use of the premises or the surrounding sidewalks. The court specifically noted that the indemnity provision did not specifically reference indemnification or contribution for claims made by the tenant's employees, nor did the clause mention any waiver by the tenant of employer immunity for personal injury suits filed by its employees.

By way of background, Judge Nealon noted that the Workers' Compensation Act requires employers, like the restaurant tenant in this matter, to provide workers' compensation coverage for an injured employee regardless of the fault of the employee or employer. In exchange for this no-fault system of compensation, employers are vested with immunity from suit by an injured worker who has received workers' compensation benefits. See Thompson v. WCAB (USF&G Co.), 781 A.2d 1146, 1153 (Pa. 2001)[citation omitted].

However, notwithstanding that tort immunity, an employer may enter into an indemnity contract with a third party in which the employer expressly assumes liability for the negligence of the third party that results in injury to the employer's employee. Morgan v. Harnischfeger Corp., 791 A.2d 1273, 1278 (Pa.Cmwlth. 2002)[citation omitted]. In this matter, it was asserted that the restaurant tenant employer had agreed to assume liability for any alleged negligence on the part of the lessor that results in injury to the restaurant tenant's employees, even though the restaurant tenant was protected by workers' compensation immunity.

Judge Nealon reviewed the law of indemnity contracts in this regard and found that such clauses must be clearly and unequivocally expressed in order to be enforceable and result in a waiver of the employer's immunity to suit. Judge Nealon ruled that since the indemnification clause at issue did not specifically reference tort claims by the tenant's employees, nor did it address the indemnification of the property owners/lessors against any injury suits by the tenant's employees, the language of the parties' lease agreement did not satisfy the specificity requirements of Section 303(b) of the Workers'

Compensation Act, 77 P.S. 481 (b), governing the express waiver of employer immunity and corresponding assumption of liability. Accordingly, the restaurant tenant's immunity under the Workers' Compensation Act to its employee's lawsuit was not waived and the tenant-employer's motion for summary judgment was therefore granted.

H. HILLS AND RIDGES DOCTRINE

Marshal v. Marshall Funeral Home, PICS Case No. 08-1054 (C.P. Lawrence 2008).

Holding: The hills and ridges doctrine only applies to natural accumulations of snow and ice. The court denied summary judgment for the defendant.

MEDICAL MALPRACTICE

A. CERTIFICATE OF MERIT

Bourne v. Temple University Hospital, 932 A.2d 114 (Pa. Super. 2007)

Background: Patient brought action against hospital, doctor, and others, alleging that defendants negligently allowed him to become injured while he recovered from surgery at the hospital. The Court of Common Pleas, Philadelphia County, Civil Division, May Term, 2005 No. 001897, entered a judgment of non pros against patient, and he appealed.

Holding: The Superior Court, 627 EDA 2006, McCaffery, Jr., held that patient's timely motion to extend the 60-day period within which to file a certificate of merit tolled the running of the period until after trial court ruled on the motion to extend. Reversed and remanded.

Court held that patient's timely motion to extend the 60-day period within which to file a certificate of merit in his negligence action against hospital tolled the running of the period until after trial court ruled on the motion to extend. 42 Pa.C.S.A. 1042.3 (a, d).

B. DOCTRINE OF RES IPSA LOQUITUR

MacNutt v. Temple University Hospital, 932 A.2d 980 (Pa. Super. 2007)

Background: Patient, who suffered a chemical burn to his shoulder during surgery to correct Thoracic Outlet Syndrome, a condition that rendered his arms cold and paralyzed on an intermittent basis, brought medical malpractice action against surgeon and hospital. The Court of Common Pleas, Philadelphia County, Younge, Jr., entered judgment in favor of surgeon and hospital, and patient appealed. The Superior Court affirmed and patient requested en banc reargument, which was granted.

Holding: The en banc Superior Court, Gantman, J., held that doctrine of res ipsa loquitur was not applicable so as to create inference of surgeon's negligence. Affirmed.

In its opinion the Court noted that the doctrine of "res ipsa loquitur" is a rule of circumstantial evidence which allows plaintiffs, without direct evidence of the elements of negligence, to present their case to the jury based on an inference of negligence.

Before a plaintiff can invoke the doctrine of res ipsa loquitur, all three of the following elements must be established, and only then does the injury-causing event give rise to an inference of negligence: the event is of a kind which ordinarily does not occur in the absence of negligence; other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and the indicated

negligence is within the scope of the defendant's duty to the plaintiff. Restatement (Second) of Torts §328D(1).

The Court further noted that, under res ipsa loquitur doctrine, if reasonable persons may reach different conclusions regarding the negligence of the defendant, then it is for the jury to determine if the inference of negligence should be drawn. Restatement (Second) of Torts §328D(3). In other words, with regard to the doctrine of res ipsa loquitur, if there is any other cause to which with equal fairness the injury may be attributed, an inference of negligence will not be permitted to be drawn against defendant.

In this case, the Court held that the doctrine of res ipsa loquitur was not applicable so as to create the inference of surgeon's negligence in malpractice action brought by patient, who allegedly suffered chemical burn to his shoulder during surgery to correct Thoracic Outlet Syndrome, since parties' experts intensely disputed exact nature of patient's injury; patient's expert opinioned that patient sustained chemical resulting from lying in pool of certain solution for extended period of time, whereas surgeon's expert opined that patient suffered outbreak of herpes zoster or shingles, and because nature of injury was itself in dispute, injury could have occurred without negligence. Restatement (Second) of Torts §328D(1)(a).

Griffin v. Univ. of Pittsburgh Medical Center, 950 A.2d 966 (Pa. Super. 2008)

Holding: The Superior Court, Bender, J., held that doctrine of res ipsa loquitur was not applicable so as to create inference of hospital's negligence.

The Plaintiff, Rita Griffin, presented to the hospital complaining of abdominal discomfort and with a prior history of Crohn's Disease. She was admitted for a work-up and possible treatment. Testing revealed a mass involving the terminal ileum.

An exploratory surgery was performed on the plaintiff's abdominal area. On the day after the surgery, the plaintiff exhibited some confusion and agitation. Later that same day, the plaintiff began to complain of right shoulder pain. Upon examination, a right shoulder fracture/dislocation was diagnosed, which required additional surgery in the form of an open reduction and internal fixation. The plaintiff would later require three additional surgeries thereafter, including a shoulder replacement and a later revision thereof.

The plaintiff later filed suit against the hospital under the *res ipsa loquitur* doctrine alleging that her right shoulder injury could not have occurred absent negligence on the part of the agents, servants, or employees of the hospital.

At trial, the plaintiff presented the videotaped testimony of her expert witness, Dr. Kevin P. Speer, an orthopedic surgeon and shoulder specialist. Unable to point to any

specific acts of negligence, this expert supported the plaintiff's *res ipsa loquitur* theory of liability by opining, with "49%" certainty, that the plaintiff's shoulder injury was caused by a grand mal seizure or, with 51% certainty, by forcible restraints, the latter of which would constitute negligence on the part of the defendants.

In contrast, the defense expert, also an orthopedic surgeon with additional training in shoulder surgery, testified, to a reasonable degree of medical certainty, that the plaintiff's injury was caused by a grand mal seizure and not by forcible restraint.

The jury returned a verdict in favor of the plaintiff in the amount of $2,277,131.00. The defendant hospital filed a motion for post-trial relief, which was denied, followed by this appeal to the Superior Court. One of the defendant's main issues on appeal was whether it was entitled to a new trial when the trial court charged the jury on the *res ipsa loquitur* doctrine even though the plaintiff's expert failed to establish the injury as one that would not occur absent negligence, where the expert failed to eliminate other possible causes, and where the expert actually offered a specific theory of negligence.

Citing the above case of MacNutt v. Temple Univ. Hosp., Inc., 932 A.2d 980, 983 (Pa.Super. 2007) as guidance, the Superior Court found that the trial court erred in allowing the plaintiff to proceed to a jury on a *res ipsa loquitur* theory of liability since the plaintiff's expert's theory of causation was, to a nearly equal extent, forcible restraint (a negligent cause) or a seizure (a non-negligent cause). Accordingly, the plaintiff's expert did not eliminate other possible causes of the injury, but rather, in violation of the doctrine, actually offered another non-negligent cause as a possibility.

As such, the Court found that the doctrine was incorrectly applied and an inference of negligence should not have been permitted to be drawn against the hospital under the evidence presented. Consequently, the Superior Court reversed the judgment entered in favor of the plaintiff, and in light of its other rulings in this opinion, granted a remand to the trial court for the entry of a judgment notwithstanding the verdict in favor of the defendant hospital.

C. OSTENSIBLE AGENCY CLAIMS UNDER MCARE ACT

Faux v. Redan, (Lacka. Co. September 5, 2007 Nealon, J.)

Background: Plaintiff underwent surgery on January 14, 2003 at CMC Hospital to repair a hernia. The plaintiff alleged that the surgery was negligently performed resulting in ongoing pain and disabilities. The plaintiff filed suit against the surgeon and the hospital.

The hospital filed Preliminary Objections essentially in the form of a motion to dismiss the plaintiff's claims that the surgeon was the hospital's ostensible agent at the time of the surgery.

Holding: Motion denied. Section 516 of the MCARE Act modified the burden of proof applicable to ostensible agency claims established by the Superior Court's decision in Capan v. Divine Providence Hospital, 430 A.2d 647 (Pa.Super. 1980).

Under Capan, the plaintiff was required to prove that he looked to the hospital rather than the surgeon for care and that the hospital held out the doctor as its employee.

Judge Nealon found that a new standard set forth in the MCARE Act reduced the number of elements a plaintiff must prove to bring a hospital into a medical malpractice case as a doctor's co-defendant.

In order to pursue an ostensible agency claim against the hospital under the MCARE Act, a medical malpractice plaintiff was only required to allege and prove either (1) that he was justified in believing that the care was provided by the hospital or its agent, or (2) the care was being represented as being provided by the hospital or its agent. Under the MCARE Act, a plaintiff was now not required to prove both elements to pursue an ostensible agency claim.

D. LIABILITY TO THIRD PERSONS

Taylor v. Nourian, 1 Pa.D.&C.5th 381 (Lacka. Co. 2007, Minora, J.)

Holding: Finding that psychiatrists may in some circumstances be liable to persons other than the patient, the court denied the defendant's motion for summary judgment.

Taylor involved a minor plaintiff who was stabbed by his psychotic mother after she was discharged from the Community Medical Center after medical personnel at that facility allegedly failed to recognize and appreciate the severity of the mother's psychiatric condition.

The defendants filed a motion for summary judgment alleging that the plaintiff's failed to sustain their burden of proof under the applicable law. Judge Minora disagreed an found that genuine material issues of fact existed as to whether the plaintiffs had met their burden of proof of showing gross negligence so as to pierce the immunity provisions of the Mental Health Procedures Act.

The Court also found material issues of fact as to whether the plaintiffs could prevail under the Restatement (Second) of Torts, Section 324A, pertaining to "Liability to third persons for negligent performance of undertaking."

E. VOIR DIRE

Wytiaz v. Deitrick, 2008 WL 2854768 (Pa.Super. July 25, 2008)

Holding: Simply because trial court refuses to use the particular wording of proposed voir dire questions does not mean that the court has prevented inquiry in to the topic in question. Superior Court affirms defense verdict in medical malpractice action.

The plaintiff sued her doctor for failing to diagnose her breast cancer sooner. The jury entered a defense verdict and the plaintiff filed post-trial motions which were denied. This appeal followed. One of the issues raised by the plaintiff was that she had ended up with a biased jury because the trial court's denial of certain proposed voir dire questions.

The Superior Court held that the trial courts have broad discretion in determining the scope, manner, and procedure of the voir dire examination and also noted that the trial court's decisions in this regard would not be reversed in the absence of a palpable error.

Here, the questions the plaintiff sought to ask concerned the potential jurors' beliefs as to whether doctors should be held liable for medical mistakes. The plaintiff argued that there was a media campaign against medical malpractice suits and that this campaign tainted the jury pool. The plaintiffs complained that they were prevented from fully inquiring as to this potential bias.

Upon review of the record, the Superior Court found that the potential jurors were indeed asked specific questions designed to uncover biases. Given that the voir dire was not plainly erroneous, the Superior Court affirmed the defense verdict obtained at trial.

PHYSICIAN-PATIENT PRIVILEGE

A. RELEASE OF RECORDS

Burger v. Blair Medical Associates, Inc., 928 A.2d 246 (Pa. Super. 2007)

Background: Patient, who signed a medical authorization to permit employer's insurer to review medical records incurred due to work-related injury or illnesses, filed a lawsuit against medical group and physician that alleged defendants breached their duty of physician-patient confidentiality by relating medical records detailing patient's marijuana and prescription medication use. The Court of Common Pleas, Blair County, Civil Division, No. 2001 GN 5931, Sullivan, Jr., entered judgment on jury verdict awaiting patient $60,052.37 in damages. Medical group and physician appealed.

Holding: The Superior Court, No. 1070 WDA 2006, Tamilla, Jr., held that two-year limitations period applicable for negligent, intentional, or otherwise tortious conduct applied to patient's action for breach of physician-patient confidentiality. Affirmed.

Two-year limitations period applicable for negligent, intentional, or otherwise tortuous conduct applied to patient's action for breach of physician-patient confidentiality, rather than one-year limitations period that governed causes of action sounding in an invasion of privacy. 42 Pa. C.S.A. §§5524(7), 5929.

RELEASES

A. SKI RESORTS

Wang v. Whitetail Mountain Resort, 933 A.2d 110 (Pa. Super. 2007)

Background: Snow tubing participant, who was struck by an oncoming snow tuber at resort, brought negligence action against resort, alleging that accident occurred after resort employee had negligently instructed participant to exit the snow tube spillway in a direction that brought her directly into the path of the oncoming snow tuber. The defendant ski resort filed an Answer and New Matter alleging that the plaintiff's claim was barred by the fact that the plaintiff had signed a Release of Liability. The Court of Common Pleas, Franklin County, Civil Division, No: 2006-2431, Walsh, Jr., dismissed complaint and granted resort's motion for judgment on the pleadings, and participant appealed.

Holding: The Superior Court, Tamilia, Jr., held that the release was enforceable as it operated as a particularized expression of intention of snow tubing participant to assume the risk of activities "related to" snow tubing at resort. Affirmed.

The plaintiff, a snow tubing participant who was struck by an oncoming snow tuber at resort, alleged that the accident occurred after resort employee had negligently instructed participants to exit snow tub spillway in a direction that brought the plaintiff directly into the path of the oncoming snow tuber.

The Court found that the plaintiff had knowledge and understanding with respect to the Release of Liability she had signed prior to participating in the snow tubing activity. The Court noted that the release was placed prominently in a separately titled paragraph in the middle of a single page document, the release was in a font larger then that used to draft the other portions of the form, and the release was highlighted through the use of emboldened capital letters.

As such, the Court found that the Release was enforceable as it operated as a particularized expression of intention of snow tubing participant, who was struck by an oncoming snow tuber at resort, to assume the risk of activities "related to" snow tubing at resort.

B. UNILATERAL MISTAKES

Ford Motor Co. v. Buseman, 2008 WL 2637181 (Pa. Super. July 7, 2008 Stevens, J.)

In this case, the plaintiff brought an action against the driver of the car in which her daughter was killed, alleging negligence, as well as an action against the dealer and manufacturer of that car in a separate products liability case. The plaintiff then released all claims in the automobile accident negligence action in two separate releases. Both releases not only released the driver of the car but "all other persons, firms or corporations of and from any and every claim, demand, right or cause of action, of whatever kind of [sic] nature…."

Ford Motor Company and its dealer filed for summary judgment in the products liability action based upon the release language. The trial court in the strict liability case refused to grant summary judgment to the defendant.

The Superior Court reversed and held that a release in an negligence case against the driver of a vehicle in a motor vehicle accident matter, releasing not only the driver but "all other…corporations" from claims arising out of the accident, will also serve to release the manufacturer of the automobile involved who the plaintiff had sued in a products liability action.

The Superior court stated that if such a release could be nullified or circumvented under the circumstances presented, then every written release could be viewed as unreliable. Unless there is proof of fraud, accident or mutual, not merely a unilateral mistake, this agreement should be held to be binding on the plaintiff. Accordingly, the Superior Court reversed and granted summary judgment in favor of the defendants.

SUBROGATION ISSUES

A. DOMESTIC RELATIONS LIEN

Faust v. Walker, 945 A.2d 212 (Pa.Super. 2008)

Walker suffered an injury while riding in a bus that was involved in an accident. The claim was settled for $10,000.00. Walker's attorney learned that Walker was an obligor for child support of more than $12,000. Per §4308.1 of the Domestic Relations Code, 23 Pa. Cons. Stat. Ann. §4308.1, a lien was created upon any settlement in excess of $5,000. Walker received a settlement of $10,000 and his attorney fees were 30% ($3,000). Costs for medical records and reports were $199.07. After these expenses, the net award was $6,800.93, or $1,800.93 in excess of $5,000.00.

The Pennsylvania State Collection and Disbursement Unit obtained an order for Walker's attorney to pay $5,000 from the settlement. A motion to strike the order was then filed. The trial court granted the motion and the Dauphin County Domestic Relations Section appealed.

The dispute in the case arose from the definition of "net proceeds." Walker's attorney argued that a net proceeds in a personal injury settlement is the net recovery in excess of $5,000 (i.e., $1,800.93). On the other hand, the Domestic Relations Section argued that the definition of net proceeds in §4308.1(i) does not contemplate a deduction for attorney's fees and expenses. Given this interpretation, the Domestic Relations Section argues that the total that should be paid was not $1,800.93 but $5,000.00.

The trial court looked to the statutory definition of "net proceeds" and defined it as "monies in excess of $5,000 payable to a prevailing party of beneficiary." The trial court also considered the definition in Black's Law Dictionary, "the amount received in a transaction minus the costs of the transaction (such as expenses or commissions)." Slip Op. at p. 413, citing, Black's Law Dictionary 1242 (8th Ed.).

The trial court concluded that the arguments by the Domestic Relations Section was untenable and would create two categories of monetary awards: one for true net proceeds under worker's compensation and another for all other kinds of monetary awards. There is no mention in the statute of two types of awards and as such, the Domestic Relations Section argument was rejected.

The Domestic Relations Section appealed to the Superior Court. The Superior Court quoted from the trial court opinion, stating its "reasoning to be sound." 2008 Pa. Super. at 6. The Superior Court affirmed the trial court, holding:

> The trial court correctly determined that pursuant to Section 4308.1(i), the total amount of the settlement award attributable

> to the child support lien was $1,800.93. The trial court arrived at this amount by deducting from the $10,000.00 award, counsel for Appellee's fees and costs in the amount of $3,199.07, leaving a net award of $6,800.93 of which $1,800.93 was the amount in excess of $5,000.00.

2008 Pa. Super. at 7.

B. FIRST PARTY BENEFITS RIGHT OF SUBROGATION HELD BY OUT-OF-STATE INSURERS

Compton v. Schweikhard, 3:06-CV-78 (M.D.Pa. 2007 Nealon, J.)

Holding: Despite Pennsylvania law prohibiting first party benefits carriers in Pennsylvania from recovering amounts paid out, an out-of-state insurer may recover on first party benefits subrogation rights in Pennsylvania if that foreign state's law allows such recovery.

In Compton, a Maryland resident tractor trailer driver was allegedly injured during an accident that occurred on Interstate 81 in Luzerne County, Pennsylvania. Some of the plaintiff's medical expenses were paid by the plaintiff's disability insurance carrier from Maryland and some of the expenses were paid by his health insurance carrier which was situated in South Carolina.

When the plaintiff advised that he intended to seek the recovery of his medical expenses at trial, the defense filed a motion in limine to preclude the introduction of such evidence under the Pennsylvania MVFRL, 75 Pa.C.S.A. 1720, 1722, which precludes the recovery of first party benefits and certain other forms of insurance benefits. In the alternative, if such recovery was allowed, the defense sought to have any recovery of medical expenses reduced in accordance with Act 6.

Judge William Nealon provided a detailed summary of the applicable law and the exceptions thereto. Additionally, after reviewing other court decisions addressing liens asserted by carriers from Virginia, New Jersey, New York, and Oregon, the Court held under a choice of law analysis that, "[i]n Pennsylvania, when dealing with an out-of-state insurer with regard to subrogation rights in a motor vehicle accident, the state law of the out-of-state plaintiffs and insurers applies."

That is, if the law of the out-of-state plaintiff or insurer allows the carrier to recover the amounts it paid out to the plaintiff as a result of an accident, the plaintiff in turn will be permitted to plead, prove, and attempt to recover the same in his or her lawsuit.

In this matter, since Maryland and South Carolina law allowed carriers to recover such benefits, the plaintiff in this matter was allowed to present evidence of the expenses at his Pennsylvania trial. The defendant's motion in limine was therefore denied.

The Compton decision is also noteworthy for the fact that Judge Nealon upheld the long-standing rule that evidence of a traffic citation issued to a defendant in a motor vehicle case was inadmissible under 42 Pa.C.S.A. 6142 and by virtue of the fact that, under F.R.E. 403 any probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

C. WAIVER OF SUBROGATION RIGHTS

Valora v. Pennsylvania Employees Benefit Trust Fund, 939 A.2d 312 (Pa. 2007)

Background: Subscriber to health care plan administered by public employees benefit trust fund filed complaint to enjoin administrator from terminating benefits on ground that subscriber failed to cooperate in subrogation claim to proceeds of medical malpractice settlement. Administrator counterclaimined asserting subrogation claim. The Court of Common Pleas, Dauphin County, Civil Division Cherry, Jr., determined that administrator had waived its right to subrogation. Administrator appealed. The Superior Court, Tamilia, J., 847 A.2d 681, affirmed. Review by Pennsylvania Supreme Court was granted.

Holding: The Supreme Court, Castille, Jr., held that:

(1) fund had a contractual right to subrogation;

(2) equitable principles applied to subrogation;

(3) substantial delay before raising subrogation claim waived or defeated contractual right to subrogation.

Affirmed.

The Supreme Court noted that a public employees benefit trust fund, as administrator of health care plan, had a contractual right to subrogation in proceeds of settlement of subscriber's medical malpractice action. In fact, the applicable State Police Handbook stated that plan would be subrogated and would succeed to any rights the subscriber had for recovery of expenses against any person or organization to the extent that benefits for covered services were provided or paid.

The Court noted that a right to subrogation may arise as a result of a contractual reservation or as a matter of equity, if no such specific reservation exists.

Subrogation is to be based upon equitable principles, even though the right thereto, as authorized by statute in respect of policies of insurance, is contractually declared. It was held that the fact that the right to subrogation stems from a contract does not render equitable consideration irrelevant.

Rather, equitable principles, such as reasonable diligence in pursuing and asserting subrogation, were found to apply to contractual right to subrogation asserted by public employees benefit trust fund, as administrator of health care plan, in proceeds of settlement of subscriber's medical malpractice action.

However, the Supreme Court ruled that the public employees benefit trust fund's substantial delay before raising subrogation claim waived or defeated contractual right to subrogation in settlement proceeds of subscriber's medical malpractice action. In this case, the administrator of the fund paid medical benefits for a child who suffered a severe birth injury that was likely to give rise to litigation and the fund was therefore on notice of a potential subrogation claim. Yet, although the administrator employed experienced attorneys to identify potential subrogation claims, and was in a position to discover its potential claim far in advance of the date of first notice, the administrator waived the subrogation claim by waiting more than five months after the approval of settlement to make the claim.

UM/UIM MATTERS

A. COVERAGE ISSUES

Reeser v. Donegal Mut. Ins. Co., PICS Case No. 08-0891 (Lacka. Co. May 14, 2008, Nealon, J.)

Holding: Employees injured while riding in a company vehicle insured by a sole proprietor may not stack underinsured motorists benefits because the policy does not allow "class two" insureds to stack UIM benefits. Under the employer's business automobile policy, only the employer and family members who reside with her may stack UIM coverage as "class one" insureds.

Background: This case involved four employees of a cleaning service operated by Merrily Custer. The four employees were riding in a vehicle owned by Custer, doing business as Clean-Ups.

The vehicle was struck by another vehicle and the employees were injured. The employees filed personal injury actions against the driver of the other vehicle, whose liability carrier tendered its $300,000 policy limits.

The employees then pursued UIM claims against Donegal Mutual Insurance Company, which insured the company vehicle the employees were located in at the time of the accident.

Custer, the employer, insured four company vehicles with Donegal under a policy issued to Custer and Clean-Ups. The policy carried liability coverage of $500,000 and uninsured/underinsured coverage of $35,000 per accident, without stacking.

However, Donegal was unable to produce executed forms verifying Custer's selection of lower UM/UIM limits and her rejection of stacking. As a result, Donegal agreed to reform the policy to provide $500,000 in UIM coverage.

In response, the injured employees asserted that, because Donegal failed to produce the executed waiver forms, the employees should have been entitled to stacked UIM coverage on the four vehicles for a total of $2 million in UIM coverage.

Donegal then filed a Declaratory Judgment action seeking a declaration that the employees were "class two" insureds and, therefore, they could not stack the UIM coverage. Nealon agreed and rejected the employees argument that recent changes to the MVFRL had eliminated the distinction between classes of insureds.

The judge also confirmed that a review of Pennsylvania case law established that the courts have long held that an employee occupying a company car is to be considered

a "class two" insured. The basic rationale is that an employee injured while using a company car has no recognizable contractual relationship with the carrier, and therefore, there is no reasonable basis upon which the employee could reasonably expect multiple coverage.

Based on applicable appellate decisions, Judge Nealon also rejected the employees argument that the inclusion of certain other employees of the company on the list of intended drivers of Clean-Ups' vehicles made all of the employees intended beneficiaries of the purchased UIM coverage. In this case, the injured employees were not on any such list. In any event, the appellate courts have never held that being listed on an insurance policy, in and of itself, confers class one status upon the listed person.

Progressive Northern Insurance Corporation v. Gushanas, 2007 WL 3053301, 2007 U.S. Dist LEXIS 77482 (M.D. Pa. Oct. 18, 2007 Vanaskie, J.)

Holding: Class 2 passenger in motor vehicle is not allowed to stack underinsured motorist coverage.

A minor class 2 insured sought stacked coverage as a result of a motor vehicle accident. The argument made by the minor's representative was that the insurance policy was not clear because it failed to distinguish between class 1 and class 2 insureds. Progressive Northern Insurance Company ("Progressive") argued that the policy did distinguish between difference classes by the limits of liability for stacked coverage provision which drew a distinction between a class 1 and class 2 insured.

The District Court observes that the Limits of Liability provision does differentiate out different persons eligible to stack and the minor is not one of the people. The Court also relies upon the en banc Superior Court decision in O'Connor-Kohler v. United States Automobile Association, 883 A.2d 673 (Pa. Super. Ct. 2005), appeal denied, 897 A.2d 459 (Pa. 2006) where the Superior Court upheld policy language which limited stacking to only a named insured or a member of the named insureds family. The District Court finds that although the language in the Progressive policy is not the same as in O'Connor-Kohler, the intention in the policy is the same that only a named insured and his or her relatives may stack. The District Court also distinguishes the Gushanas situation from State Farm v. Kramer, 2003 WL 23100165 (Erie Co. March 31, 2003), affirmed, 849 A.2d 618 (Pa. Super. Ct. 2004) (Memorandum) because in Kramer there was not limitation in the stacking language of the policy to exclude a class 2 insured from coverage but in Progressive's policy the policy identifies who is entitled to stacking. The District Court enters judgment in favor of Progressive.

Kalinoski v. Erie Insurance Exchange, No. C-0048-CV2005-03993 (Northampton Co. Feb. 14, 2008)

Holding: Person listed as a "driver" on a motor vehicle insurance policy is entitled to stack underinsured motorist benefits, even if not a resident relative.

On August 21, 2001 Richard Kalinoski Jr. ("Kalinoski") was seriously injured in a car accident with an underinsured motorist. At the time of the accident, Kalinoski was a 26 year old resident of Florida who was operating a 1994 Jeep Wrangler owned by his father and insured under a policy with Erie Insurance Exchange ("Erie"). There were 6 vehicles insured on the policy which all had $100,000 in underinsured motorist coverage and stacking. Kalinoski was listed in the Declarations as a "Driver" along with his license number and date of birth. He made a claim for underinsured motorist benefits and Erie paid $100,000. Kalinoski claimed that he was entitled to $500,000 more in coverage since he was listed as a "driver". Erie denied the stacking claim and a declaratory judgment action was filed.

After extensive discovery and cross-motions for Summary Judgment, on February 14, 2008 Judge Roscioli, from the Court of Common Pleas of Northampton County holds that where a person, such as Kalinoski, is listed as a "driver" on a policy he or she is entitled to stacking of underinsured (and one would also assume uninsured) motorist benefits. The trial court rejects Erie's reliance on Utica Mutual v. Constriciane, 473 A.2d 1005 (Pa. 1984); Caron v. Reliance Ins. Co., 703 A.2d 63 (Pa. Super. 1997) as well as a common pleas and federal court Eastern District decision. Erie attempted to argue that those cases stand for the proposition that being listed as a "driver" does not mandate stacking.

Instead the trial court follows Marchese v. Aetna Casualty and Surety Co., 426 A.2d 646 (Pa. Super. 1981) and notes that the passage of the Financial Responsibility Law in 1984 does not undercut the Marchese decision. The trial court holds that Kalinoski is entitled to the stacking of benefits and orders the case to arbitration.

Nationwide Mutual Insurance Company v. Kuentzler, 2007 U.S. Dist. LEXIS 43236 (M.D. Pa. June 14, 2007 Caldwell, J.)

Holding: Middle District Court Rules that the listing of a driver on a policy does not automatically make the person an "insured".

Shawn Kuentzler ("Kuentzler") was seriously injured in a motor vehicle accident. He made a claim for underinsured motorist benefits ("UIM") with his parents insurance company Nationwide and argued that he qualified for coverage because he "regularly resided" with them and also was listed as a driver on the policy.

First, the court finds that he did not regularly reside with them. The court notes his address at the time of the accident and other specific facts in the case to make its finding.

Second, the court looks at whether the declaration page which listed Kuentzler and his parents as "Insured Drivers" made a difference. Kuentzler argued that the policy fails to define "Insured Driver" or "driver." However, it does define "Insured" as "one who is described as entitled to protection under each coverage." Thus, he was entitled to UIM coverage because he as an insured "under each coverage." Their was also an argument made that the term "Insured Driver" is ambiguous and since ambiguity must be construed against the drafter, this also leads to the conclusion that there is coverage since. Importantly, there was no argument asserted that Kuentzler was entitled to coverage as a "designated" insured which allows him class one status.

In opposition, Nationwide argued that under Caron v. Reliance Ins. Co., 703 A.2d 63, 68 (Pa. Super. 1997) there was no coverage. Also, it submitted an affidavit that supported by the fact that the son was listed as an insured driver on the declaration page only because of Nationwide's policy of naming drivers who have regular access to the vehicle.

Under the policy language the court agrees that the insurer that the policy confers no UIM coverage on an "Insured Driver" alone. Any "Insured Driver" must still meet the requirements imposed by the UIM coverage, including whether relevant, satisfying the definition of "relative." The court grants the Nationwide Motion for Summary judgment.

Burdick v. Erie Insurance Group, 946 A.2d 1106 (Pa. Super. 2008)

Holding: Defendant's exclusion of uninsured motorist coverage for collisions involving motor vehicles designed for use mainly off public roads was contrary to the Motor Vehicle Financial Responsibility Law. Reversed and remanded.

The Claimants were injured in a collision with a dirt bike that left a private driveway and entered a public highway where they were driving. The dirt bike was unregistered and uninsured.

As such, the injured parties filed a claim for uninsured motorist (UM) benefits with defendant, which insured their vehicle. Defendant denied the claim due to the policy's exclusion of UM coverage for collisions involving motor vehicles designed for use mainly off public roads.

Plaintiffs filed a Complaint for declaratory judgment. The trial court granted summary judgment to defendant, concluding that the policy exclusion did not violate the Motor Vehicle Financial Responsibility Law (MVFRL). Plaintiffs appealed.

An en banc panel for the Superior Court noted that the MVFRL requires that UM coverage be offered. The MVFRL does not, however, provide a definition of the term "motor vehicle." The General Assembly provided a definition of that term in the broader vehicle code at 75 Pa. C.S. §102. The dirt bike at issue clearly fell within this definition, the court said.

The court further noted the plain language of 75 Pa. C.S. §1731(b), which provides that "[UM] coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefore from owners or operators of uninsured motor vehicles."

"Accordingly, the exclusion contained in the [defendant's] policy, which excludes UM coverage for a collision with a motor vehicle intended primarily for off-road use, violates the MVFRL[,]" the court stated.

The court further noted with respect to the MVFRL, the fact that the general assembly specifically imposed a limitation regarding coverage for recreational vehicles in certain sections of the statute but not in the UM section "is evidence that the Legislature specifically chose not to impose such a limitation with respect to UM coverage."

Finally, the court found its decision consistent with the public policy behind the enactment of the MVFRL. It, therefore, reversed and remanded for entry of judgment in plaintiffs' favor.

Nationwide Mut. Ins. Co. v. Yungwirth, 940 A.2d 523 (Pa. Super. 2008) (en banc)

Holding: A person injured while a passenger on an ATV is not injured by an uninsured motorist.

On May 11, 2002 Anthony Yungwirth ("Yungwirth") was injured while a passenger on an all terrain vehicle ("ATV"). The ATV was driven off road and the driver lost control causing Yungwirth to be ejected and injured. He filed an uninsured ("UM") motorist claim with his insurance carrier since the ATV did not carry insurance and the claim was denied due to an exclusion in the policy which excluded from the definition of "uninsured motorist vehicle" a "vehicle designed for use mainly off public roads except while on public roads." The trial court held that the exclusion was invalid as contrary to the provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") and Nationwide appealed.

The Superior Court in the en banc decision observes that in the MVFRL there is no specific definition of "motor vehicle." The broader Motor Vehicle Code provides a definition in Section 102 that arguable would include an ATV within the definition of "motor vehicle." However, the court observes that there are special laws for the ATVs, such as the Snowmobile All-Terrain Vehicle Law, which do provide a specific definition of ATVs and basically take ATVs out for the definition of "motor vehicle" in Section 102

of the Pennsylvania Motor Vehicle Code. Thus, the en banc panel finds that ATVs are not within the scope of "motor vehicle" under the MVFRL and not an "uninsured vehicle" under the MVFRL.

The court writes that "the provision of the Nationwide policy which excludes ATVs from the definition of 'uninsured motor vehicle' does not impermissibly narrow the MVFRL. The Superior Court therefore concluded that the trial court erred when it found the exclusion invalid.

Farmers New Century Insurance Co. v. Angerson, 2008 WL 238622 (M.D. Pa. Jan. 22, 2008 Jones, J.)

Holding: Court allows recovery under homeowners policy for injuries sustained while occupying an ATV.

As thoroughly discussed and explained in the Court's decision, the question presented by this declaratory judgment action is whether Farmers homeowners insurance policy issued to Angerson covers injuries sustained by J.V., arising out of an all-terrain vehicle ("ATV") accident. On April 16, 2004, J.V., a minor, was a passenger on an ATV driven by Angerson's son, C.L.A., also a minor. C.L.A. started out from the residence where he and Angerson reside. C.L.A. drove the ATV approximately half a mile onto land not owned by Angerson. As C.L.A. was operating the ATV, it tipped over.

The Angerson residence is located on Bowen Road, a paved road, however the road does not reach the Angerson property directly, and an access road is used to get from the Angerson residence to Bowen Road. Approximately one-third of a mile pas the Angerson residence, Bowen Road becomes a dirt road and is then known as Elias.

There are numerous ATV paths in the area around the Angerson home. C.L.A. had ridden the ATV on some of these paths to the accident site before, and used the ATV on these paths about once a week. Neither Angerson nor C.L.A. is sure which of the paths C.L.A. took on the day of the accident. However, C.L.A. took one of the paths he "always" takes "every time" he rides in that area. No path to the accident site originates on Angerson's property, and to get to the accident site C.L.A. would have had to cross.

Prior to the accident, Angerson and C.L.A. frequently used the ATV on their property to move rocks that accumulated because of flooding. Angerson also used the ATV himself about 10-15 times a month for recreation on different paths in the woods outside of his property. However, Angerson had never ridden the ATV to the exact location of the accident. In addition, four to five times a year in 2001 and 2002, Angerson used the ATV outside of his property to gather large stones which his wife used to create rock gardens around their property. On these occasions, Angerson would pick rocks within 100-150 yards of the accident site.

Farmers relied on an exclusion to deny coverage. The policy provided that Coverage E does not apply to bodily injury arising out of:

> (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an 'insured';
>
> (2) The entrustment by an 'insured' of a motor vehicle or any other motorized land conveyance to any person; or
>
> (3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above.

Farmers argued that Angerson's ATV is a "motor vehicle" or "motorized land conveyance" and therefore, this motor vehicle exclusion precludes coverage. Defendants argued that the terms of the exclusion are ambiguous.

Regardless of whether it is a "motor vehicle", the ATV falls within the broader terms "motorized land conveyances" and therefore triggers the exclusion. This term is undefined by the policy, but is unambiguous in the context of the exclusion. "[C]ommon sense suggests it means any motorized vehicle intended for land use except those designated for travel on public roads or those subject to motor vehicle registration, which are defined as motor vehicles…" Nationwide Mut. Ins. Co. v. Gardner, 79, Pa. D. & C. 4th 150, 158-59 (C.C.P. Huntingdon County 2006). The clear purpose of this term is to bring within the exclusion a broader category of motorized land vehicles that do not fall within the definition of motor vehicles.

Because the ATV at issue is an "other motorized land conveyance", the motor vehicle exclusion precludes coverage for the April 16, 2004 accident. However, this analysis does not end our inquiry, and we will next examine an exception to this exclusion.

The defendants rely on an exception to the motor vehicle exclusion to bring the April 16, 2004 accident within Coverage E. The policy provides that the motor vehicle exclusion does not apply to: "A motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and … owned by an insured and on an insured location." Thus, to meet their burden of proving that this exception applies, the defendants must show that the ATV (1) is a motorized land conveyance, (2) designed for recreational use off public roads, (3) not subject to motor vehicle registration, (4) owned by an insured, and (5) on an insured location."

In this case, Angerson and C.L.A. made frequent use of the area in which the accident occurred. About 10-25 times per month, Angerson road the ATV from his property onto the paths through the woods adjacent to his land. About once a week, C.L.A. also road the ATV on these adjacent paths, and he had previously ridden to the

location of the accident. In addition, up until about two years before the accident, Angerson used the ATV to collect stones for rock gardens on his property from a location 10-150 yards from the accident site. These facts demonstrate that Angerson and C.L.A. repeatedly road the ATV from their property into the adjacent woods and back for recreational and home-improvement purposes. Therefore, the area where the accident occurred was used in connection with the residence premises within the meaning of the term "insured location."

Farmers further argues that only Angerson's use of the adjacent woods may be considered because the word "you" in the phrase "used by you in connection with [the residence premises]" refers to "the 'named insured' shown in the Declarations and the spouse if a resident of the same household." In MacDonald, the court considered the testimony of the daughter of the insured's friends regarding use of the adjacent field. MacDonald, 850 A.2d at 711. Similarly, in Prevatte, 423 S.E.2d at 92. Further, Angerson could be considered to "use" the adjacent woods "in connection with" his home by permitting a minor member of the household to ride his ATV there. Regardless, however, Angerson's activities alone are enough to establish the repeated use of the area where the accident occurred.

The April 16, 2004 accident comes within the coverage of Angerson's Farmers homeowners policy, but this occurrence also triggers the motor vehicle exclusion to that coverage. Farmers remains obligated to defend and indemnify Angerson and C.L.A. from claims arising out the accident, however, because this occurrence falls within the exception to the motor vehicle exclusion for motorized land conveyances, designed for recreational use off public roads, not subject to motor vehicle registration, owned by an insured, and on an insured location. Therefore, and for the foregoing reasons, Farmers' motion for summary judgment will be denied, and the defendants' motions for summary judgment will be granted.

B. VALID REQUESTS FOR LOWER UM/UIM COVERAGE

Sokoloski v. Erie Insurance Exchange, No. 2004 CIV 2114 (Lack Co. Sept. 12, 2007 Smith, J.)

Holding: Application for coverage is sufficient under the facts to operate as a written request for lower underinsured motorist coverage.

Francis Sokoloski ("Sokoloski") claimed that a insurance application for coverage was not a valid written request for lower underinsured motorist coverage ("UIM") from $100,000 to $50,000. Erie Insurance Exchange ("Erie") argued that the application was a sufficient sign down since the application included a place for uninsured and underinsured coverages to be filled in with the amounts filled in for uninsured and underinsured motorist for $50,000 and bodily injury limits of $100,000.

The court observes that Section 1734 of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") does not have a specific notice. One two (2) things are required: 1. a signed writing by the named insured and 2. an express designation of the amount of UM and UIM requested. The application had the amounts filled in and was signed so there was found to be a written request for lower limits. Therefore, the trial court holds that a valid written request for lower limits was made under Section 1734 of the MVFRL.

Sackett I - Sackett v. Nationwide Insurance Company, 919 A.2d 194 (Pa. April 17, 2007) (Pennsylvania Supreme Court REVERSES Superior Court and Holds that A New rejection of stacking for form uninsured and underinsured motorist coverage is required when adding a vehicle to an already existing policy).

Victor Sackett ("Sackett") was seriously injured in a car accident while a passenger in another car. He obtained the third party liability limits and the underinsured motorist ("UIM") limits on the vehicle was occupying at the time of the accident. He then sought additional UIM coverage on his own personal policy with Nationwide.

Sackett purchased coverage initially in 1998 with two (2) vehicles and not stacking on the policy. Prior to the accident he added a third vehicle to the policy and no new forms were signed regarding UM and UIM coverage or stacking. Sackett argued that he had stacking since a new rejection of stacking form was not executed when the third car was added.

The Superior Court initially held that a new rejection of sacking waiver is not necessary every time a car is added to a policy of insurance> The initial rejection form (assuming it complies with the statutory law) is effective regardless of subsequent changes to the policy. HOWEVER, the Pennsylvania Supreme Court reversed and holds that a new rejection of stacking form is required.

The Supreme Court decision focuses on the word "purchase in Section 1738 of the Motor Vehicle Financial Responsibility Law. The Court finds that when an insured adds a second, third, fourth or any other car to a policy that there is a "purchase" of that coverage. Thus, when an insured initially rejects the stacking of coverage on the policy there is a rejection of stacking for the amount of vehicles on the policy at the time of the "purchase". However, when a vehicle is added, not replaced or deleted, then there is a new "purchase" and the insured should receive a new form to reject stacking. The decision of the Superior court is reversed.

The Supreme Court also makes certain to mention in this decision that the language of a statute of paramount, even if there may be a subsequent increase in insurance premiums. Therefore, the insurance company is not, and really has never been, able to simply argue that premiums will increase as a way to prevail.

Lastly, the Court also notes that if there is a requirement in the statute and the insurance company fails to follow it, the coverage is by statute automatically what the law provides. In this case, Nationwide attempted to argue that even if a new form was not required that there was no remedy anyway. This argument has been rejected because the statute mandates that an insured has the coverage unless rejected. Therefore, no remedy is needed and the insured has the coverage from its inception.

Sackett II - Sackett v. Nationwide Mutual Insurance Company, 940 A.2d 329 (Pa. Dec. 27, 2007) (Pennsylvania Supreme Court limits the extent of Sackett I if a car is added as a result of the "newly acquired vehicle" clause).

After Sackett I the insurance company Nationwide filed an application for reargument and the Supreme Court invited the Insurance Commissioner to comment on the decision. The Commissioner stated that the addition of a new vehicle to an exiting multi-vehicle policy was not a new purchase of coverage because cars are generally added to a policy by way of a "new acquired vehicle clause". This clause explicitly permits consumers to extend existing coverage, with the same applicable types of coverage and limits, to new and/or substitute vehicles, with coverage applying automatically upon acquisition, subject to various conditions, including a requirement of timely subsequent notice to the insurer. Thus, the Insurance Commissioner opined that the original Sackett decision ("Sackett I") effectively nullifies the newly-acquired-vehicle.

The Court in Sackett II specifically states that the Court's "interest in reargument, however, is focused on the contention that Sackett I can be read as negating the effect of after-acquired-vehicle clauses of automobile insurance policies". Thus, unless a car was added to the policy through a "newly acquired vehicle" clause then apply Sackett I.

The Supreme Court gives great deference to the Insurance Commissioner's view that the stacking waiver remains in effect upon the acquisition of a vehicle covered under contractual after-acquired-vehicle provisions. In addition to the Commissioner's view, the parties arguments and applying the statutory construction act the Court "clarif[ies] that Sackett I does not preclude the enforcement of an initial waiver of stacked UM/UIM relative to coverage extended under after-acquired-vehicle provisions of an existing multi-vehicle policy".

Assuming a vehicle is added to the policy under this provision of a policy the Court next decides the duration of the automatic coverage under an after-acquired-vehicle provision. Reviewing decisions from other jurisdictions the Court notes that there are generally two types of clause, those that provide automatic coverage for a closed term as in Bird v. State Farm Mutual Automobile Insurance Company, 2007 NMCA 88, 165 P. 3d 343 (N.M. 2007) where the coverage to new vehicles applies only until the thirty-first day after acquisition, thus requiring insureds to apply for a new policy after or clause as in Satterfield v. Erie Insurance Property and Casualty, 217 W. Va. 474, 618 S.E.2d 483 (W. Va. 2005), where coverage continued, subject only to a condition subsequent of

notice to the insurer concerning the purchase and, presumably, payment of an additional premium. The Curt adopts the following rule to determine whether a new rejection of stacking form is needed when a vehicle is added to a policy under the "newly acquired vehicle" clause. It writes:

> "To the degree that coverage under a particular after-acquired-vehicle provision continues in effect throughout the existing policy period, subject only to conditions subsequent such as notice and the payment of premiums, again, we clarify that *Sackett I* should not disturb the effect of an initial UM/UIM stacking waiver obtained in connection with a multi-vehicle policy. Again, our reasoning is that the term "purchase," as specifically used in Section 1738. does not subsume such adjustments to the scope of an existing policy containing such terms.
>
> We hold that the extension of coverage under an after-acquired-vehicle provision to a vehicle added to a pre-existing multi-vehicle policy is not a new purchase of coverage for purposes of Section 1738(c), and thus, does not trigger an obligation on the part of the insurer to obtain new or supplemental UM/UIM stacking waivers. However, where coverage under an after-acquired-vehicle clause is expressly made finite by the terms of the policy, See, e.g., Bird, 165 P. 3d at 346-47, Sackett I controls and requires the execution of a new UM/UIM stacking waiver upon the expiration of the automatic coverage in order for the unstacked coverage option to continue in effect subsequent to such expiration."

The opinion in Sackett I, 591 Pa. 416, 919 A.2d 194 is modified by the above, albeit that we reaffirmed the result."

Thus, just a few of the results of both Sackett I and Sackett II can be summarized for the insured as:

1. The original Sackett I case still applies unless a car is added to a multi-vehicle policy under the "after acquired/newly acquired vehicle."
2. If a vehicle was added under an after "acquired/newly acquired vehicle clause" then a new waiver of stacking may have been required depending upon the way the clause was worded in the policy at the time the new car was added.
3. The effects of adding a car to a single vehicle policy was an issue left open by the Court.
4. A new waiver is not required when the new vehicle is only replacing a vehicle on the policy.

5. A new waiver is not required when a vehicle is deleted from a policy.

Clearly, the insured's policy *at the time* the vehicle was added will need to be reviewed and analyzed carefully. For example, in some policies the company does not automatically cover a new vehicle because all of the vehicles in the house are insured with different companies. In this case the clause would not apply and then a new waiver would be needed once the car is added to the policy as a purchase of coverage. Also, companies will surely be changing their policies to make sure that the new waiver would not be needed if a vehicle is added to a policy. These are all issues that must be addressed. The impact and effect of the Sackett I and II decisions will still be seen and litigated for several years and the insurance companies and agents will need to be receptive and cooperative for the insured when producing policies, forms and other documents relevant to the issue.

State Auto Property & Casualty Ins. Co. v. Pro Design, P.C., PICS Case No. 08-1009 (M.D. Pa. June 17, 2008 Munley, J.).

Holding: Although the insured signed a waiver of stacking of UIM benefits at the inception of the policy, which insured only one car, the insurer should have requested a waiver of stacking when the insured later added a second and third vehicle to the policy. Motion for summary judgment denied.

Plaintiff-insurer filed a declaratory judgment action seeking a determination of its obligations under an automobile insurance policy issued to "pro Design Plus, P.C. and/or Ronald Dillman." Dillman and his wife had filed a claim for underinsured motorist (UIM) benefits. At issue was whether Pro Design could avail itself of stacked UIM benefits when it had waived stacking of UIM benefits when it purchased the policy. At its inception, the policy covered only one car. However, upon subsequent renewals, Pro Design added two more cars. When Pro Design added them, plaintiff did not request another waiver of UIM stacking.

Plaintiff moved for summary judgment, relying on the wavier executed at the inception of the policy.

The instate case involved the intra-policy stacking of insurance policy benefits, i.e., multiplying the limits of uninsured/underinsured motorist coverage under a single policy by the number of vehicles insured under that policy. Under Pennsylvania law, stacking may be waived. 75 Pa. C.S. §1738(c) provides, "more than one vehicle. - Each named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage and instead purchase coverage as described in subsection (b) [relating to waiver of stacked coverage]."

In Sackett v. Nationwide Mut. Ins. Co., 940 A.3d 329 (Pa. Dec. 27, 2007) (Sackett II), the Supreme Court addressed the issue of whether a new waiver of stacking must be provided when an insured adds a vehicle onto a *mutli-vehicle* policy. The Sackett II court determined that the operative would in Section 1738(c) was "purchased."

"As with Sackett II, our analysis turns on the definition of 'purchase'[.]" the court stated. In the instant case, the defendant signed the waiver of stacking when it purchased the single-vehicle policy. Thus, the court pointed out, when he executed the wavier, he did not fall under the protection of Section 1738(c) because the policy covered only one vehicle. When the defendant waived intra-policy stacking, he waived nothing.

"We find under the statute that the adding of new vehicles was in fact the purchase of a multi-vehicle policy that required the plaintiff to obtain a waiver of stacking or coverage would in fact be stacked under [Section] 1738(a)[,]" the court stated. Here, however, despite the directive of Section 1738(c), the plaintiff did not provide the defendant with the opportunity to waive stacking at the appropriate time.

Concluding that intra-policy stacking was available here, the court denied the plaintiff's motion for summary judgment.

C. EXHAUSTION OF COVERAGE

Nationwide Insurance Company v. Schneider, 906 A.2d 586 (Pa. Super. 2006) (en banc).

On February 5, 2007 the Pennsylvania Supreme Court granted Nationwide Insurance Company's Petition for Allowance of Appeal limited to two issues:

1. Did the Superior Court properly apply the exhaustion rule of UIM litigation to the primary UIM-excess claim contest?

2. Did the Superior Court properly apply the consent to settle rule of UIM motorist litigation in the less than policy limits settlement context?

The en banc Superior Court held that the insured had not violated the exhaustion clause or consent to settle clause when he settled a first level underinsured motorist claim for less than the coverage and without obtaining consent to settle from a second level carrier.

The argument of this case took place on April 15, 2008. No decision has been rendered at the time these materials were written.

D. NON-OWNED REGULARLY USED VEHICLE EXCLUSION

Brink v. Erie Insurance Group, 940 A.2d 528 (Pa. Super. 2008)

Background: Insured police officer brought action against his own personal automobile insurer to recover underinsured motorist (UIM) benefits for injuries sustained while driving police vehicle. The Court of Common Pleas, Dauphin County, Civil Division, Bratton, Jr., granted insurer's motion for judgment on the pleadings based upon the non-owned, regularly used vehicle exclusion. Insured appealed.

Holdings: The Superior Court, Lally-Green, Jr., held that:

(1) officer "regularly used" car in fleet within meaning of regular use exclusion, and

(2) exclusion was valid.

Affirmed.

Brink arises out of a September, 2004 motor vehicle accident during which a police officer was injured while driving a police vehicle. When it was determined that the other motorist involved in the accident had insufficient liability coverage to completely compensate the officer for his injuries, the officer filed a claim for underinsured (UIM) coverage with Erie to recover UIM benefits under his own personal policy.

Erie denied the claim citing the policy's exclusion for regular use by the insured of a non-owned vehicle. The police officer then filed a lawsuit alleging that Erie breached its contract and acted in bad faith in denying benefits.

The police officer argued that the policy language at issue was ambiguous and that the exclusion did not apply in any event because the police officer was not assigned to a specific car from the police department's fleet of police vehicles, he had no vehicle for his use, and because he was not authorized to use the police vehicle for personal reasons.

Similar arguments had been previously raised by another police officer, and rejected by the Court, in the U.S. Middle District of Pennsylvania case of Calhoun v. Prudential General Ins. Co., 2005 U.S. Dist. LEXIS 44302 (M.D. Pa. 2005).

The Superior Court held that exclusion of underinsured motorist (UIM) coverage for bodily injury to named insured while using a non-owned motor vehicle if regularly used by name insured, but not insured for UIM coverage under the policy, required that the vehicle be regularly or habitually used, as opposed to occasionally or incidentally used; thus, the exclusion was not ambiguous.

Turning to the facts of the case before it, the Court found that the police officer "regularly used" police cars in the police department's fleet within meaning of exclusion of underinsured motorist (UIM) coverage for bodily injuries sustained by a named insured while using a non-owned motor vehicle regularly used by named insured. Therefore, the Court held that officer was not entitled to UIM benefits under his own personal automobile policy for injuries he sustained while driving police car, even though officer was not assigned specific car in fleet and even though he did not use any particular car on daily basis.

The Court found that regular use of any particularly vehicle in a fleet is not required for application of exclusion of uninsured/underinsured motorist (UM/UIM) coverage for bodily injury to named insured while using a non-owned motor vehicle if such vehicles are regularly used by named insured, but are not insured for UM or UIM coverage under the police officer's own personal automobile policy. Rather, an

employee can be found to regularly use a fleet vehicle in this context if he regularly or habitually has access to vehicles in that fleet.

Accordingly, the court held that a police officer who was injured while driving police car was not entitled to underinsured motorist (UIM) benefits under his own personal policy based upon claim of his alleged reasonable expectation of coverage under that personal automobile policy despite unambiguous exclusion of UIM coverage for bodily injury to named insured while using a non-owned motor vehicle if regularly used by named insured.

The Court also stated that the exclusion of underinsured motorist (UIM) coverage for bodily injury to named insured while using a non-owned motor vehicle if regularly used by named insured was valid as applied to police officer seeking UIM benefits under personal automobile policy for injuries sustained while driving police car, even though insurer knew about officer's employment and operation of police cars. The Court stated that invalidating the exclusion would force insurer to subsidize an uncompensated risk.

Erie Insurance Exchange v. E.L. ex rel. Lowry, 941 A.2d 1270 (Pa. Super. 2008)

Background: Automobile insurer sought a declaratory judgment that a rear seat passenger, who was only 11 years old, was not entitled to underinsured motorist (UIM) benefits since she was using non-owned vehicle driven by her brother. The Court of Common Pleas, Somerset County, Civil Division, Klementik, Jr., granted insurer's motion for judgment on pleadings. Passenger appealed.

Holding: The Superior Court, Colville, J., held that passenger was not "using" her mother's car within the meaning of exclusion making UIM coverage under father's policy inapplicable to resident using a non-owned motor vehicle regularly used by named insured or a resident.

In this case, the Claimant in the underlying UIM case was an 11 year old rear seat passenger who was injured when her older brother crashed their mother's vehicle. The minor Claimant recovered the policy limits from her mother's policy that covered the vehicle. The Claimant then turned to her father's policy with Erie under which the carrier had an exposure of up to $500,000 in UIM coverage.

Erie denied coverage under "regularly used non-owned vehicle exclusion" in the policy. The Erie policy provided, in pertinent part, that

> This insurance policy does not apply to…bodily injury to **you** or a **resident** using a non-owned **motor vehicle** or a non-owned **miscellaneous vehicle** which is regularly used by you or a **resident**, but not insured for uninsured or underinsured motorist's coverage under this policy.

The policy did not define the word "using," but did provide a definition for "occupying." The 11 year old back seat passenger Claimant argued that she was not "using" the vehicle when she was injured.

The carrier filed a declaratory judgment seeking a declaration that they owed no duty to provide any UIM benefits to the Claimant under her father's policy. The Somerset County Court of Common Pleas ruled in favor of Erie under the rationale that the terms "using" and "occupying" should be applied interchangeably under the policy. The Claimant appealed.

The Superior Court held that "using" was not synonymous with "occupying" in the exclusion of underinsured motorist (UIM) coverage for resident using a non-owned motor vehicle regularly used by named insured or a resident, but not insured for UIM coverage. The Court noted that if Erie intended the exclusion to apply to persons "occupying" other vehicles they should have specifically utilized that term in the exclusion.

As such, the Court held that a passenger was not "using" her mother's car within the meaning of the exclusion making the underinsured motorist (UIM) coverage under father's policy inapplicable to resident using a non-owned motor vehicle regularly used by named insured or a resident, but not insured for UIM coverage; term "using" was ambiguous requiring construction in favor of insured.

In so ruling, the Superior Court noted that courts may inform their understanding of common insurance policy words by considering their dictionary definitions.

Decker v. Nationwide Insurance Company, 2005 CV 1863 (Lacka. Co. April 16, 2007 Minora, J.)

Holding: Court declares regular use exclusion in an underinsured motorist policy invalid.

John Decker ("Decker") was injured is a car accident on February 13, 2004 while in the course and scope of his employment as a State Police Officer. He settled the third party claim and then sought additional underinsured motorist ("UIM") coverage with his own insurer Nationwide which then denied UIM coverage citing the regular use exclusion in Decker's policy. At the time of the accident he was required to operate the police cruiser while working and there was no UIM coverage on the State Police vehicle. Decker filed suit against both Nationwide and his insurance agent who sold him the policy. Preliminary Objections were filed and denied by the trial court.

In the initial Preliminary Objections the insurance agent argued that under Pennsylvania law there is neither duty to advise Decker of the effect the exclusion would have on coverage nor duty to sell him a policy without the exclusion. The trial court dismissed the Preliminary Objections and observed that the Complaint Decker alleges he

requested UIM coverage which would also include payments for this type of accident situation and that the agent misrepresented the scope and extent of coverage issued. Using the correct standard of review the trial court writes, "we cannot say as a matter of law that they have [Deckers] not plead an actionable claim for negligence and misrepresentation." Thus, the entire case went forward and then Motions for Summary Judgment were filed.

Judge Minora denies the Nationwide Motion for Summary Judgment and sets aside the use of the exclusion for several reasons. He finds that the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") mandates that UIM coverage be offered and provided, unless rejected by the insured and goes on to state that an exclusion cannot take away a right that the legislature has stated is so paramount that it must be provided unless rejected. Therefore, the insurance company cannot enforce an exclusion which takes away coverage that the General Assembly requires the insured choose whether to have it or not.

He also states that the exclusion was added to the policy after the policy was initially issued. Under Pennsylvania appellate case law the insurance company must provide that the insured was told specifically about the exclusion which it did not. Additionally, the agent and company can be negligent for not advising Decker when the policy was taken out and/or the exclusion added that he would not receive UIM coverage if injured while operating a vehicle he is required and it is mandatory he operate.

Lastly, the trial court notes that it is not in the public's interest or policy to punish a first responder such as Decker who has not choice but to operate the police cruiser while he is working. Therefore, it writes:

> "Disturbing is the broad-based possibility that the quiet insertion of a Regular Use Exclusion functioning to limit an insured's UM/UIM coverage as done here, might occur to any firefighter, police officer, sheriff, ambulance driver, volunteer fire-fighter, utility worker, refuse-collector, delivery person for UPS, DHL or FedEx, teamster, on-the-road trucker, cabbie, bus driver, this list court go on, who works to protect and improve the community, as well as conduct business here."
>
> Opinion at p. 21-22.

For all these reasons the trial court holds that Decker is entitled to UIM coverage for the work related accident. The Motion for Summary Judgment is denied.

Brink v. Erie Insurance Group, 940 A.2d 528 (Pa. Super. 2008)

Holding: Superior Court upholds "regular use" exclusion by finding that a person does not need to operate the same vehicle all of the time to be subject to the exclusion.

Donald Brink ("Brink") was injured while working in the course and scope of his employment as a Pennsylvania State Trooper. He filed a claim with his underinsured motorist carrier which was denied because the company cited a provision in the policy which excluded coverage if Brink was injured while occupying or using a vehicle that was available for his "regular use". The trial court held that the exclusion was valid and Brink appealed.

Among several arguments Brink argued that the exclusion should not apply in his case because he was not allowed to use the state vehicle other than for work, he never operated a specific vehicle, and the exclusion violated public policy. The Superior Court reviews the various cases and finds that the term "regular use" means available for use and that all of the vehicles were available for Brink. Also, the Court notes that the exclusion was clear and unambiguous so the exclusion cannot violate the reasonable expectation of the insured and does not violate public policy, although an identifiable one was not mentioned.

The Superior Court affirms the trial court and holds that (1) 'regular use" exclusion can apply to a case even if the person/insured does not regularly use the vehicle in question, (2) the use of the regular use exclusion does not necessarily go against the reasonable expectations of the insured, and (3) does not violate public policy.

Erie Insurance v. E.L., 941 A.2d 1270 (Pa. Super. 2008)

Holding: Regular use exclusion is not valid when applied to a passenger when the policy provision does not include the term "Occupy"

The Superior Court (2-1 with Bowes dissenting) sets asides the regular use exclusion finding that a minor was not subject to the regular use exclusion. The vehicle the minor was injured while occupying it as a passenger was provided to her mother by her mother's employer. The insured minor child was injured in a motor vehicle accident and a claim for underinsured motorist ("UIM") benefits was made. Erie denied the claim arguing that the regular use exclusion applied because the minor was injured while occupying the "regularly used" vehicle. The exclusion only refer to those being injured while "using" the vehicle and not occupying.

Erie argued that the terms "use" and "occupy" are really one in the same and the exclusion applies. The court finds that "use" does not mean the same as "occupy" and the minor was not "using" the vehicle at the time of the accident. Thus, she is entitled to UIM coverage and the exclusion does not apply.

Erie filed a Motion for Reargument. This motion was denied on March 11, 2008.

E. SETOFFS/OFFSETS

Pennsylvania National Insurance v. Black, 916 A.2d 569 (Pa. 2007)

Holding: Class 2 guest passenger is subject to setoff language in policy.

The Pennsylvania Supreme Court reverses the non-published Superior Court decision which invalidated a set-off clause in a motor vehicle policy as being against public policy. In this case the passenger (class 2 insured) made a claim against both the driver and another driver. There was also UIM coverage and the company took the position that the passenger could only receive a total of 100K from BI and UIM combined. The passengers Estate claimed that the setoff clause was invalid. The Supreme Court finds that the setoff clause is not against public policy and reinstates the trial court decision which stated that the State receives a total of 100K from either the BI and/or UIM.

However, there is some language in footnote 7 which indicates that if there was a class insured and stacking applied the outcome may be different because the Court was focusing on limited rights that a passenger/occupant has as opposed to a class 1 insured. In addition, the decision writes about "competing" public policies of consumer choice and rising premiums which must be balanced. This clearly indicates that some forms of coverage ay not be excluded if there is a violation of consumer choice. In certain situations, such as a Class 1, the insureds are paying for more protections for themselves and also resident relatives, such as spouses and children. In those case there may be an overriding public policy of consumer choice which is implicated.

F. WORKER'S COMPENSATION ISSUES

Burke v. Erie Insurance Exchange, 940 A.2d 472 (Pa. Super. 2007)

Background: Following execution of compromise and release agreement between employee who had been injured in automobile accident and employer's workers' compensation carrier, employee thereafter sought underinsured motorist (UIM) benefits from employer's automobile insurance carrier, including recovery of amount equaling total workers' compensation benefits paid to employee, the repayment of which the compensation carrier had waived pursuant to agreement. The matter was submitted to arbitration. The arbitration panel excluded this amount from its final award to employee. Employee appealed. The Court of Common Pleas, Luzerne County, Civil Division at No. 10257 of 2005, Muroski J., affirmed arbitration award. Employee appealed to Superior Court.

Holding: The Superior Court, Bender, Jr., held that the amount of workers' compensation benefits was not recoverable in arbitration proceeding for UIM benefits. Affirmed.

Employee who had entered into compromise and release agreement with employer's workers' compensation carrier, agreeing to receipt of total payment of $95,000 in benefits in exchange for carrier's waive of lien of $237,021.14 and statutory subrogation rights against claimant, was not entitled to recover $237,021.14 in subsequent underinsured motorist (UIM) arbitration proceeding with employer's vehicle insurance carrier, as workers' compensation carrier and vehicle insurance carrier were the same. Also, the carrier agreed to forgo lien in workers' compensation context with intent that amount of lien would not be item of special damages that employee could later recover in arbitration proceeding involving employer's UIM policy. Therefore, employee's attempt to include workers' compensation payments as item of damages in arbitration was impermissible attempt to avoid prior agreement and an impermissible attempt to obtain a double recovery.

The Superior Court noted that, as a general principle of law, an employer's subrogation rights with respect to a workers' compensation claimant's recovery from a third-party are statutorily absolute and can be abrogated only by choice.

G. DISABILITY BENEFITS

Tannenbaum v. Nationwide Ins. Co., 919 A.2d 267 (Pa. Super. 2007), petition for allowance of appeal granted on October 17, 2007, 934 A.2d 687 (Pa. 2007).

Dr. Alan Tannenbaum was rendered permanently disabled as a result of an automobile accident. After resolution of his third-party claim against the tortfeasor, Dr. Tannenbaum sought UIM benefits from Nationwide. Prior to the UIM arbitration hearing, Nationwide submitted a motion in Limine seeking to preclude Dr. Tannenbaum from recovering loss of earnings based on disability payments paid or payable from two personal disability policies and one group policy supplied by his employer.

Nationwide's motion was based on the argument that because Dr. Tannenbaum had already received disability benefits, the receipt of UIM benefits would constitute a "double recovery," which is prohibited under the Pennsylvania Motor Vehicle Financial Responsibility Law. The Arbitration Board granted Nationwide's motion. Dr. Tannenbaum petitioned the Court of Common Pleas to vacate the arbitration award. The petition was granted and Nationwide appealed.

On appeal, the Superior Court noted that while 75 Pa. Cons. Stat. Ann. §1722 of the MVFRL does preclude double recovery of benefits, it does not preclude the recovery of excess benefits. The Superior Court emphasized disability benefits are in excess of first-party benefits available under the MVFRL and that "[e]xcess clauses have long been understood to provide protection to the insured in addition to other coverage which might be available to him." Tannenbaum, 919 A.2d, citing, Connecticut Indemnity Co. v. Cordasco, 369 Pa. Super. 439, 535 A.2d 631, 633 (1985). Furthermore, the Superior Court cited its decision in Carroll v. Kephart, 717 A.2d 554 (Pa. Super. 1998), where the Court held that "benefits which a Plaintiff has paid or earned through his employment are

not within the purview of §1722 and the receipt of those benefits do not constitute a double recover." Tannenbaum, 919 A.2d at 270-271, citing, Carroll v. Kephart, 717 A.2d at 558.

The Superior Court rejected Nationwide's classification of Dr. Tannenbaum's disability payments and UIM benefits as a "double recovery," concluding that "[w]here the personal policies resorted to are both separate from UIM or UM coverage, and paid for exclusively by the claimant either directly, or through payroll deductions which result in lower wages, payments received from these coverages do not duplicate benefits under the MVFRL as they are fundamentally different from those benefits." Tannenbaum, 919 A.2d at 271.

Dr. Tannenbaum had personally paid for the disability policies or received them through his employment. Consequently, the Superior Court affirmed the trial court's decision to vacate the decision of the Arbitration Board.

On October 17, 2007, the Supreme Court granted Nationwide's Petition for Allowance of Appeal. The two issues to be decided are as follows:

a. Did the Superior Court ignore the mandates of the Legislature in judicially repealing §1722 of the MVFRL, thereby reinstituting double recovery and the collateral source rule in the system of automobile accident litigation in Pennsylvania?

b. Did the Superior Court depart from judicial precedent and ignore prior decisions by this Supreme Court by allowing a claimant to recover the same damages twice under the MVFRL?

Tannenbaum, 934 A.2d at 688.

BAD FAITH

A. TWO YEAR STATUTE OF LIMITATIONS

Ash v. Continental Insurance Co., 932 A.2d 877 (Pa. 2007)

Plaintiffs purchased an insurance policy from defendant insurer on a parcel of property and the property was damaged by fire in July 2000. Plaintiffs filed a notice of loss and defendant insurer denied the claim on November 21, 2000, on the basis of concealment or fraud. On May 3, 2002 (18 months post denial), plaintiffs filed a complaint alleging breach of contract.

Defendant insurer filed a motion for summary judgment asserting plaintiffs' breach of contract claim was barred by the one year statute of limitations period set forth in the policy. On June 23, 2003 (31 months post denial of claim), plaintiffs filed a motion for leave to amend their complaint to include a claim against defendant insurer for bad faith under 42 Pa. C.S. §8371. Defendant insurer opposed the motion to amend, arguing that the bad faith claim was untimely since it was subject to the two year statute of limitations applicable to tort actions. 42 Pa. C.S. §5524(7). Plaintiffs contended that their bad faith claim was a contract action with a six year statute of limitations.

The trial court granted the insurers motion for summary judgment with regard to the breach of contract claim and denied plaintiffs' request to amend the complaint, determining that plaintiffs' §8371 bad faith claim was subject to a two year statute of limitations. On appeal, the Superior Court agreed with the trial court's analysis and affirmed. The Pennsylvania Supreme Court granted allowance to determine the appropriate statute of limitations period for a cause of action under Pennsylvania's bad faith insurance statute, 42 Pa. C.S. §8371.

The Supreme Court noted that since the enactment of Section 8371 there have been a number of conflicting decisions regarding the applicable statute of limitations for an action under section 8371. Several trial courts have applied a two year limitation period, while other trial courts have employed a six year statute of limitations, concluding that a §8371 claim does not fall under either §5524 or §5525 since bad faith acts can sound under either tort or contract. Likewise, the federal district courts have been divided on this issue. The Third Circuit Court of Appeals had predicted that the Pennsylvania Supreme Court would apply a two year statute of limitations.

On appeal, the plaintiffs argued that the bad faith insurance statute must be construed in *pari materia* with the Unfair Trade Practices and Consumer Protection Law, (UTPCPL), 73 Pa. §201-1 et. seq., since both are hybrid causes of action. Since the UTPCPL encompasses many different causes of action, each of which is governed by its own limitations period, the UTPCPL is subject to the catch-all limitations period of six years. The rules of statutory construction require that statutes in *pari materia* be

construed as one statute, if possible. 1 Pa. C.S. §1932. In dismissing this argument, the Pennsylvania Supreme Court held that the bad faith insurance statute does not relate to the same broad category of persons or things subject to the UTPCPL. The court concluded that these two laws were not in *pari material* since the bad faith insurance statute applied only in limited circumstances and only to a narrow class of plaintiffs to pursue a bad faith claim against a narrow class of defendants. Furthermore, even assuming the statutes were in *pari materia*, the court held that the plaintiffs had failed to establish that the designation of these statutes would affect the determination of the applicable statute of limitations.

As to the issue of whether section 8371 is more akin to a tort action than a contract action, the court assessed the statute's underpinnings. The court noted that under contract principals, there is an implied duty of good faith that is imposed on the parties to a contract. This is different than the duty of good faith imposed by section 8371. This distinction between the common law contractual duty of good faith and the duty of good faith imposed by section 8371 was highlighted in The Birth Center v. The St. Paul Companies, Inc., 878 A.2d 376 (Pa. 2001). In that case, the court rejected the insurer's claim that section 8371 supplanted the existing common law remedy of compensatory damages, noting section 8371 does not refer to or explicitly abrogate that remedy, and that the application of Section 8371 is not inconsistent with the common law. The court concluded that section 8371 does not prohibit the award of compensatory damages beyond those already available. Thus, while the insured may not recover compensatory damages based on Section 8371, that section does not alter the insured's common pleas contract rights. Accordingly, an action under §8371 is distinct from the common pleas cause of action for breach of the contractual duty of good faith.

The Pennsylvania Supreme Court went on to note that the key difference between tort actions and contract actions is this: Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. With this distinction in mind, the court noted that the legislature apparently determined the protections afforded by the Unfair Insurance Practices Act were insufficient to curtail certain bad faith acts by insurers and that it was in the public interest to enact §8371 as an additional protection. Therefore, the duty under §8371 is one imposed by law as a matter of social policy, rather than one imposed by mutual consensus and an action to recover damages for breach of that duty derives primarily from the law of torts. Consequently, an action under §8371 is a statutorily-created tort action subject to the two year statute of limitations under 42 Pa. C.S. §5524.

B. START OF TWO YEAR STATUTE OF LIMITATIONS

Bowers v. Nationwide Insurance Company, No. 3:07-CV-1134 (M.D. Pa. Jan. 18, 2008 Manley, J.)

Plaintiff was seriously injured in an automobile accident that occurred on May 27, 1997. In his complaint, plaintiff alleged damages in excess of $800,000.00. The third party had liability insurance with limits of $15,000.00 which was tendered and accepted. Plaintiff then sought UIM benefits of $500,000.00 from his policy with Nationwide. Nationwide offered $35,000.00 as settlement for the claim. Plaintiff then agreed to mediate the claim, but the mediation was unsuccessful. Plaintiff then offered to settle the claim for $300,000.00, but Nationwide continued to offer $35,000.00. The matter went before a UIM arbitration panel which awarded plaintiff damages of $551,673.00. In his subsequent bad faith complaint, plaintiff alleged that at this arbitration hearing, Nationwide did not present any expert or other testimony to support its position, but instead relied on previously complied reports that were inadequate.

After the arbitration award, plaintiff filed a precise for writ of summons in Lackawanna County on February 22, 2007. Plaintiff filed his complaint on June 5, 2007 and the case was removed to federal court on June 25, 2007 based on the diversity statute. Defendant Nationwide then filed a 12(b)(6) motion to dismiss based on the two year statute of limitations. Ash v. Continental Ins. Co., 932 A.2d 877 (Pa. 2007).

Among the incidents cited by plaintiff as evidence of bad faith were defendant's November 30, 2004 refusal to offer more than $35,000.00 to resolve the claim through mediation and plaintiff's counsel's January 27, 2005 to Nationwide that appeared to have alleged that Nationwide was acting with bad faith in denying the claim. Both incidents were more than two years before plaintiff filed the precise for a writ of summons on February 22, 2007.

In dismissing Nationwide motion, the court found that neither the mediation nor letter would be considered a "denial of coverage" by Nationwide to start the statute of limitations nor that it started the day of the arbitration. As to the mediation, the court found that the plaintiff may have considered the offer unfair, or ridiculous, but the mere fact of an offer far below his expectation, does not amount to a denial of coverage that would cause the statute of limitations to begin to run. The denial was not plain, or absolute, and the documents attached to the complaint indicated that neither side had come to a final position on the value of a claim. Since the insurer's position could not be considered final, the claim did not begin to accrue during the 2004 mediation.

As to the January 27, 2005 letter from plaintiff's counsel, the court found that it informed Nationwide that plaintiff's counsel had "put a bad faith counsel on notice of what is presently transpiring". This statement is not by itself evidence that Nationwide had denied the claim or made a final offer. Rather, the court found that plaintiff's attorney apparently felt that the threat of an investigation into whether the company had engaged in bad faith practices would lead the company to increase its settlement offer.

Judge Manley found that the bad faith claim accrued at the UIM arbitration on March 2, 2005. Thus, the bad faith claim filed in February 2007 was within the two year period.

Also, the court found that independently the statute of limitations started on a new act of bad faith in March 2005 when the company participated in the UIM arbitration but offered "no serious defense of its position".

Saco v. Nationwide Mutual Insurance Company, 2007 WL 1811215 (M.D. Pa. June 21, 2007 Conner, J.)

The plaintiff filed suit in 2006 alleging that the insurer had handled his claim for income loss in bad faith following an automobile accident in 2001. The insurer moved for summary judgment arguing that the plaintiff had never made a claim for income loss benefits and that his bad faith claim was barred by the statute of limitations in any event.

The court noted that the statute of limitations begins to run when a right to institute and maintain suit arises, but it was not clear when the plaintiff's right arose.

While the insurer argued that the plaintiff had never made a claim for income loss benefits, the plaintiff pointed to the dates of a conversation with an adjuster that had occurred within 24 hours of the accident, as well as an application for benefits containing questions about work loss. The court observed, however, that even if a claim for benefits had been made on one of those dates, the insurer had never formally denied that claim.

Thus, the court held the plaintiff was entitled to wait a reasonable period of time for the defendant to act on his claim, but at some point it would have become clear to a reasonable person that the insurer was not going to act on the claim.

The court concluded, without pinpointing a date, that the plaintiff's right to institute and maintain a suit arose a reasonable period of time after he filed his application for benefits, and that time was more than two years before he filed his complaint.

The plaintiff argued that the defendant had misled him to believe that he did not have income loss coverage and he therefore did not learn that he was eligible for income loss benefits until 2006. The court rejected this argument, holding that while the discovery rule applied to bad faith claims, the fact that a plaintiff is not aware that the defendant's conduct is wrongful or legally actionable is irrelevant to that rule. The statute of limitations, the court held, runs from the date the plaintiff is reasonably charged with the knowledge that he has an injury caused by another.

C. ERRONEOUS EXPERT REPORT UNDERMINES BAD FAITH VERDICT

Zappile v. AMEX Assurance Co., 928 A.2d 251 (June 8, 2007)

The plaintiff was an ex-deputy police commissioner and the ex-deputy mayor for Philadelphia. At the time of the collision, he was chief of police for the Philadelphia Housing Authority. While walking his dog, the plaintiff was struck by a car with $15,000.00 of liability insurance coverage. Zappile suffered knee and shoulder injuries, including a torn rotator cuff which resulted in surgery. AMEX paid the full PIP medical benefits of $5,000.00 and wage loss benefits of $1,000.00. The insured had stacked UIM benefits totaling $150,000.00. The insured demanded the full $150,000.00 in UIM benefits, while the insurer never offered more than $32,000.00. Ultimately, the arbitrators awarded Richard Zappile $95,000.00 and his wife an additional $10,000.00 for loss of consortium. This money was paid and the insureds filed a bad faith action against AMEX.

The trial court found by clear and convincing evidence that AMEX had acted in bad faith in handling the UIM claim and awarded $75,000.00. The trial court determined that AMEX showed bad faith in failing to make a partial payment representing an excess wage loss claim of approximately $4,000.00; undervalued the claim, thereby forcing the claim into arbitration; never raising the offer; and telling trial counsel that the plaintiffs would not accept anything less than $150,000.00 to settle.

In reversing the trial court, the Superior Court panel took issue with the plaintiffs' expert's report finding factual and legal errors. Relying on Condio v. Erie Ins. Exch., 899 A.2d 1136 (Pa. Super. 2006), the panel chastised the insured's expert for testifying that a UIM claim is a first party claim and not an adversarial situation. On the contrary, Judge Klein noted that a UIM claim is "inherently and unavoidably adversarial". Specifically, the Superior Court panel disagreed with plaintiffs' expert's conclusions that the insurer was required to make a partial payment of the $4,000.00 balance of loss wage benefits and the $32,180.00 offer for pain and suffering. The Superior Court panel concluded that Pennsylvania has not recognized a duty to make partial payments of undisputed amounts and the court was not prepared to say that as a general rule, the failure to cut out certain portions of a general damages claim, especially where the insurance contract makes no representation that such a procedure will be followed, constitutes bad faith. The court also noted that it had no idea how such a practice would impact the cost of evaluating and settling claims and that it was extremely hesitant to require a practice and procedure that might negatively impact the cost of insurance.

Finally, it was noted that the trial court made no finding that Zappile had ever made a demand for partial payment. Additionally, the insurance contract itself made no representation that an insured was in any way entitled to a partial payment. Thus, the court held that it could not be reasonable expectation of an insured, who had no copy of the claims manual, that his or her policy required a partial payment.

The appellate court also found that plaintiffs' expert had misstated critical evidence regarding a transmittal letter from AMEX to its defense counsel. Based on this expert testimony, the trial court had found bad faith by AMEX telling its trial counsel that plaintiffs would not accept anything less than $15,000.00 to settle. The appellate court found that there was nothing in the letter that told defense counsel not to evaluate the claim or not to negotiate. The formal demand was never lowered from $150,000.00, but plaintiffs' counsel did tell the claims representative handling the case that he expected a $100,000.00 to $120,000.00 arbitration award. Although the $100,000.00 to $120,000.00 figure was not specifically a demand, it did indicate that it was a sum that could settle the matter. The evidence reflected that the demand never lowered from $150,000.00. It was "signaled" that Zappile would accept a lesser amount to settle the claim, but no specific figure was ever put forth. Similarly, AMEX "signaled" it could raise the offer, but when the initial offer was rejected and no counter demand was made, the process stopped on both sides. It could not be said that Zappile "kept coming down" while AMEX "never went up". The court viewed this as the classic "dance" that plaintiffs and defendants go through in attempting to settle a dispute. This, however, did not constitute bad faith.

Finally, the trial court found that AMEX improperly undervalued the claim. As evidence of this, the trial court pointed to the $105,000.00 total award, which was roughly $70,000.00 more than the offer. However, a difference between the offer and the amount awarded is not, by itself, evidence of bad faith. See Condio v. Erie in. Exch., 899 A.2d 1136, 1143 (Pa. Super. 206). The award for Zappile, however, was $95,000.00, not $105,000.00. The demand never lowered from $150,000.00, which made the award $55,000.00 less than the demand. The offer was never raised from $32,180.00, which is a $62,820.00 difference. The appellate court noted that from this, it appeared that both parties were off by approximately the same amount in their assessment of the value of the case. Thus, the appellate court found that while it was apparent that AMEX undervalued the claim, it was not apparent that it did so out of ill will or without reasonable basis. Also, there was no showing that raising its offer would have had any effect on the outcome of the case. As a result, the appellate court found that there had been no demonstration by clear and convincing evidence that AMEX acted in bad faith in its handling of this claim. The judgment of the trial court was reversed.

In a concurring statement, President Judge Emeritus McEwen ruled separately to emphasize that the situation in Zappile was not the type of situation to which he referred in his concurring statement in Williams v. Nationwide Mutual Insurance Co., 750 A.2d 881 (Pa. Super. 2000) since Zappile was a legitimate dispute as to the entitlement of the insured to the amount requested under the policy and not coverage issues.

D. FIRST PARTY BENEFITS

Loz v. United Services Automobile Ass'n, PICS Case No. 08-1128 (C.P. Lehigh May 16, 2008)

Holding: An insurer cannot be liable for treble damages under the Motor Vehicle Financial Responsibility Law (MVFRL), §1797(b) for refusing to pay first party benefits if it goes through the statutorily authorized peer review process. The court granted defendant's preliminary objections.

In this matter, the plaintiff was involved in a motor vehicle accident, and sought first party benefits from his insurer, USAA. The defendant insurance carrier submitted certain massage and rehabilitation therapy bills to a peer review as authorized in the MVFRL, and then refused to pay the bills as a result of the peer review findings in favor of the carrier. The plaintiff brought this action.

The Court noted that the plaintiff's claims for payment of the bills themselves should be submitted to arbitration. However, the court granted the carrier's preliminary objections to the plaintiff's claims for treble damages for "wanton conduct" by USAA pursuant to 75 Pa. C.S. §1797(b).

Under Section 1797(b)(4), an insured is allowed to challenge an insurer's refusal to pay bills the reasonableness or necessity of which insurer has not challenged before a peer review organization. The **Loz** Court ruled that where, as here, the insurer did seek such a review, it is insulated from suit if the peer review organization determined that the medical expenses were not reasonable or necessary.

The claims for bad faith asserted by the plaintiff also were not permitted by the Court in this case. The Court in **Loz** noted that, in Barnum v. State Farm Mutual Auto Ins. Co., 635 A.2d 155 (1993), the Superior Court had previously held that there can be no recovery for bad faith where there was a proper peer review completed under the circumstances. Although that prior decision was reversed in part, it was reversed on other grounds, unrelated to that specific holding.

E. BREACH OF CONTRACT

Kryeski v. Erie Insurance Group, No. 2006 CV 552 (C.P. Lackawanna Dec. 4, 2007 Minora, J.)

Holding: (1) Breach of contract claim against an insurance company based on failure to pay a claim may proceed even if the carrier eventually pays the claim as plaintiff may be able to show that the carrier breached the contractual duty to act in good faith;

(2) Although the plaintiff should have attached a copy of the underlying policy to the Complaint, the Complaint would not be dismissed; plaintiff directed to file a copy of the Complaint;

(3) Plaintiff's request for punitive damages under the breach of contract count of the Complaint was dismissed as improper; however, plaintiff allowed to proceed on punitive damages claim requested under Section 8371 bad faith count of the Complaint.

In this case, the plaintiffs filed a two count Complaint (breach of contract and bad faith) against Erie Insurance Company over an alleged improper handling of a theft loss that occurred at their home. The plaintiffs alleged that, although they complied with all procedures necessary to process the insurance claim, the carrier refused to make payment until the plaintiffs engaged counsel and filed suit.

Erie filed preliminary objections asserting a demurrer to the breach of contract count for failure to stated a valid claim, on the basis of the plaintiff's failure to attach a copy of the policy to the Complaint, and with respect to the plaintiff's claim for punitive damages under the breach of contract count.

On the first issue, Judge Minora found that, even though the carrier eventually paid on the claim, pursuant to the Pennsylvania Supreme Court's ruling in Birth Center v. St. Paul Companies, Inc, 787 A.2d 376 (Pa. 2001), a jury could still find that breach of contract existed with respect to the carrier's contractual duty to act in good faith towards its insured. Judge Minora also noted that the Birth Center court found such a breach of contract claim to be wholly independent of a bad faith claim and, when a carrier breaches its insurance contract by a bad faith refusal to settle a case, it is appropriate to require the carrier to pay other compensatory damages that the carrier knew or should have known the insured would incur because of the bad faith conduct.

Judge Minora also summarily dismissed Erie's claim that the plaintiff's Complaint should be dismissed because a copy of the insurance policy was not attached to the Complaint. The court noted that the policy was obviously equally accessible to Erie Insurance, who had written the policy. However, the plaintiff was ordered to produce and file a copy of the policy within a short time or explain why they could not do so.

Lastly, while the court acknowledged that punitive damages were an appropriate element of recovery under the bad faith statute, Pennsylvania case law held that such damages were generally not recoverable in a contract action. As such, the defendant's demurrer to the punitive damages claim under the breach of contract count in the Complaint was sustained. The plaintiff was allowed to continue to proceed on the punitive damages claim asserted under the bad faith count of the Complaint.

F. VIOLATIONS OF INSURANCE REGULATIONS

Oehlmann v. Metropolitan Life Insurance Co., 2007 WL 4563522 (M.D.Pa. 2007, Kosik, J.)

Holding: With Pennsylvania state courts and federal courts sitting in diversity having decided the issue differently, the Federal Middle District Court followed Third Circuit decisions and held that an alleged violation of the Pennsylvania insurance regulations is not bad faith *per se*; rather, plaintiff must show that insurer did not have a reasonable basis to deny benefits and that the insurer knew, or recklessly disregarded, its lack of a reasonable basis in denying the claim. NOTE: Case was appealed to Third Circuit, but was then settled before decision was handed down.

The Oehlmann arose out of a dispute of Defendant Metropolitan Life Insurance Company's handling of a life insurance claim, under which the plaintiff-wife was a primary beneficiary.

The plaintiff-wife and her husband had purchased the life insurance policy for their minor daughter. The husband and wife were the beneficiaries of the policy on a 50-50 basis. Thereafter the couple divorced but their divorce decree required that the life insurance policies remain in effect with the husband and wife as beneficiaries. Thereafter, the minor child died as a result of a house fire while living with her mother and her mother's new husband.

The ex-husband and the plaintiff-wife submitted claims to MetLife for the life insurance proceeds and the carrier initially agreed to pay out the benefits on a 50-50 basis. However, before the money was distributed, the ex-husband notified MetLife that he disputed the plaintiff-wife's entitlement to the benefits. Thereafter, as litigation was pursued by the ex-husband and the wife, MetLife continued to take a position that the carrier would issue the benefits on a 50-50 basis but not until it was given a release of any and all claims by any party, including claims for bad faith.

The plaintiff-wife continued to refuse to sign any release and eventually filed suit in Lackawanna County against MetLife for bad faith and other counts. MetLife removed the case to the Middle District and eventually filed a summary judgment motion, which was the subject of this opinion.

Judge Kosik entered summary judgment in favor of MetLife, finding that the plaintiff-wife failed to satisfy the elements of bad faith under 42 Pa.C.S.A. § 8371. Judge Kosik rejected the plaintiff-wife's arguments that, when considering the issue of bad faith, the court should consider alleged violations by the carrier of the Pennsylvania Unfair Insurance Practice Act and/or the regulations promulgated thereunder, i.e., the Unfair Claims Settlement Practices Regulations.

Judge Kosik noted that no Pennsylvania Supreme Court decision on the issue existed. Although the Supreme Court recognized the issue in the case of Toy v. Metro. Life Ins. Co., 829 A.2d 186, 200 n. 17, it chose not to address the question of whether a violation of the insurance regulations, in and of itself, amounted to bad faith conduct.

On the other hand, the Pennsylvania Superior Court had ruled that trial courts could consider violations of insurance regulations in considering bad faith claims. *Citing* Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1233 (Pa.Super. 1994)[other Superior Court citations omitted].

Yet, Judge Kosik noted that Federal Courts in the Third Circuit sitting in diversity had abstained from applying the Romano decision and had instead applied the landmark test for bad faith noted in the Pennsylvania Superior Court decision of Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa.Super. 1994). That test required plaintiff to show (1) that insurer did not have a reasonable basis to deny benefits and (2) that the insurer knew, or recklessly disregarded, its lack of a reasonable basis in denying the claim.

Judge Kosik also chose to follow the Terletsky decision as that was considered to have enunciated the landmark test for bad faith. Under that test, whether a carrier had violated any regulations was "irrelevant" to the analysis. Additionally, Kosik noted that the referenced regulations were designed to be implemented and enforced by the Insurance Commissioner of Pennsylvania and not the courts. Rather, the court noted that the regulations did not give rise to any private cause of action and should be left to the Commissioner for enforcement. The judge also noted that the regulations were designed to prevent widespread violations by carriers and not as a means to evaluate individual episodes of bad faith as alleged in this case.

Despite ruling in this fashion, the court in Oehlmann did note that it considered MetLife's conduct in light of the regulations. In the end, Judge Kosik found that the plaintiff failed to support her claim of bad faith with clear and convincing evidence as required by law. MetLife was found to have acted reasonably in transferring the funds owed to the beneficiaries on a 50-50 basis in interest-bearing accounts and holding the funds therein for a reasonable time to allow for a resolution of the underlying dispute between the husband and wife. The court noted that, under the circumstances of a dispute over the beneficiaries arrangement as well as a lawsuit being filed over the arrangement, it was also reasonable for MetLife to have requested releases before a final distribution of the proceeds.

As such, summary judgment was entered in favor of MetLife on the bad faith count as well as a myriad of other claims asserted by the plaintiff allegedly arising out of the same conduct. As stated, although this case was appealed to the Third Circuit it was settled before a decision could be handed down by that court.

ATTORNEYS AT ISSUE CASES

A. SUIT AGAINST ATTORNEY FOR WRONGFUL USE OF CIVIL PROCEEDNGS

Morris v. DiPaolo, 930 A.2d 500 (Pa. Super. 2007 Panella, J.)

Background: After attorney representing township police officer in underlying wrongful termination dispute initiated federal civil rights action against township's attorney, the township's attorney brought action against officer's attorney for wrongful use of civil proceedings, and sought damages, sanctions, and attorney fees. The Court of Common Pleas, Philadelphia County, Watkins, Jr., entered summary judgment in favor of township's attorney. Following a trial on damages, the Court of Common Pleas, Philadelphia County, Civil Division, No. 2236 April Term, 2002, John Milton Younge, J., entered judgment on jury verdict for $47,000 in damages, then added additional sanctions. Officer's attorney appealed.

Holding: The Superior Court, No. 3051 EDA 2005, Panella, Jr., held that a triable issue existed as to whether officer's attorney brought the federal action with an improper purpose. Vacated and remanded.

The court stated that in order to sustain a claim for wrongful use of civil proceedings, a plaintiff must prove that the defendant initiated or continued civil proceedings against the plaintiff: (1) without probable cause or in a grossly negligent manner; (2) for an improper purpose; and (3) that the proceedings were terminated in favor of the plaintiff. 42 Pa. C.S.A. §8354.

Here, it was ruled that a genuine issue of material fact existed as to whether attorney had an improper purpose in filing, on behalf of his client, a federal civil rights action against another attorney, thereby precluding summary judgment in wrongful use of civil proceedings action.

However, the court noted that even if an attorney lacked probable cause in filing a lawsuit on behalf of a client, he is not liable for wrongful use of civil proceedings unless he filed the lawsuit with an improper purpose.

B. LEGAL MALPRACTICE

Buntz v. Pepperno and Gnall, et al., 2008 WL 693590 (Lacka. Co. Feb. 8, 2008, Nealon, J.)

Holding: Preliminary objections to plaintiff's private cause of action against her former attorney under § 401 and 501 of the Pennsylvania Securities Act were sustained as

plaintiff did not allege that her former attorney was a seller or purchaser of securities. However, former attorney's demurrers to plaintiff's claims for fraud, conspiracy, conversion, malpractice, breach of fiduciary duty, negligence, unjust enrichment and consumer protection law were all overruled.

The plaintiff instituted this civil action against her former counsel with respect to his mis-handling of her underlying automobile accident litigation during which the statute of limitations was missed by counsel to whom her former attorney referred the case. The plaintiff also sued her former attorney with regards to his non-disclosure of his receipt of a referral fee on the attorney malpractice action against the other attorney, the former attorney's mis-handling of a large portion of the $1 million dollars in settlement funds that the plaintiff later realized from the attorney malpractice claim against the other attorney who missed the statute of limitations, and her former attorney's referral of the plaintiff to a bogus financial advisor who the former attorney also represented and from whom the former attorney received an additional referral fee unbeknownst to the plaintiff. The former attorney was also accused of conspiring with the phony investment advisor to misappropriate $270,000.00 of the plaintiff's settlement funds for the former attorney's personal use to purchase an office building and to fund construction of a home. It was additionally alleged that the former attorney conducted a sham "dry closing" with respect to the plaintiff's purchase of a property which could not be consummated due to the former attorney's alleged theft of the plaintiff's settlement funds.

Counsel for Gnall in this matter filed demurrers to all ten of the plaintiff's claims against Gnall. The preliminary objections to plaintiff's private cause of action against her former attorney under § 401 and 501 of the Pennsylvania Securities Act were sustained as plaintiff did not allege that her former attorney was a seller or purchaser of securities.

However, the former attorney's demurrers to plaintiff's claims for fraud, conspiracy, conversion, malpractice, breach of fiduciary duty, negligence, unjust enrichment and consumer protection law were all overruled. In so ruling, Judge Nealon emphasized that it is well-settled under Pennsylvania law that "an attorney owes a fiduciary duty to his client" which "duty demands undivided loyalty…." Maritrans G.P., Inc. v. Pepper, Hamilton & Sheetz, 602 A.2d 1277, 1283 (Pa. 1992). He also noted that "[o]ur appellate courts have characterized a lawyer's fiduciary responsibility as 'the highest duty of honesty, fidelity, and confidentiality." Capital Care Corp. v. Hunt, 847 A.2d 75, 84 (Pa.Super. 2004).

The court also found that the former attorney's receipt of improper referral fees from the legal malpractice settlement as well as from the phony advisor could be found to be the result of unenforceable attorney fee-sharing agreements in that they were entered into without the knowledge and consent of the attorney. As such, the former attorney's improper receipt and retention of those funds, even though arguably based only on alleged ethical violations, could support the various causes of actions asserted by the plaintiff and, in particular, the unjust enrichment claim.

C. EFFORTS TO DISQUALIFY OPPOSING COUNSEL

Cooper v. Abdalla, No. 06-CV-512 (Lacka. Co. Dec. 5, 2007, Nealon, J.)

Holding: Motion to disqualify opposing counsel pursuant to Rule Prof. Cond. 1.9 and 3.7 denied.

Former clients sued their accountants for fraud and malpractice in connection with an unsuccessful commercial enterprise. The defendant accountants filed a petition with the trial court seeking to disqualify the attorneys for the former client-plaintiffs, Attorneys George A. Reihner and Kevin C. Quinn and the law firm of Wright & Reihner, P.C. The petition to disqualify was based upon the plaintiffs' attorneys' prior representation of the defendant accountants in their capacity as directors and stockholders of local banks involved in merger negotiations.

Judge Nealon reviewed the applicable law and noted that, trial courts possess the inherent power to disqualify counsel based upon a breach of an ethical standard as set forth in the Rules of Professional Conduct. See Vertical Resources, Inc. v. Bramlett, 837 A.2d 1193, 1201 (Pa.Super. 2003); In re Condemnation of Lands in City of Scranton (Petition to Disqualify Hailstone), 46 Pa.D.&C.4th 66, 95-96, 101 (Lacka. Co. 1998)[other citations omitted]. The court noted that a high standard must be surpassed in order to disqualify opposing counsel in light of the recognized public policies in favor of permitting litigants to retain the counsel of their choice and allowing counsel to practice law without excessive restrictions.

Rule of Professional Conduct 1.9 governs a lawyer's duties to former clients, including an attorney's subsequent representation of another client in a "substantially related" matter. The accountants asserted in this matter that the attorneys should be disqualified from representing their opponent in this matter given that the accountants had disclosed confidential information to Reihner and Quinn relative to their bank stockholdings and that the attorneys could therefore use that financial information to their new clients' advantage in conducting discovery on the accountant's assets and net worth.

Nealon held that since the bank stockholding data, which the accountants had characterized as confidential, had either been publicly disclosed or rendered obsolete during the past eight years since the attorneys' prior representation, it did not qualify as confidential information warranting a disqualification under Rule of Professional Conduct 1.9.

The accountants also sought to disqualify their former attorneys from representing the plaintiffs against them under Rule of Professional Conduct 3.7, which restricts a lawyer's ability to act as an advocate and a necessary witness in the same trial. Judge Nealon held that, given the fact that the petitioning accountants had not demonstrated that their former counsel would be necessary witnesses with regards to a relevant issue at trial, the accountant's alternate request for disqualification pursuant to Rule of Professional Conduct 3.7 was likewise denied.

D. DISTRIBUTION OF INTERPLEADED CONTINGENT FEE PROCEEDS

In re Distribution of Attorney's Fees Between Munley, Munley & Cartwright, P.C. and John Cerra, Esquire, No. 08-CV-2099 (Lacka. Co. June 13, 2008, Nealon, J.)

Holding: Court ordered 75% - 25% distribution of interpleaded contingent fee proceeds based upon *quantum meruit* principles. NOTE: Appeal pending before Superior Court.

In this matter, two lawyers, who were jointly retained by adversarial co-administrators of an accident victim's estate, interpleaded into court the contested contingent fee proceeds from a wrongful death settlement. The lawyers sought a judicial determination regarding the distribution of those funds between counsel.

The issue arose from an underlying matter involving a 17 year old decedent who died as a result of a motor vehicle accident caused by a drunk driving defendant. At the time of the accident, the decedent's parents had been divorced for a number of years and the decedent was residing with his maternal grandparents. The maternal grandparents had been granted guardianship over the decedent by the mother and had raised the decedent for some time prior to the accident.

The maternal grandparents were noted to harbor great animosity towards the decedent's father due, in part, to his recurring failure to make court-ordered child support payments for the decedent during his lifetime.

Following the fatal accident, the father and the maternal grandparents retained separate counsel to pursue wrongful death claims, with the father retaining the Munley law firm and the maternal grandparents retaining Attorney Cerra. The father and the maternal grandparents were eventually appointed as co-administrators of the estate of the decedent.

The father and the maternal grandparents thereafter also jointly executed a contingent fee agreement retaining the Munley law firm and Attorney Cerra to represent the estate of the decedent in the claim for damages arising out of the subject accident. Although the agreement called for the payment of a 35% contingent fee for the attorneys, it was silent as to how proceeds were to be distributed between the two attorneys.

The Munley law firm took the lead on the case and quickly secured a tendering of the available $100,000.00 in UIM benefits from National Grange Mutual Insurance Company. Since very little work was required to secure that settlement, there was no dispute between the attorneys with regards to how the split the $35,000.00 contingent fee. The attorneys amicably split that fee on a 50-50 basis.

Allstate, the third party carrier covering the drunk driver defendant, only had $25,000.00 per person/$50,000.00 accident in liability coverage which they, of course, declined to tender in settlement. Allstate's decision in this regard was apparently based

on the fact that other parties were also injured and it was Allstate's intention to interplead all of the liability coverage into court. Judge Minora would later deny Allstate's petition to interplead the funds, finding that Allstate had unreasonably delayed in filing that petition and in light of the fact that an interpleader would improperly discharge any bad faith liability claims against Allstate.

Thereafter, the Munley law firm led the third party lawsuit against the tortfeasor until it was discontinued after five years of litigation. The case was eventually settled in a global fashion, i.e. also covering the bad faith claims, for $950,000.00, which, as Judge Nealon noted in his opinion, exceeded Allstate's per person coverage limits by $925,000.00.

Thus, the contingent fee at issue amounted to $332,500.00. A dispute then arose between the Munley law firm and Attorney Cerra as to whether Cerra was entitled to receive any portion of that fee. The Munley law firm and Cerra stipulated to the distribution of one-half of the fee to the Munley law firm, with the remaining 50% of the fee (i.e. $166,250.00) being interpleaded into court for a judicial determination concerning its distribution.

Judge Nealon ruled that since the parties' contingent fee agreement did not specify how the contingent fee was to be divided between counsel and since there was never a meeting of the minds concerning the apportionment of the fee, the interpleaded funds were distributed based upon *quantum meruit* principles, i.e., an implied promise to pay a reasonable amount for labor furnished absent a specific contract between the parties, as well as the relevant factors enumerated in Rule 1.5 of the Pennsylvania Rules of Professional Conduct, pertaining to the propriety of a fee, contingent fees, and fee-sharing agreements.

Nealon granted lead counsel 75% of the interpleaded fees and cooperating counsel the remaining 25% in fees.

MISCELLANEOUS ARTICLES