THE TORT TALK

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CIVIL LITIGATION UPDATE

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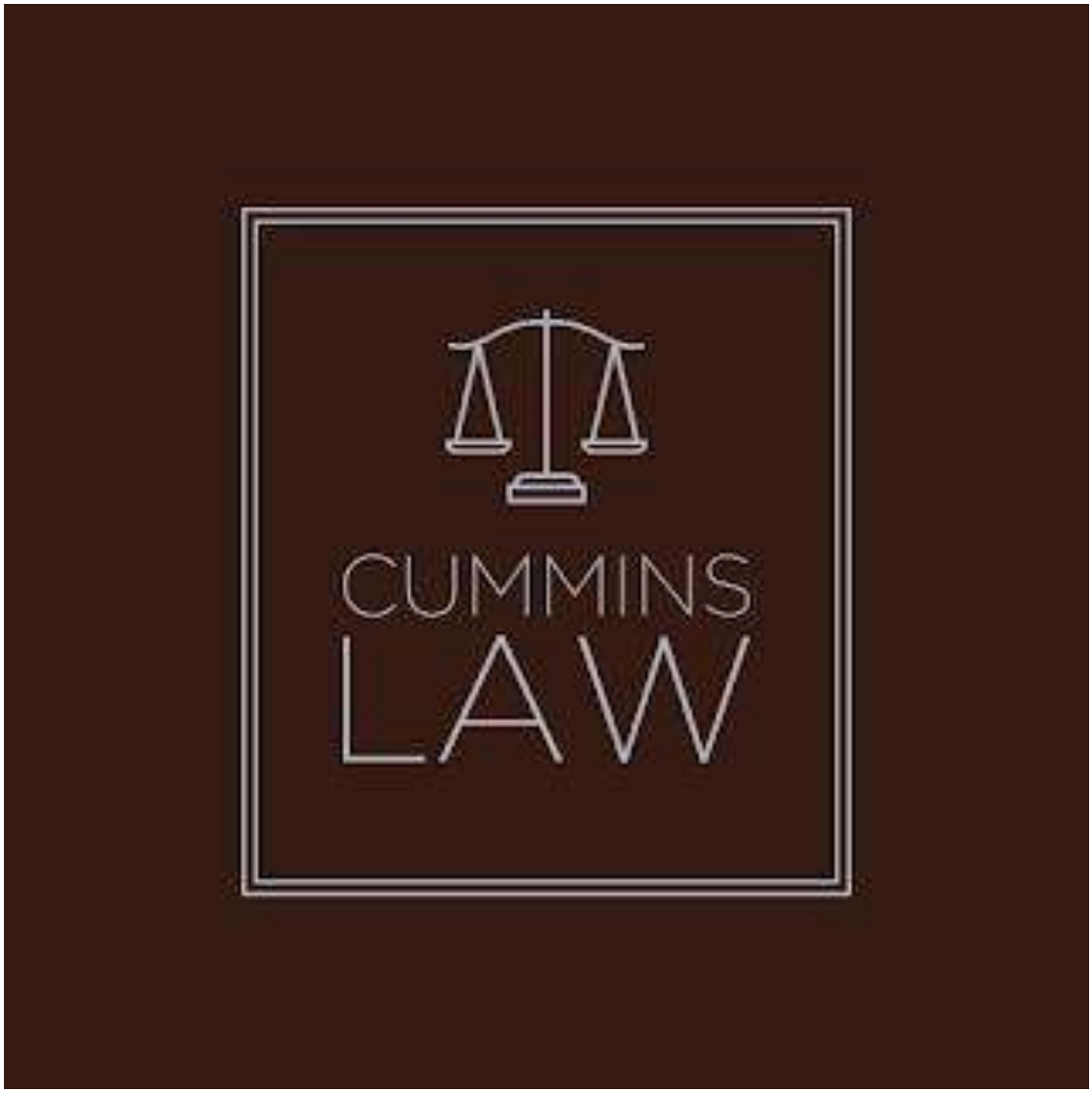

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Daniel E. Cummins, Esquire is the founder of the Clarks Summit, Pennsylvania law firm of Cummins Law, which he opened in 2019 with his nearly 25 years of experience in insurance defense litigation. His practice centers around defending against automobile accident claims and premises liability cases along with the defense of products liability and medical malpractice matters. Attorney Cummins also handles insurance coverage and insurance subrogation claims as well.

Attorney Cummins also serves as a Mediator and helps litigants bring their matters to a close through Cummins Mediation Services and as a certified Mediator for the Federal Middle District Court of Pennsylvania.

Attorney Cummins has been granted an AV rating by Martindale-Hubbard, which is the highest rating possible in that directory's peer review system for lawyers.

Since 2015, Attorney Cummins has also been the only attorney in northeastern Pennsylvania to annually be selected in the *Best Lawyers in America* Directory under the category of attorneys who practice Personal Injury Law - Defense.

He has also previously been selected as a Super Lawyer - Rising Star and, every year since 2015, he has been selected by his peers as a Super Lawyer.

Attorney Cummins is a graduate of Villanova University ('90, B.A., *cum laude*, English) and The Dickinson School of Law (Carlisle, PA) ('93, J.D.). He completed his law school studies at the University of London, Faculty of Laws in London, England.

After graduating from law school, Mr. Cummins served as the Senior Law Clerk for the Honorable Harold A. Thomson, Jr. in the Pike County Court of Common Pleas. After the completion of his two-year clerkship, Attorney Cummins went into private practice in 1997, practicing ever since in the insurance defense field.

In September of 2005, Attorney Cummins was recognized and honored by the American Law Media as a "Lawyer on the Fast Track." To date, he remains one of only four attorneys from Northeastern Pennsylvania to ever have been so recognized. This recognition was given to attorneys who have exhibited excellence in advocacy, advancement of the law, community service and service to the bar.

In 2014, Mr. Cummins was awarded the "Distinguished Defense Counsel of the Year" honor by the Pennsylvania Defense Institute for excellence in defense litigation and service to the defense bar.

In addition to being an insurance defense litigator, Attorney Cummins also serves as a frequently contributing columnist with the Pennsylvania Law Weekly and other publications covering emerging trends in civil litigation in the Commonwealth of Pennsylvania. Over the course of his career, Cummins has published over 170 articles in newspapers, magazines, scholarly publications, and law reviews both inside and outside of Pennsylvania.

In the years 2006, 2007, 2010, 2011, and 2012, articles of his went on to secure First and/or Second Place Awards in the Weekly Newspaper Category of the annual Schnader Print Media Awards put on by the Pennsylvania Bar Association.

In 2010, Attorney Cummins was hired by the George T. Bisel, Inc. publishing company to be the writer of the annual Supplement to the *Pennsylvania Trial Advocacy Handbook* and continued in that capacity through 2012.

Attorney Cummins is also the sole creator and writer of an award-winning legal blog entitled "Tort Talk" which can be viewed at www.TortTalk.com. The blog, which was

created over a decade ago in May of 2009, provides updates on important cases and trends in Pennsylvania civil litigation law. Over the years, the Tort Talk blog has been selected and honored by both the ABA Law Journal and LexisNexis as one of the Top Insurance Law Blogs, as well as one of the Top Tort Law Blogs in the entire United States.

Readers of the blog may provide their email addresses in the box in the upper right-hand corner of the blog if they wish to become an email subscriber and receive notification of the periodic updates posted.

Attorney Cummins has also created and presented nearly 60 CLE seminars over the years on a wide variety of civil litigation topics and practice tips. These seminars are designed to provide fellow lawyers with updates on the law and tips to improve their practice of law.

Mr. Cummins is an active member of the Pennsylvania Bar Association, the Lackawanna County Bar Association, the Luzerne County Bar Association, the Monroe County Bar Association, and the Pike County Bar Association. He is also a former member of the Defense Research Institution (DRI) and a former member of the Claims and Litigation Management Alliance (CLM), both of which are national organizations of defense counsel and insurance professionals. Attorney Cummins is also a former board member of the Northeastern Pennsylvania Trial Lawyers Association.

He is also a former Board Member and former Vice President of the North for the Pennsylvania Defense Institution (PDI), a statewide group of insurance defense counsel and professionals. He has also been a former Co-Chairperson of the Auto Law Committee of the PDI and remains a member of the PDI.

Attorney Cummins has also been a long-time Attorney Advisor for the Abington Heights High School Mock Trial Team for the annual Competition put on by the Pennsylvania Bar Association. In that capacity, Attorney Cummins has taught and advised high school students on the Rules of Evidence and proper Trial procedure and etiquette for many years. He has served in this capacity in 2009-2010 and from 2016 to the present.

Attorney Cummins is proud to note that the Abington Heights Mock Trial Team is routinely among the finalists in its Region and was the back-to-back Pennsylvania State Champion during the 2021 and 2022 Statewide Competitions. In 2021, the Abington Heights High School Mock Trial Team finished 24th in the nation at the Nationals. In 2022, the team finished 15th in the nation.

Attorney Cummins resides in Newton-Ransom, Pennsylvania with his wife, his three sons and the family's Black Lab.

WAYS TO SECURE COPIES OF DECISIONS REFERENCED IN THIS BOOKLET

To secure a copy of any decision summarized in this 2021 Tort Talk Civil Litigation Update Booklet:

(1) Type the Plaintiff's name in the Search Box in the upper right hand corner of the Tort Talk Blog at www.TortTalk.com. That will take you to the blog post on that case within which there should be a LINK to the decision.

(2) Email Dan Cummins to request a copy -- dancummins@CumminsLaw.net

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PLEADINGS

Discovery Rule Under the Statute of Limitations

In the case of *DiDomizio v. Jefferson Pulmonary Associates*, No. 1999 EDA 2021 (Pa. Super. Aug. 2, 2022 McLaughlin, J., McCaffery, J., and Pellegrini, J.), the Pennsylvania Superior Court reversed a trial court's entry of summary judgment in favor of certain Defendants in a medical malpractice case. The trial court had based its decision upon a statute of limitations defense.

In its ruling, the court accepted the Plaintiff's argument that the trial court had erred in relying on the case of *Rice v. Dioceses of Altoona-Johnston*, 255 A.3d 237 (Pa. 2021) to find that the Plaintiff, under the discovery rule affiliated with the statute of limitations analysis, had "inquiry notice" of her injury more than two years before she filed suit, making her action fall outside of the statute of limitations.

According to the Opinion, in essence, "inquiry notice" relates to facts and circumstances that would put a reasonable person on notice to inquire further as to the status of their medical condition and whether a medical error had occurred.

According to the Opinion, the Plaintiff had a complex medical history during an approximately five (5) year period that caused her to treat with many different types of physicians under an ultimate diagnosis of lung cancer. At the relevant time, the Plaintiff was a woman in her 50s with an approximately thirty (30) year history of smoking who initially went to the hospital because she was coughing up blood. She then began a long course of testing and treating with different doctors.

The Plaintiff eventually filed a medical malpractice action alleging that certain Defendants had misdiagnosed her with a different condition and that the misdiagnosis delayed a cancer diagnosis and thereby limited her treatment options for lung cancer.

In their defense, the hospital Defendants asserted that the Plaintiff's claims were barred by the statute of limitations.

In its Opinion, the Pennsylvania Superior Court reviewed the discovery rule as applied to the statute of limitations and whether or not the *Rice* case was factually distinguishable since there was, according to the Plaintiff, an issue of material fact as to when she could have been reasonably considered to have had notice of her possible misdiagnosis.

The trial court had accepted the argument of the hospital Defendants that the discovery rule did not toll the running of the statute of limitations because any ordinary, reasonable person who is diagnosed with lung cancer under the facts and circumstances as presented in this particular case, including the fact that the record revealed that the Plaintiff allegedly experienced the signs and symptoms of cancer earlier, possessed sufficient critical facts to put her on notice to make an inquiry of the possible misdiagnosis.

The Defendants asserted that, since the lawsuit was not filed until more than two (2) years after the Plaintiff was placed on "inquiry notice," the Plaintiff's claims were time-barred.

On appeal, the Pennsylvania Superior Court reversed and found that there was much uncertainty about what was reasonable under facts of this case. The court noted that, given the lengthy history of attempted contradictory diagnoses and treatments, the date of accrual for inquiry notice purposes could not be determined as a matter of law by the trial court and that these issues should be left for a jury to decide as to when the Plaintiff reasonably knew of a medical error that could be redressed by way of a lawsuit. As such, the appellate court ruled that the trial court erred in granting summary judgment in favor of the hospital Defendants.

Pleadings Lumping Defendants Together Are Prohibited

In the case of *Gowden v. Com., Pa. Dept. of Transp.*, No. 21-CV-3046 (C.P. Lacka. Co. March 31, 2022 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas addressed Preliminary Objections filed by Defendants challenging the specificity of an Amended Complaint in a case involving a motor vehicle accident that was allegedly caused, in part, due to loose gravel and other materials resulting from the work on the roadway.

Judge Nealon sustained the Defendant's Preliminary Objections against the Plaintiff's general use of the term "Defendants" throughout the Complaint without identifying which named Defendants were being accused of which acts of negligence. The court noted that, in the Amended Complaint at issue, the only change the Plaintiff made from the general, lump sum allegations against all "Defendants" in the Amended Complaint was to simply insert the names of the Defendant after the terms "Defendants" in the challenged paragraphs. This the court again found was insufficient to put the defense on notice as to which Defendant was being accused of which act of negligence.

As such, the court sustained the Preliminary Objections to the Plaintiff's only negligence count in the Amended Complaint given that that pleading attempted to assert a single negligence claim against all four (4) Defendants based on the same exact conduct in violation of the Pennsylvania Rules of Civil Procedure.

The court granted the Plaintiff a "final opportunity to sufficiently identify each cause of action being advanced against named Defendant in a separate count." The court noted that, the failure of the Plaintiff to do so in the next Amended Complaint would result in a dismissal of claims.

Citations to Statutes Required in Complaints (Federal Court)

In the case of *Furhman v. Mawyer*, No. 1:21-CV-02024 (M.D. Pa. June 28, 2022 Kane, J.), the court declined to dismiss a punitive damages claim where the record revealed that the Defendant

tractor trailer driver was facing pending criminal charges of homicide by vehicle and careless driving.

The court found that the Plaintiff had sufficiently pled that the Defendants' actions leading to the fatal accident at issue constituted a reckless disregard of the substantial risk of a serious injury. The Plaintiff alleged, in part, that the tractor trailer driver ran a red light while driving through town and struck the Plaintiff's vehicle, resulting in fatal injuries to the Plaintiff.

The Court noted that, while the Plaintiff had pled in the Complaint the many violations that made up the charges against the Defendant driver, the Plaintiff had not pled as to whether the Defendant driver had been formally charged. The Court noted that it had the power to look outside of the Complaint to review documents of public record. In doing so, the Court confirmed that the Defendant had been formally charged criminally.

Given the facts pled in the Complaint and the information gathered by the Court from a review of public records, the Court held that it would be premature to dismiss the punitive damages claims at the pleadings stage.

The court did otherwise grant in part and deny in part the Defendant's Motion for a More Definite Statement under F.R.C.P. 12(e).

More specifically, as to the subparagraphs of the Complaint that alleged that a Defendant breached a law or regulation, the court held that the Plaintiff should cite to the specific statute, ordinance, regulation, or rule that the Defendant was alleged to have violated.

Citations To Statutes Required in Complaints (State Court)

In the case of *Comerford v. Burrier*, No. 20-CV-1368 (C.P. Lacka. Co. July 22, 2022 Nealon, J.), the court addressed Preliminary Objections asserting a demurrer against claims asserted by a basketball game spectator who filed suit after she was allegedly injured while seated in the bottom row of bleachers when another fan fell onto her, allegedly due to the absence of any designated stairs or handrail for the bleachers. The lawsuit was commenced against the owner of the gymnasium and the fan who fell upon the Plaintiff.

The court denied the Defendant's demurrer, in part, based upon the spectator's contention that she was a "business invitee" of the owner of the premises, and in light of the owner's obligation to protect invitees from dangerous conditions that were either known to the owner or discoverable by the exercise of reasonable care.

However, the court did note that, under previous precedent in Lackawanna County, as well as an application of Lacka. Co. R.C.P. 1019, if the Plaintiff was opting to affirmatively assert in a Complaint that a negligence claim was based upon a Defendant's violation of a statute, ordinance, regulation, or rule, then the Plaintiff must cite to that specific statute, ordinance, regulation, or rule allegedly violated.

As such, while the owner's demurrer to the negligence claim was overruled, the Preliminary Objections asserted by the Defendant relative to the Plaintiff's failure to provide citations for allegedly applicable statute, ordinances, regulations, and rules was sustained.

Facts Required For New Matter Defenses

In the case of *J.C.F., a minor v. Brenneman*, No. 2021-SU-001714 (C.P. York Co. March 4, 2022 Strong, J.), a court addressed Preliminary Objections filed by a Plaintiff against a Defendant's Amended Answer and New Matter. According to the Opinion, this matter involved an alleged dog bite incident.

In the Plaintiff's Preliminary Objections to the Defendant's New Matter, the Plaintiff alleged a lack of factual specificity in violation of the Rules of Civil Procedure as well as a lack of legal sufficiency.

The Plaintiff attacked the allegations in the Defendant's New Matter in which the Defendants had asserted that the Plaintiff's injuries and/or damages may have been caused in whole or in part by the Plaintiff's own conduct when the Plaintiff had interacted with the dog. The Plaintiff also attacked allegations by the Defendant that the Plaintiff may have assumed the risk of injuries and/or that the Plaintiff failed to mitigate any alleged injuries by not following medical advice.

After reviewing the pleadings, the court found that the Defendants failed to provide sufficient factual specificity in support of the defenses raised in the Defendant's New Matter. The court noted that the conclusory paragraphs asserted by the Defendant did not enable the Plaintiff to prepare their case in opposition to the defenses raised.

In striking the new matter allegations regarding contributory negligence and assumption of the risk, the court noted that, under Pa. R.C.P. 1030(b), it is provided that the affirmative defenses of assumption of the risk and contributory negligence need not be pled. As such, the court noted

that the Defendant did not need to restate these claims in any amended pleading but that, if they chose to do so, the Defendants were required to fully conform to the requirement under Pa. R.C.P. 1019(a) of providing sufficient factual specificity in support of such pleadings.

Facts Required For New Matter Defenses

In the case of *Philips v. Horvath*, No. 536-CV-2021 (C.P. Monroe Co. Oct. 1, 2021 Williamson, J.), the court found that the Defendant's Answer and New Matter, which attempted to assert that the Plaintiff's own contributory negligence was a factor in this dog bite case, failed for lack of specificity where the Defendant did not allege enough facts to put the Plaintiff on notice as to what purported misconduct and/or negligence on the part of the Plaintiff was at issue.

According to the Opinion, the Plaintiff was an Assistant Fire Chief who had responded to a 911 call regarding a potential house fire. When the Plaintiff entered the premises, he was allegedly attacked by a pit bull.

In filing Preliminary Objections to the Defendant's New Matter allegations, the Plaintiff asserted that the facts alleged in the New Matter only indicated that the Plaintiff had come into contact with the dog but did not put the Plaintiff on notice of any alleged misconduct on the part of the Plaintiff that allegedly caused the dog to attack the Plaintiff.

The court agreed with the Plaintiff that the Defendants' allegations were not factually sufficient to support claims of contributory negligence. In so ruling, Judge Williamson emphasized that Pennsylvania is a fact-pleading state under the mandates of Pa.R.C.P. 1019(a).

Motion to Amend Answer and New Matter Granted

In the case of *Bellersen v. Gill*, No. 19-CV-2686 (C.P. Lacka. Co. Nov. 1, 2021 Nealon, J.), Judge Terrence R. Nealon addressed a motion filed by a trucking Defendant in a motor vehicle accident litigation under which the trucking Defendant sought to amend its Answer and New Matter to change previous denials in its original Answer and New Matter relative to the facts and the cause of the accident.

The trucking Defendant sought to admit factual allegations of the accident and to further admit that the Defendant driver's failure to use due care while driving his vehicle on Interstate 380 caused him to rear-end the vehicle in front of him which, in turn, caused that vehicle to rear-end the vehicle that the Plaintiff was driving, and further caused the front of the Plaintiff's vehicle to hit the vehicle in front of the Plaintiff.

It was noted in the Opinion that, while this proposed amendment was offered up two (2) years after the original Answer and New Matter was filed, no trial date was scheduled in the case and discovery was ongoing.

The Defendant offered up a proposed Order that not only granted his motion but also contained language under which the Defendant driver seeking the court to rule that such admissions shall not be used as any admission of any type of conduct which could serve as the basis for the imposition of punitive damages.

Judge Terrence R. Nealon

Lackawanna County

In his Opinion, Judge Nealon reviewed the rules regarding pleading, which he confirmed are to be liberally applied. The court also noted that there was no time limit under Pa.R.C.P. 1033 for the filing of any request for an amendment to a pleading.

The court granted the Defendant's Motion and allowed the amendment but held any decision on the impact of any such amendment on any claim for punitive damages for a later day.

The court noted that the Defendant's request that the Plaintiff be prevented from making any evidentiary use of the allowed admissions in support of the Plaintiff's punitive damages claims was not an appropriate consideration relative to the request for leave of court to amend a pleading under Rule 1033. Rather, the court noted that the preclusion of evidence at trial is more properly a subject for a Motion In Limine to be decided by any assigned trial judge.

The court emphasized that any admission that the trucking Defendant would put in his Answer and New Matter would be considered a judicial admission. However, any legal conclusions in the Plaintiff's Complaint, such as allegations of negligence and/or recklessness, would not qualify as judicial admissions under Pennsylvania law.

PA Law Found to Apply to Case Involving NJ Accident

In the case of *Hutchinson v. Millet*, No. 22-CV-1166 (C.P. Lacka. Co. Aug. 8, 2022 Nealon, J.), the court addressed choice of law questions and punitive damages issues in response to Preliminary Objections raised in a motor vehicle accident case.

According to the Opinion, this matter involved a fatal motor vehicle accident that occurred in New Jersey.

The estate of the Lackawanna County decedent, who was killed in a New Jersey automobile accident while a passenger in a vehicle operated by a Lackawanna County resident and owned by the Defendant driver's Lackawanna County employer, commenced this lawsuit against the deceased Defendant driver's estate and his employer seeking to recover compensatory and punitive damages based upon alleged negligent and reckless conduct of the Defendant driver in allegedly causing the fatal collision while allegedly driving under the influence of alcohol, cocaine, and prescribed medications.

The deceased driver's estate filed Preliminary Objections seeking to dismiss the punitive damages claims on the grounds that New Jersey law prohibits the recovery of punitive damages from a deceased tortfeasor's estate, and also restricts an employer's vicarious liability for punitive damages to those instances where the employer specifically authorized, ratified, or participated in the employee's reckless conduct.

The Defendant driver's estate alternatively argued that, even if Pennsylvania law applied, the punitive damages claims should be dismissed since the deceased Defendant driver was allegedly chargeable with nothing more than ordinary or gross negligence and such claims were insufficient to support a punitive damages claim.

In response, the Plaintiff's estate asserted that Pennsylvania law governed and that Pennsylvania law allowed for the punitive damages claim.

Judge Terrence R. Nealon

Lackawanna County

After applying a detailed choice of law analysis, Judge Nealon ruled that Pennsylvania law controls the punitive damages issues raised by the Defendant's Preliminary Objections.

Judge Nealon went on to note that, under Pennsylvania law, the estate of a tort victim may recover punitive damages from a deceased tortfeasor's estate for causing an accident while operating a vehicle allegedly while impaired with alcohol or drugs. The court also noted that the employer of an allegedly intoxicated or impaired driver may be found vicariously liable for punitive damages even if that employer did not direct or ratify that reckless conduct.

As such, the court overruled the Defendant's Preliminary Objections in the nature of a demurrer that was asserted against the punitive damages claims.

Can't Blame COVID-19 for Lack of Service

In the case of *Bellan v. Penn Presbyterian Medical Center*, 2022 Pa. Super. 32 (Pa. Super. Feb. 22, 2022 Bender, P.J.E., Murray, J., and Stevens, P.J.E.) (Op. by Stevens, P.J.E.), the Pennsylvania Superior Court affirmed a trial court's dismissal of a Plaintiff's medical malpractice Complaint with prejudice based upon service of process issues.

According to the Opinion, the issue presented to the appellate court was whether the medical provider Defendant being closed for service for several months due to COVID, and, therefore not accepting service of process, equitably provided more time for the Plaintiff to serve the Complaint. The Plaintiff asserted that these circumstances should be found to allow the Complaint to remain effective despite the fact that the Complaint was not reinstated, where the

Plaintiff allegedly previously made a good faith attempt at service and where the medical provider Defendant allegedly suffered no prejudice from the timing of the service.

The court noted that, it was undisputed that the Plaintiff failed to serve the Defendant within thirty (30) days of filing the Complaint and did not attempt to reinstate the Complaint. Approximately five (5) months after filing the Complaint, the Plaintiff attempted to serve the Defendant by email. It was emphasized by the Defendant that the Plaintiff never sought to reinstate the Complaint or file any Affidavit of No-Service. As such, the Defendant filed Preliminary Objections regarding lack of service.

The Plaintiff responded by arguing, in part, that the Plaintiff had previously attempted to serve the Defendant at its general counsel's office but was unsuccessful. According to the Plaintiff, the process server was informed that the workers at the general counsel's office would not return until after 2020.
The Plaintiff argued that the Defendant should have had someone left in charge to accept service or provide instructions to those attempting service. The Plaintiff additionally asserted that the Defendant has not suffered prejudice with regards to service.

After providing a detailed analysis of the current status of Pennsylvania law regarding proper service of original process, including the Pennsylvania Supreme Court's recent decision in the case of *Gussom v. Teagle*, 247 A.3d 1046 (Pa. 2021), the Pennsylvania Superior Court emphasized that, although the Plaintiff timely commenced the lawsuit, the Plaintiff did not serve the Defendant within the thirty (30) days of filing the Complaint and did not seek to reinstate the Complaint as required by the Rules of Civil Procedure to maintain the validity of the Complaint. [Click this LINK to view the Tort Talk Blog post on the *Gussom* case and to access a link to that Opinion.].

The court in this *Bellan* case also emphasized that the record and docket confirmed that the Plaintiff took no action to serve the Defendant until the Plaintiff filed an Affidavit five (5) months after the filing of the Complaint claiming that the Defendant had accepted service via email on a date which was months after the statute of limitations had expired.

In that email, an associate of the Plaintiff's law firm contacted the defense counsel and informed them that the Plaintiff had unsuccessfully attempted to personal served the Complaint and inquired whether the Defendant's attorney would accept the Complaint via the email. The response from a claims administrator at the office of defense counsel was that she was able to accept service by email or, in the alternative, was able to meet the Plaintiff's process server on Wednesdays. Within an hour of the Plaintiff's initial email, the claims administrator at the defense attorney's office confirmed that she had accepted service of the Complaint on behalf of the Defendant.

The Superior Court agreed with the trial court that the record confirmed that the Plaintiff had not made good faith efforts to complete service.

With regards to the Plaintiff's reference that they had attempted to complete personal service that was unsuccessful when the process server was informed by a front desk security guard at the

general counsel's office that no one would be working in the office until after 2020, the Superior Court found that the Plaintiff failed to explain why the Plaintiff neither filed an Affidavit of No-Service with the trial court or informed the trial court in any way that the Defendant had not been served with the Complaint, all of which was in violation of Pa. R.C.P. 405(a).

The Superior Court otherwise indicated that, after the Plaintiff's first attempt at service was unsuccessful, the Plaintiff did not offer any evidence that he diligently made efforts to discover on how to serve the Defendant or provide any notice to the Defendant of the lawsuit.

The court otherwise indicated that the Plaintiff also did not seek permission from the trial court to use an alternative method of service pursuant to Pa. R.C.P. 430.

The court noted that the Plaintiff offered no explanation as to why the Plaintiff's counsel could not have sent the email inquiry regarding service of process months earlier than the five (5) months after the Complaint was served that the email was sent. The court noted that, to the contrary, the Plaintiff's counsel's lack of due diligence was apparent in the case and the Plaintiff's attorney's "attempt to blame the COVID-19 pandemic as the cause of the lack of timely service is [was] misplaced."

Moreover, the Superior Court noted that there was no evidence in the record to show that the Plaintiff's actions gave the actual Defendant actual notice of the filing of the lawsuit in the timely manner. The court emphasized that the courts of Pennsylvania have never modified the Plaintiff's duty to act diligently to serve notice of the commencement of a lawsuit so as not to undermine the policies that drive the statute of limitations.

Overall, the Superior Court agreed with the trial court that the Plaintiff had failed to produce evidence to show that the Plaintiff's counsel had acted diligently in making a good faith effort to serve the actual Defendant with notice that the Plaintiff had filed a Complaint.

Med Mal Claim Dismissed For Lack of Timely Service

In the case of *Frye v. Wellspan Health*, No. 20-SU-1116 (C.P. Adams Co. Feb. 4, 2022 George, P.J.), the trial court granted a Defendant's Preliminary Objections to a Plaintiff's medical malpractice Complaint on the basis that the Plaintiff failed to effectuate proper service on that particular Defendant.

According to the Opinion, the Plaintiff filed a medical malpractice action against a medical doctor who performed a procedure placing a spinal stimulator on the Plaintiff's thoracic spine. The Plaintiff also sued the medical facility and other Defendants.

The Complaint was filed just five (5) days before the expiration of the statute of limitations.

According to the record before the court, the medical doctor was not an employee of the hospital where the procedure was performed but rather, was an independent contractor. The Plaintiff served the hospital and the remaining individual Defendants but not the medical doctor who performed the actual procedure.

After nearly nine (9) months into litigation, the doctor at issue received word from his insurance company about the lawsuit but otherwise alleged that he never was served with a copy of the Complaint. He also asserted that he never authorized anyone else to accept service on his behalf.

The Plaintiff's argued that they believed that the doctor was properly served when they served the hospital with the Complaint.

The Defendant doctor at issue filed Preliminary Objections asserting that he was not properly served until approximately 9 ½ months after the expiration of the applicable statute of limitations.

After applying the law of the Pennsylvania Supreme Court ruling in the case of *Lamp v. Heyman*, 366 A.2d 822 (Pa. 1976), and its progeny, the court found that the Plaintiff had not acted

diligently to meet the Plaintiff's requirement of making a good faith effort to complete service of process upon the Defendant.

More specifically, the court found that the Plaintiff did not make a good faith effort to investigate the doctor's service address. Also, although the doctor had not responded to any of pleadings for approximately nine (9) months, the Plaintiffs made no effort to investigate whether that Defendant had actually received the Complaint.

As such, the trial court dismissed the Plaintiff's medical malpractice Complaint against that Defendant doctor with prejudice.

Premises Liability Case Dismissed For Lack of Timely Service

In the case of *Correa v. Bridge St. Apts.*, No. 311-CV-2021 (C.P. Monroe Co. June 15, 2022 Zulick, J.), the court dismissed a premises liability lawsuit due to the Plaintiff's failure to serve original process in a timely fashion.

According to the Opinion, the Plaintiff allegedly fell on property owned by the Defendant owner about January 21, 2019.

Two (2) years later, and four (4) days before the expiration of the statute of limitations, the Plaintiff filed a Writ of Summons on January 15, 2021.

Plaintiff's counsel alleged that the Writ had been served by regular mail. However, the court noted that there is no indication on the docket that the Defendants received the Writ or any other evidence to show that the Defendants received notice of the lawsuit.

On October 21, 2021, the court took judicial notice that the Writ had not been promptly served and issued an Order directing the Plaintiff to file a Motion for Special Service in the event that service was otherwise not completed within 90 days of that Order.

Thereafter, the Plaintiff filed a Praecipe to Reissue the Writ of Summons on December 15, 2021 and the Sheriff filed an Affidavit of Service on December 20, 2021 indicating that the Defendants were served on December 16, 2021.

The Defendants filed an Objection asserting that the Plaintiff did not promptly serve the Complaint and that, therefore, the Complaint should be dismissed.

Judge Arthur L. Zulick

Monroe County

Reviewing the record, Judge Arthur L. Zulick noted that service of process was not effectuated for almost eleven (11) months after the statute of limitations had run.

The court additionally noted that there was never an attempt to serve the Complaint in accordance with the Rules of Civil Procedure and there was no attempt by the Plaintiff to ensure that the method of service was correct. More specifically, the court noted that, under Pennsylvania Rules of Civil Procedure 400(a), original service by mail for an in-state Defendant was not authorized.

The court emphasized that the issue was that service was not effectuated until after the statute of limitations had already expired. The court additionally emphasized that the Plaintiff's eleven (11) month delay demonstrated a lack of any good faith effort by the Plaintiff to properly complete service.

As such, the court granted the Defendant's Preliminary Objections and dismissed the Complaint in its entirety.

Service of Process on Out-of-State Defendants

In the case of *Auto Club Ins. Ass'n v. Enter. Holdings, Inc.*, No. 16-CV-422 (C.P. Lacka. Co. Oct. 5, 2021 Nealon, J.), the court held that a Defendant was properly served with a Writ of Summons filed within the statutory time limits. The court also ruled that the Defendant did not suffer prejudice such that the Complaint should not be dismissed due to an alleged untimely prosecution of the claim.

In this matter, the Defendant was headquartered in another state.

The court determined that the Pennsylvania Rules of Civil Procedure required that this Defendant be served within ninety (90) days of the Writ of Summons by way of certified mail, return receipt requested.

Judge Nealon found that the record before him confirmed that this Defendant was timely and properly served. As such, the first Preliminary Objection regarding service of process issues was overruled.

With regard to the Defendant's argument that the matter was not timely prosecuted due to the fact that the sixty (60) months had passed between the issuance of the Writ of Summons and the filing of the Complaint, the court stated that this issue was not properly raised as a Preliminary Objection but should have been raised via Motion for Judgment Non Pros.

However, even applying the rules pertaining to the determination of a Motion for Judgment of Non Pros, Judge Nealon found that the Defendant failed to identify any actual prejudice it had suffered due to the passage of time. Given that there was no prejudice found, the Defendant's objection in this regard was also overruled.

Pennsylvania Supreme Court Limits Reach of Long-Arm Statute Over Foreign Corporations

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Court

In the case of *Mallory v. Norfolk Southern Railway Co.*, No. 3 EAP 2021 (Pa. Dec. 22, 2021) (Maj. Op. by Baer, C.J.)(Concurring Op. by Mundy, J.), the Pennsylvania Supreme Court recognized that a recent decision by the United States Supreme Court precluded the exercise of general personal jurisdiction by a Pennsylvania court over a party solely on the basis of the fact that a foreign corporation had registered to do business in Pennsylvania. As such, that aspect of the Pennsylvania long-arm statute has been declared unconstitutional in this *Mallory* decision.

In this matter, a Virginia resident filed an action in Pennsylvania against a Virginia corporation, under an allegation of injuries sustained in Virginia and Ohio.

The Plaintiff asserted that the Pennsylvania courts have general personal jurisdiction over the case based exclusively upon the fact that the foreign corporation registered to do business in Pennsylvania.

In this regard, the Plaintiff had relied upon 42 Pa. C.S.A. §5301(a)(2)(i). The Pennsylvania Supreme Court agreed with the trial court decision that the Pennsylvania statute, affording Pennsylvania court general personal jurisdiction over a foreign corporation that registers to do business in Pennsylvania regardless for the lack of continuous and symptomatic contacts within the state by that corporation, fails to comport with the due process clause of the Fourteenth Amendment of the United States Constitution.

In other words, the Court held that Pennsylvania's "statutory scheme is unconstitutional to the extent that it affords Pennsylvania courts general jurisdiction over foreign corporations that are not at home in the Commonwealth." ***See*** **Op. at p. 44**.

Note: This case is on its way up to the United States Supreme Court for further review.

Pennsylvania Supreme Court Broadens Venue Rules for Medical Malpractice Cases

Under an Order dated August 25, 2022, the Pennsylvania Supreme Court approved amendments to the medical malpractice venue rules that govern such lawsuits filed in the state court. Under the new venue rules, set to go into effect on January 1, 2023, plaintiffs will have more options as to forum shopping in terms of where they can file their medical malpractice lawsuits.

The amendments undo a 20 year old rule. Under the old rule, plaintiffs were required in medical malpractice cases to sue their medical providers in the counties where the treatment was completed.

Under the new rules, plaintiff's will be allowed to sue providers in any of the counties where the providers regularly do business or have significant contacts.

Proper Venue Against One Defendant Can Be Proper Venue Against All Defendants

In the case of *Hagedorn v. Rick's Backhoe Service, Inc.*, No. 18-CV-3723 (C.P. Lacka. Co. April 5, 2022 Nealon, J.), the court addressed an improper venue challenge in a case where a Plaintiff's attorney was appointed the Administrator of a deceased tortfeasor's estate.

According to the Opinion, an injured Schuylkill County motorcyclist filed a lawsuit against the Lackawanna County personal representative of a deceased truck driver's estate and a Schuylkill County trucking company regarding a motor vehicle accident that occurred in Berks County.

The accident allegedly arose out of an alleged road rage incident. The Plaintiff alleged that the truck driver pursued the motorcyclist following an angry exchange of strong language and gestures in a construction zone. The truck driver allegedly struck the rear of the Plaintiff's motorcycle and ejected the motorcyclist from his motorcycle, resulting in fatal injuries.

The Defendant Administrator of the truck driver's estate and trucking company filed Preliminary Objections challenging venue under Pa. R.C.P. 1006(b) and Pa. R.C.P. 2179(a) on the basis that the trucking company did not regularly conduct business in Lackawanna County as required under the quality/quantity test for corporate venue.

The trucking company also filed a demurrer to the Plaintiff's allegations of willful, wanton, and reckless conduct on the part of the truck driver, as well as the claims for punitive damages, on the basis that those claims lack a sufficient factual basis.

On the venue issue, the court noted that, since a civil action against a deceased tortfeasor must be filed against the personal representative of the decedent's estate, and given that the Administrator appointed to the truck driver's estate was properly served at the Administrator's law office in Lackawanna County, venue is found to be proper as to that personal representative.

As such, all of the Preliminary Objections asserted were overruled.

Proper Venue

All in all, [they'd] rather be in Philadelphia.

In the case of *Hausmann v. Bernd*, 2022 Pa. Super. 27 (Pa. Super. Feb. 17, 2022 Stabile, J., Dubow, J., and McCaffery, J.) (Op. by McCaffery, J.), the Pennsylvania Superior Court affirmed a Philadelphia County trial court decision that sustained Preliminary Objections by a Defendant based upon improper venue regarding a motor vehicle accident that occurred in Montgomery County.

The court found that venue in Philadelphia County was improper against the Defendant driver given that the Defendant driver lived in Montgomery County and given that the accident occurred in Montgomery County.

However, the court acknowledged that, if venue was proper for the business Defendants in Philadelphia County, then the Plaintiffs could file suit against all three (3) Defendants in Philadelphia.

Yet, the court affirmed the trial court's determination that the Defendant company did not "regularly conduct business" in Philadelphia County sufficient to support venue.

The court found that, generally speaking, the percentage of revenue derived from work in a county was not necessarily determinative of whether a business regularly conducted business operations in that county.

The court pointed to other evidence that supported the trial court's decision that the company Defendant did not regularly conduct business in Philadelphia.

In so ruling, the Pennsylvania Superior Court also held that the Plaintiffs had an obligation to conduct discovery for any additional evidence that would have supported their claim to venue.

As noted, the decision by the trial court to sustain the Preliminary Objections to venue were affirmed on appeal.

Proper Venue for Social Media Defamation Claim

In the case of *Fox v. Smith*, No. 39 EAP 2019 (Pa. Nov. 17, 2021) (Op. by Saylor, J.), the Pennsylvania Supreme Court addressed whether the standards governing the selection of an appropriate venue of litigating libel or defamation claims grounded on newspaper publications should also be applied to causes of action premised upon internet-based publications.

The court reviewed the prior cases indicating that the applicable law of venue under Pa. R.C.P. 1006 and 2179 provides that an action against an individual or corporation may be commenced in a county in which the cause of action arose. Under prior Pennsylvania Supreme Court precedent, relative to defamation and libel actions, a cause of action in this regard has been deemed to arise in locations where the publication of the statements had occurred.

In this case, a democratic candidate for Mayor of the Borough of Chester Heights in Delaware County was defeated in an election and, thereafter, brought a defamation action against her political opponent and certain other organizations, alleging defamation and other claims. The Complaint asserted that, during the campaign, the Defendant published information on the internet and on social media websites falsely accusing the Plaintiff of having been charged, in another state, with criminal conduct in the form of allegedly engaging in a fraudulent banking transaction.

The Pennsylvania Supreme Court ruled, on the facts before it, that venue in a defamation action arising from internet communications and/or publications is proper in any jurisdiction where comments were read by individuals who understood such comments to be defamatory. As such, the Pennsylvania Supreme Court affirmed the lower court rulings that overruled the Defendant's Preliminary Objections to venue.

The court stated that, when a person is defamed on the internet, which has worldwide reach, a defamation cause of action can arise in multiple venues. The court further held that an allegedly defamed Plaintiff could choose any venue in which publication and the injury occurred, even if the publications occurred in many different venues.

Doctrine of *Forum Non Conveniens*

In the case of *Fellerman & Ciarimboli Law, PC v. Joseph L. Messa, Jr., & Associates*, No. 21-CV-4654 (C.P. Lacka. Co. April 14, 2022 Nealon, J.), the court addressed issues under the doctrine of forum non conveniens.

According to the Opinion, the personal injury law firm Plaintiff in this matter, which maintains offices in Delaware County, Lackawanna County, Luzerne County, Philadelphia County, and New Jersey, commenced a declaratory judgment action against a Philadelphia personal injury law firm seeking a determination regarding the proper method for calculating the Philadelphia firm's share of attorney's fees of a little over $2 million dollars that relative to a civil litigation matter.

The counsel fees in dispute were generated from a wrongful death lawsuit that was filed and litigated in Philadelphia County and defended by Philadelphia area attorneys. The underlying case arose from the death of a Philadelphia resident in a Philadelphia accident. The court also noted that the counsel fees were approved by a Philadelphia County judge.

It was also noted that, with regards to the attorney's fees at issue, the Philadelphia law firm had instituted a separate action against the Plaintiff law firm in Philadelphia County asserting breach of contract, breach of fiduciary duty, unjust enrichment, and other claims.

In this Lackawanna County declaratory judgment case filed by the Plaintiff law firm, the Defendant Philadelphia law firm filed a Petition pursuant to Pa. R.C.P. 1006(d)(1) seeking to transfer venue in this declaratory judgment action to the Court of Common Pleas of Philadelphia County on forum non conveniens grounds.

After reviewing the record before him, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas determined that the records contained sufficient proof that the continued litigation of this declaratory judgment action in Lackawanna County would be unduly burdensome for the Philadelphia law firm and the anticipated witnesses. The court noted that no

material witness or any relevant evidence was located in Lackawanna County and that Philadelphia County would provide easier access to the witnesses and other sources of proof.

Based upon the totality of the circumstances, the court found that Lackawanna County is an oppressive forum for the adjudication of this case. As such, the court granted the Petition to Transfer Venue and transferred the case to Philadelphia County.

Doctrine of Forum Non Conveniens

In the case of *Shaver v. Levelle*, No. 21-CV-2465 (C.P. Lacka. Co. Aug. 22, 2022 Nealon, J.), the court addressed *forum non conveniens* issues in a motor vehicle accident case.

According to the Opinion, a recently relocated Lackawanna County resident sued a Centre County Defendant and his Huntingdon County and Centre County employers as a result of a motor vehicle accident that occurred in Blair County.

The Plaintiff sought to recover compensatory and punitive damages for the alleged negligent and reckless acts of the Defendants that resulted in the accident and against the employers for hiring and supervising the motorist and entrusting a tractor trailer to the Defendant driver.

The Defendants provided affidavits from the motorists, his employer, and the investigating officer indicating that Lackawanna County was an oppressive forum that caused great hardship and extreme inconvenience for them due to the significant distance and its adverse impact on their personal and professional responsibilities. The Defendants filed these affidavits in support of a motion pursuant to Pa. R.C.P. 1006(d)(1) seeking to transfer venue of this Lackawanna County case to the Blair County Court of Common Pleas on *forum non conveniens* grounds.

After reviewing a copy of the record before the court, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas found that record contains sufficient evidence to confirm that the continued litigation of this case in Lackawanna County would be unduly burdensome for the motorists, his employers, and the anticipated witnesses. The court also found that the record established that the litigation of this case in Lackawanna County would significantly disrupt their professional and personal obligations in their counties of residence.

Judge Nealon also noted that Blair County will provide easier access to material witnesses and other sources of proof relative to the liability and punitive damages issues, including a likely site inspection of the scene of the accident.

Therefore, based upon the totality of the circumstances, the court found that Lackawanna County is indeed an oppressive forum for the adjudication for this particular matter. Accordingly, the Motion to Transfer was granted, sending the case to the Court of Common Pleas of Blair County.

The court additionally ruled that, pursuant to Pa. R.C.P. 1006(d)(3), any cost or fees associated with the transfer of the record shall be paid by the Defendants.

Proper Jurisdiction for Social Media Defamation Claim

In the case of *Gorman v. Shpetrik*, No. 2:20-CV-04759-CMR (E.D. Pa. March 10, 2022 Rufe, J.), the court addressed jurisdiction issues, and other issues, arising out of a claim of defamation related to online post and tweets that allegedly damaged the Plaintiff's reputation.

With regard to the jurisdiction issue, the court found that the defendant allegedly directed allegedly defamatory messages to a person within the jurisdiction, with the intent to damage the reputation of another person also in that jurisdiction. The court found that the defendant had therefore been involved in activity expressly directed at the jurisdiction such that the exercise of personal jurisdiction was proper over the case presented.

Relative to a statute of limitations issues raised by one of the Defendants, the court noted that the limitations period began to run when defamatory material was published.

The court also noted that the Plaintiff's lack of knowledge as to the Defendant's identity could not support an application of the discovery rule under the facts presented in this case.

However, the court found that the Plaintiff had sufficiently pled a claim of fraudulent concealment by alleging that the Defendant had provided false information when registering on the social media platforms on which the allegedly defamatory material was allegedly published. As such, the court allowed discovery on this issue before making a determination as to whether the doctrine of fraudulent concealment could serve to toll the statute of limitations on some of the Plaintiff's claims in this matter.

The court additionally dismissed the Plaintiff's claims of intentional infliction of emotional distress after finding that this claim failed because the Plaintiff had not alleged any physical injury connected to or caused by the Plaintiff's alleged emotional distress.

The court also found that the Plaintiff's claims for civil conspiracy failed because the Plaintiff had not alleged that all members of the purported conspiracy shared a common purpose, but rather, merely alleged that they took acts that furthered the alleged purpose of the conspiracy.

Specific Jurisdiction Issues Addressed in Federal Court Trucking Case

In the case of *Allen v. Foxway Transp.*, No. 4:21-CV-00156 (M.D. Pa. Jan. 27, 2022 Brann, C.J.), the court denied various Motions to Dismiss and/or To Transfer Venue and, in doing so, provided a detailed discussion of the current state of federal law on the issue of specific jurisdiction.

In particular, the court addressed the issue of the required minimum contacts sufficient to establish jurisdiction in Pennsylvania over a trucking company and/or a broker with regards to hauling freight headed for Pennsylvania.

Judge Brann's Opinion contains an analysis of the "alien-venue rule" as it relates to the Canadian Defendant in this cause of action. The court additionally addressed the distinctions between requests for venue transfer under §1406(a) and 1404(a) in the U.S. Code.

In his Opinion, Judge Brann also touched upon other issues such as vicarious liability, allegations of joint venture, and claims for punitive damages in this trucking accident case.

No General Jurisdiction Over Trucking Defendant, But Specific Jurisdiction Found

In the case of *Allen v. Foxway Transp., Inc.*, No. 4:21-CV-00156 (M.D. Pa. Jan. 27, 2022 Brann, C.J.), the court denied a Motion to Dismiss based upon general personal jurisdiction issues raised

in a tractor trailer accident case that involved Pennsylvania Plaintiffs and out-of-state Defendants. The accident actually happened in New York state.

The court found that there was no basis for general personal jurisdiction over either of the Defendants in this case. Chief Judge Matthew W. Brann noted that general jurisdiction exists over foreign defendants when their contact with Pennsylvania is so systematic and continuous as to render them at home in Pennsylvania. Here, the court found that the frequent freight hauling into Pennsylvania is simply the regular course of doing business which is insufficient to trigger jurisdiction over a Defendant.

The court additionally reiterated a rule that the designation of a Pennsylvania registered agent as a federally regulated motor carrier also did not serve to create general jurisdiction.

However, Chief Judge Matthew W. Brann ruled that, since the Defendant was shipping freight that was destined to go to Pennsylvania and given that the trucker had injured Pennsylvania residents during the course of the trip, there was enough case-specific contacts by the Defendant to support a finding of specific personal jurisdiction over the Defendant trucking company and driver even though the subject accident occurred outside of Pennsylvania.

The court noted that the other Defendant, who had brokered numerous Pennsylvania shipments, including the one at issue in this case, was found to have the same state-specific contacts with Pennsylvania to support a finding of specific personal jurisdiction over that Defendant as well.

Out-of-State Defendant Did Not Have Requisite Minimum Contacts To Support Exercise of Jurisdiction

In the case of *Bean Sprouts LLC v. Life Cycle Const. Serv., LLC*, No. 1467 EDA 2021 (Pa. Super. Feb. 17, 2022 Panella, P.J., Dubow, J., McCaffery, J.) (Op. by Panella, P.J.), the Pennsylvania Superior Court held that the trial court did not err when it found that the Defendant did not have the requisite minimum contacts with Pennsylvania for the trial court to exercise jurisdiction.

According to the Opinion, this case arose out of a construction contract dispute.

The Plaintiff was a construction and excavating company and the Defendant was a contractor engaged in construction projects throughout the country.

The Plaintiff filed a breach of contract action in Pennsylvania. The Defendant contractor filed Preliminary Objections asserting that it did not have the requisite minimum contacts with Pennsylvania such that a Pennsylvania court could not exercise personal jurisdiction over the Defendant.

The trial court sustained the Preliminary Objections and the appellate court affirmed.

Proper Venue Against One Defendant Can Be Proper Venue Against All Defendants

In the case of *Hagedorn v. Rick's Backhoe Service, Inc.*, No. 18-CV-3723 (C.P. Lacka. Co. April 5, 2022 Nealon, J.), the court addressed an improper venue challenge in a case where a Plaintiff's attorney was appointed the Administrator of a deceased tortfeasor's estate.

According to the Opinion, an injured Schuylkill County motorcyclist filed a lawsuit against the Lackawanna County personal representative of a deceased truck driver's estate and a Schuylkill County trucking company regarding a motor vehicle accident that occurred in Berks County.

The accident allegedly arose out of an alleged road rage incident. The Plaintiff alleged that the truck driver pursued the motorcyclist following an angry exchange of strong language and gestures in a construction zone. The truck driver allegedly struck the rear of the Plaintiff's motorcycle and ejected the motorcyclist from his motorcycle, resulting in fatal injuries.

The Defendant Administrator of the truck driver's estate and trucking company filed Preliminary Objections challenging venue under Pa. R.C.P. 1006(b) and Pa. R.C.P. 2179(a) on the basis that the trucking company did not regularly conduct business in Lackawanna County as required under the quality/quantity test for corporate venue.

The trucking company also filed a demurrer to the Plaintiff's allegations of willful, wanton, and reckless conduct on the part of the truck driver, as well as the claims for punitive damages, on the basis that those claims lack a sufficient factual basis.

On the venue issue, the court noted that, since a civil action against a deceased tortfeasor must be filed against the personal representative of the decedent's estate, and given that the Administrator appointed to the truck driver's estate was properly served at the Administrator's law office in Lackawanna County, venue is found to be proper as to that personal representative.

Judge Nealon additionally noted that, since Pa. R.C.P. 1006(c)(1) provides that an action seeking to enforce joint or joint and several liability against multiple defendants may be brought against all Defendants in any county in which venue may be established against any one of the defendants, and given that the motorcyclist had asserted joint and/or joint and several liability against both the Administrator of the tortfeasor's estate and the trucking company, venue is also found to be proper in Lackawanna County with respect to the trucking company regardless of whether or not the trucking company regularly conducted business in Lackawanna County.

As to the allegations of recklessness and the claims for punitive damages, Judge Nealon followed his numerous previous decisions in allowing such claims to be asserted in any case whatsoever regardless of the facts alleged. The court additionally noted that, even if Rule 1019 did happen to obligate the Plaintiff to allege specific facts sufficient to sustain a punitive damages claim at trial (which this Court did not read Rule 1019 as requiring), the allegations regarding the truck driver's alleged actions, for which the trucking company would allegedly be vicariously liable, were found to satisfy that standard in any event in this case involving alleged road rage conduct.

As such, all of the Preliminary Objections asserted were overruled.

It is noted that, on pages 13 and 15 of the Opinion, Judge Nealon made references to the dispute in Pennsylvania as to the proper assertion of claims of recklessness in Pennsylvania and, in doing so, noted the Pennsylvania Bar Quarterly article entitled "Pleadings for Clarity: Appellate Guidance Needed to Settle the Issue of the Proper Pleading of Recklessness in Personal Injury Matters" written by Daniel E. Cummins.

Private Sector Defendant Can Rely Upon Venue Argument Typically Reserved for PennDOT

In the case of first impression of *Kim v. Com. of Pa., Dept. of Transp*., No. 7 CD 2020 (Pa. Cmwlth. Feb. 9, 2022 Wojcik, J., Cannon, J., and Ceisler, J.) (Op. by Wojcik, J.), the Commonwealth Court held that private sector Defendants in a personal injury suit may seek a new venue under a section of the Sovereign Immunity Act despite the State Agency Co-Defendant's objections to the requested transfer of venue.

According to the Opinion, the Plaintiffs were injured in a single car accident that occurred in Delaware County.

In addition to suing PennDOT, which maintained the area of the road in question, the Plaintiff also sued private contractors who worked on the construction of the road as well as the Delaware County resident who owned the property where the accident occurred. The Plaintiffs filed suit in Philadelphia.

According to the Opinion, the Pennsylvania Department of Transportation, as a Defendant in this case, had earlier waived its right to venue protections under the law as part of that Defendant's settlement with the Plaintiffs.

As a result of that agreement, PennDOT even joined the Plaintiffs in arguing against the venue Preliminary Objections filed by the Defendants and asserted that the private sector Defendants could not utilize §8523(a) of the Judicial Code in support of their argument.

According to the Opinion, §8523(a) of the Judicial Code establishes that state entities may only be sued in the county where either the incident at issue occurred or where that state agency entity is located.

The issue in this case was whether, in a suit against both state and private Defendants, the right to object to venue under that section only rested with the state entity.

In a decision of first impression, the Commonwealth Court ruled that, under the facts and circumstances of this case, a private sector Defendant could also rely upon §8523(a) of the Judicial Code to challenge the venue issue as well.

The court rejected the argument by the Plaintiffs and PennDOT that, under the Pennsylvania Rules of Civil Procedure 1006, which governs non-state venue objections, the private Defendants could not raise objections to venue. It was otherwise indicated in the Opinion that one of the Defendants later joined in the suit conducted business within Philadelphia County.

The Commonwealth Court noted that, although the private Defendants could not have raised objections to venue under Rule 1006, the court found that they could still raise objections under §8523(a). The Commonwealth Court emphasized that there was no language under Section 8523(a) that placed any limitations as to which party could raise such venue arguments.

The court remanded the case back to the trial court where the private Defendants would be permitted to argue for a change in venue.

Petition to Open a Default Judgment

In the case of *Hackett v. Home Solutions Group, LLC*, No. 190202344 (C.P. Phila. Co. July 13, 2021 Foglietta, J.), the court denied the Defendant's Petition to Open and/or Strike a Default Judgment after finding that the Defendant failed to timely respond to the Plaintiff's Complaint after receiving proper service of the same.

This matter arose out of claims by a Plaintiff-property owner who asserted that a Defendant developer trespassed and encroached upon her property during the Defendants' construction activities on adjacent properties.

A central issue in this case was whether service of the Plaintiff's Complaint was proper. After reviewing the record, the court found that service was indeed proper.

Applying the 3-prong test for the opening of a default judgment, the court noted that the Defendant would have to show that (1) the Petition to Open the Judgment was promptly filed, (2) that the Defendant had a meritorious defense, and (3) that there was a reasonable excuse for the Defendant's failure to answer the Plaintiff's Complaint in a timely fashion.

The court reiterated that the Plaintiff had made proper service. The court also found that the Defendants could not meet the third prong of the test in that they did not have a reasonable excuse failing to file an Answer for over twenty-one (21) months.

The court found no basis for the opening of the default judgment and the Defendants' Petition was dismissed. The trial court issued this Rule 1925 Opinion requesting that the Superior Court affirm its decision.

Petition to Open Judgment Non Pros

In the case of *Mark v. McCarthy*, No. 991 EDA 2021 (Pa. Super. June 8, 2022 Dubow, J., McLaughlin, J., and King, J.) (Mem Op. by Dubow, J.) (non-precedential), the Pennsylvania Superior Court reversed a trial court's denial of a Defendant's Motion to Open a Judgment of Non Pros after finding that the trial court's reasoning that the Plaintiff's estate failed to act with diligence was untenable in a case where the trial court based its decision, in part, on the grounds that the estate did not make Rules absolute within two (2) days.

In this case, it appeared that the Plaintiff needed pre-Complaint discovery to survive a demurrer and filed multiple motions in an attempt to avoid entry of a judgment of non pros.

According to the Opinion, the estate argued, in part, that because the Defendant had concealed assets of the estate, the estate could not file a Complaint without first conducting pre-Complaint discovery.

In this non-precedential decision, the Pennsylvania Superior Court provided a nice update on the Rules applicable to the entry of judgment non pros and efforts to open the same.

Proper Substitution of Party's Name for John Doe Designation

In the case of *Woelfel v. Universal Linx Serv. Inc.*, No. 2021-CV-1131 (C.P. Leh. Co. June 3, 2022 Caffrey, J.), the court found that the Plaintiff did not meet the requirements of Pa. R.C.P. 2005(c) relative to her efforts to replace a John Doe designation in her Complaint with the Defendant's actual name.

This matter arose out of a motor vehicle accident during which the Plaintiff's vehicle was rear-ended by a vehicle driven by an unknown individual but which vehicle was owned by the Defendant Universal Linx Services, Inc. The Plaintiff had alleged that the driver was an employee of that company.

In an effort to identify the John Doe Defendant, the Plaintiff served Universal Linx with certain discovery requests and Universal identified the driver.

However, the Plaintiff did not seek leave to amend her Complaint to identify the driver until about six (6) months later. In addition to finding other errors with the Plaintiff's Motion, the court noted that Pa. R.C.P. 2005(c) requires a party to file a Motion within twenty (20) days of learning the name of a John Doe Defendant within which to request leave to amend the pleading.

Given that the Plaintiff had failed to satisfy the requirements for moving to amend the Complaint to replace the John Doe designation with the name of the individual involved, the court denied the Plaintiff's Motion.

Pleading Allegations of Recklessness

In the companion cases of *McLane v. Almquist*, No. 7057-CV-2021 (C.P. Luz. Co. Jan. 24, 2022 Hughes, III, J.), and *Kastreva v. Almquist*, No. 7056-CV-2021 (C.P. Luz. Co. Jan. 24, 2022 Hughes, III, J.), Judge Richard M. Hughes, III of the Luzerne County Court of Common Pleas sustained Preliminary Objections seeking to strike all references to recklessness and reckless conduct, along with a claim for punitive damages, in a motor vehicle accident case.

The court found that these types of allegations lacked conformity to the Rules of Civil Procedure and/or Pennsylvania law and/or were legally insufficient, in part, under Pa. R.C.P. 1019.

As such, the court ruled that all allegations of "recklessness" and the Plaintiff's request for punitive damages directed against the corporate Defendant were stricken from the Plaintiff without prejudice for leave to amend at a later date should discovery warrant the same.

In so ruling, Judge Hughes followed the rulings of a majority of trial courts from around the Commonwealth as well as several appellate court decisions.

Pleading Allegations of Recklessness

In the case of *Meshinski v. Zim*, No. 2022-CV-0434 (C.P. Luz. Co. June 27, 2022 Pierantoni, J.), the court sustained a Defendant's Preliminary Objections asserted against the Plaintiff's allegations of recklessness in the Plaintiff's Complaint in this standard motor vehicle accident case.

The Order was issued without Opinion.

The court struck the allegations of recklessness from the Plaintiff's Complaint and dismissed the same without prejudice.

Pleading Allegations of Recklessness

In the case of *Markiewicz v. Avanti of Drums, Inc.*, No. 2022-CV-03926 (C.P. Luz. Co. July 12, 2022 Gelb, J.), by Order only, Judge Lesa Gelb of the Luzerne County Court of Common Pleas denied Preliminary Objections filed by Defendants against allegations of recklessness contained in the Plaintiff's Complaint in a premises liability case.

Pleading Allegations of Recklessness

In the case of *Walsh v. Toth*, No. 22-CV-96 (C.P. Lacka. Co. June 28, 2022 Nealon, J.), the court addressed Preliminary Objections in the form of a demurrer asserted by dog owners in a case in which the Plaintiff alleged that she was attacked and injured by her neighbors' dog when she [the Plaintiff] opened the side door of her home.

The Plaintiff filed a Complaint seeking compensatory damages along with punitive damages as a result of the Defendant's alleged negligence and recklessness.

More specifically, the Plaintiff asserted that the dog owners knew of the "dangerous, aggressive, and fearsome" dog's "dangerous propensities" prior to the incident.

The Plaintiff also alleged that the dog owners were aware of other neighbors' concerns regarding the dog.

The Plaintiff additionally asserted that the owners of the dog negligently and recklessness permitted the dog to run unattended and unleashed throughout the neighborhood with reckless disregard for others.

The Plaintiff also alleged that the Defendants violated certain provisions of the Dog Law, in part, by failing to keep the dog confined or firmly secured within the dog owner's premises and/or by harboring a dangerous dog with a propensity to attack people without provocation.

In this decision, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas ruled that the Plaintiff's claims under the Dog Law were permissible. The court additionally noted that, viewing the Complaint as a whole, the Plaintiff had provided the dog owners with adequate notice of the claims against which the Defendants must defend.

Furthermore, Judge Nealon ruled, as he has on numerous previous occasions, that, since the allegations of recklessness may be averred generally under Pa. R.C.P. 1019(b), and given that the related request for punitive damages is not a "cause of action" subject to the factual specificity requirements in Pa.R.C.P. 1019(a), the Defendant dog owners were not entitled to have the recklessness allegations and the demand for punitive damages stricken.

As such, the court overruled the Defendant's Preliminary Objections.

Pleading Allegations of Recklessness

In the case of *Gawrys v. Zaffino*, No. 21-CV-4129 (C.P. Lacka. Co. Feb. 11, 2022 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas allowed a claim for recklessness and a demand for punitive damages to go beyond Preliminary Objections in a premises liability case.

The court ruled in favor of the Plaintiff relative to the claim of recklessness and for punitive damages after noting that Pa. R.C.P. 1019(b) provides that conditions of mind may be averred generally and that, since a claim of recklessness is a claim regarding a condition of mind, that claim may be pled generally under Rule 1019(b).

The court noted that, since the landlord Defendant had not challenged the factual specificity of the allegations supporting the Plaintiff's stated cause of action, the Preliminary Objection filed by the Defendant that sought to strike the Plaintiff's general averments of recklessness and the derivative demand for punitive damages would be overruled by the court based upon Rule 1019.

In addressing this issue, the court made reference to the fact that, "During the past decade or more, disputes have arisen as to whether Plaintiffs who allege recklessness and seek punitive damages must state a certain degree of supporting "material facts" to withstand Preliminary Objections, or instead may generally aver such "conditions of [the] mind" in connection with a request for punitive damages." *See* Op. at p. 6 *citing with "see" signal*, Daniel E. Cummins "Pleading for Clarity: Appellate Guidance Needed to Settle the Issue of the Proper Pleading of Recklessness in Personal Injury Matters," 93 Pa. B.A.Q. 32 (Jan. 2022).

Judge Nealon noted that, while there are differing Opinions from around the Commonwealth of Pennsylvania on this issue, the courts in Lackawanna County have uniformly followed the decision of *Archibald v. Kemble*, 971 A.2d 513, 517 (Pa. Super. 2009), *app. denied*, 989 A.2d 914 (Pa. 2010), in overruling Preliminary Objections seeking to strike allegations of wanton, willful, or reckless conduct and to dismiss punitive damages claim based upon the alleged absence of substantiating factual allegations, provided that the Complaint generally avers willfulness, wantonness, or recklessness. [Other citations from Lackawanna County omitted].

Relative to other claims presented, the Plaintiff's claim for "attorneys' fees" was stricken due legal insufficiency (it is noted that the Plaintiff agreed to this result in its submissions).

The court otherwise overruled the Defendant's demurrer to the Plaintiff's claims for prejudgment interest under Pa. R.C.P. 238 and taxable costs pursuant to 42 Pa. C.S.A. §1726 and Lacka. Co. R.Civ. P. 275.

Pleading Allegations of Recklessness

In the case of *Guziak v. Blystone*, No. 1883 of 2020 G.D. (C.P. Fayette Co. July 20, 2021 Wagner, J.), the court overruled a Defendant's Preliminary Objections to Plaintiff's allegations of recklessness in a Complaint filed in a motor vehicle accident case after finding that the Plaintiff had alleged outrageous facts in support of such allegations.

The court emphasized in its Opinion that "an essential fact needed to support a claim for punitive damages is that the Defendant's conduct be outrageous."

The court noted that outrageous conduct is defined as an act done with reckless indifference to the interests of others. Reckless indifference to the interests of others is defined as wanton misconduct meaning an intentional act done in disregard of a risk known to him or her or so obvious that he or she must be taken to have been aware of this.

Turning to the facts before him, Judge John F. Wagner, Jr. of the Fayette County Court of Common Pleas noted that, where the Plaintiff alleged that a Defendant deliberately turned into on-coming traffic, with the drivers in that other traffic having the right-of-way at that intersection, and with no traffic control device or turning lane located in the area, the Defendant's actions could be considered to have been done in disregard of a known risk and could therefore be considered to have been reckless. As such, the court overruled the Defendant's Preliminary Objections to the claims of recklessness.

In so ruling, Judge Wagner and the Fayette County Court of Common Pleas joined the majority of those trial courts across the Commonwealth of Pennsylvania who have held that allegations of recklessness must be supported by factual allegations of outrageous conduct.

Pleading Allegations of Recklessness

In the case of *Hagedorn v. Rick's Backhoe Service, Inc.*, No. 18-CV-3723 (C.P. Lacka. Co. April 5, 2022 Nealon, J.), the court addressed allegations of recklessness in a case of alleged road rage.

The Plaintiff alleged that the truck driver pursued the motorcyclist following an angry exchange of strong language and gestures in a construction zone. The truck driver allegedly struck the rear of the Plaintiff's motorcycle and ejected the motorcyclist from his motorcycle, resulting in fatal injuries.

As to the allegations of recklessness and the claims for punitive damages, Judge Nealon followed his numerous previous decisions in allowing such claims to be asserted in any case whatsoever regardless of the facts alleged. The court additionally noted that, even if Rule 1019 did happen to obligate the Plaintiff to allege specific facts sufficient to sustain a punitive damages claim at trial (which this Court did not read Rule 1019 as requiring), the allegations regarding the truck driver's alleged actions, for which the trucking company would allegedly be vicariously liable, were found to satisfy that standard in any event in this case involving alleged road rage conduct.

As such, all of the Preliminary Objections asserted were overruled.

It is noted that, on pages 13 and 15 of the Opinion, Judge Nealon made references to the dispute in Pennsylvania as to the proper assertion of claims of recklessness in Pennsylvania and, in doing so, noted the Pennsylvania Bar Quarterly article entitled "Pleadings for Clarity: Appellate Guidance Needed to Settle the Issue of the Proper Pleading of Recklessness in Personal Injury Matters" written by Daniel E. Cummins.

Pleading Allegations of Recklessness

In the case of *Koloras v. Dollar Tree Stores, Inc.,* No. 21-CV-2700 (C.P. Lacka. Co. April 19, 2022 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas continued the trend in Lackawanna County of allowing personal injury cases to proceed with allegations of recklessness regardless of the facts alleged.

In his Opinion, Judge Nealon notes that facts are not required to support claims of recklessness and/or punitive damages in any Complaint because those claims do not amount to causes of action and, are instead, claims that are derivative of other causes of action.

The court noted that the fact pleading requirements set forth under Rule 1019(a) only apply to the allegation of "a cause of action or defense." In this *Koloras* case, the court ruled that under Pa. R.C.P. 1019(b), allegations of recklessness should be considered an allegation of a state of mind of a party to the action which, according to this court, may be pled generally under Pa. R.C.P. 1019(b). In so ruling, the Lackawanna County Court of Common Pleas relied, in part, the case of *Archibald v. Kemble*, 971 A.2d 513, 517 (Pa. Super. 2009), *appeal denied*, 989 A.2d 914 (Pa. 2010).

While the court does refer to other trial court decisions that have sustained Preliminary Objections to punitive damages claims by finding that a Complaint lacked sufficient factual averments supporting claims of willful, wanton, or reckless conduct as set forth, this court declined to follow those cases.

Pleading Allegations of Recklessness

In the case of *Hagedorn v. Rick's Backhoe Service, Inc.*, No. 18-CV-3723 (C.P. Lacka. Co. April 5, 2022 Nealon, J.), the court addressed preliminary objections, including with respect to allegations of recklessness.

According to the Opinion, an injured Schuylkill County motorcyclist filed a lawsuit against the Lackawanna County personal representative of a deceased truck driver's estate and a Schuylkill County trucking company regarding a motor vehicle accident that occurred in Berks County.

The accident allegedly arose out of an alleged road rage incident. The Plaintiff alleged that the truck driver pursued the motorcyclist following an angry exchange of strong language and gestures in a construction zone. The truck driver allegedly struck the rear of the Plaintiff's motorcycle and ejected the motorcyclist from his motorcycle, resulting in fatal injuries.

As to the preliminary objections to the allegations of recklessness and the claims for punitive damages, Judge Nealon followed his numerous previous decisions in allowing such claims to be asserted in any case whatsoever regardless of the facts alleged. The court additionally noted that, even if Rule 1019 did happen to obligate the Plaintiff to allege specific facts sufficient to sustain a punitive damages claim at trial (which this Court did not read Rule 1019 as requiring), the allegations regarding the truck driver's alleged actions, for which the trucking company would allegedly be vicariously liable, were found to satisfy that standard in any event in this case involving alleged road rage conduct.

As such, all of the Preliminary Objections asserted were overruled.

Forum Selection Clause // Allegations of Recklessness

In the case of *Coello v. Fitzgerald and Erie Insurance Exchange*, No. 7019-CV-2021 (C.P. Monroe Co. Feb. 11, 2022 Zulick, J.), the court addressed issued of proper venue in a post-Koken motor vehicle accident litigation.

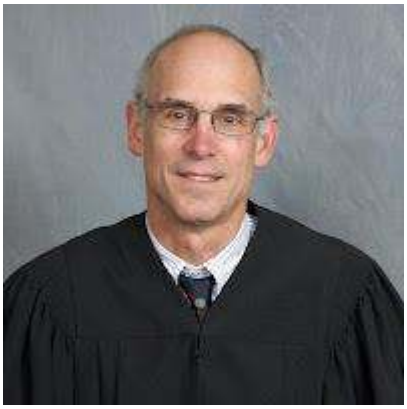
Relative to the Preliminary Objections filed by the UIM carrier Defendant asserting improper venue, the court noted that, although venue is proper in Monroe County under Pa. R.C.P. 2179, which allows for an injured party to bring a civil action against an insurance company/ corporation in a county where that company or corporation regularly conducts business, in this matter, Erie Insurance was relying upon a forum selection clause in the parties' insurance contract.

Under that forum selection clause, the parties agreed that any suit to enforce the terms of the policy would be filed in the county of the Plaintiff's legal domicile at the time the suit was filed. The record in this case confirmed that the Plaintiff alleged in his Complaint that he resided in Scranton, Lackawanna County.

The court upheld the forum selection clause and carved out the UIM case and transferred that portion of the case to Lackawanna County but kept the Plaintiff's case against the tortfeasor in Monroe County.

As such, the UIM carrier Defendant's Preliminary Objections with regards to venue was sustained.

In so ruling, the court found that the Plaintiff's argument that it would be unreasonable to put him to the expense of securing a medical expert for two (2) separate trials did not outweigh the contract provision on venue.



Judge Arthur L. Zulick

Monroe County

In his Opinion, Judge Arthur L. Zulick of the Monroe County Court of Common Pleas also addressed the tortfeasor Defendant's demurrer against the Plaintiff's claims against punitive damages. The tortfeasor Defendant asserted that the Plaintiff failed to allege sufficient facts to support such a claim and that the Plaintiff had only merely alleged that a motor vehicle collision had occurred.

Relative to the allegations of recklessness, Judge Zulick referred to Rule of Civil Procedure 1019(b), which provides that conditions of the mind may be averred generally. The court noted that, under the case of *Archbald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. 2009), an allegation of recklessness is an allegation as to a condition of the mind which could be averred generally.

As such, the court denied the Defendant's demurrer to the Plaintiff's claim for punitive damages and noted that such a decision should be left to the jury in terms of whether the Plaintiff's case met the burden of proof in this regard.

Petition to Open Default Judgment Denied

In the case of *Roy v. Rue*, No. 1598 EDA 2021 (Pa. Super. April 12, 2022 Lazarus, J., Kunselman, J., and Stevens, P.J.E.) (Op. by Stevens, P.J.E.), the Pennsylvania Superior Court affirmed a trial court's denial of a Defendant's Petition to Open and Strike a Default Judgment entered against him by the Plaintiff.

This lawsuit arose out of a fight that occurred at a restaurant that resulted in eventually fatal injuries to the Plaintiff's decedent. The Plaintiff filed suit against a restaurant and the assailant. The issues in this case pertain to the entry of a default judgment against the assailant.

The restaurant defendant settled out of the case.

The case eventually went to trial on damages and a verdict was entered against the assailant in an amount in excess of $23 million dollars.

Thereafter, the assailant filed a Petition to Open the Default Judgment. The assailant asserted that he was incarcerated when the trial court held the assessment of damages trial and that he did not appear because he allegedly did not have notice of the trial. The court noted that the docket confirmed that the Prothonotary provided notice to the Defendant of the trial at the Defendant's home address, at which time the Defendant was in prison.

The Defendant additionally asserted that he was not provided with service of the original process.

The Defendant also argued that he acted promptly once he learned of the default judgment and that he allegedly had a meritorious defense to the claims in the lawsuit, that being that the Defendant allegedly acted in self-defense.

The Pennsylvania Superior Court ruled that the trial court properly denied the Defendant's Petition to Open or Strike the Default Judgment where the Defendant failed to show any defects with regards to the return of service of the Complaint, with regards to the 10-Day Notice of Intent to File a Default Judgment, or with respect to the Notice regarding the trial date on the assessment of damages.

The court additionally found that the Defendant's Petition was not timely filed.

Federal Court Motion to Transfer Venue (Trucking Case)

In the case of *Miller v. Sawa Transp. Inc.*, No. 2:21-CV-02308-AB (E.D. Pa. Sept. 27, 2021 Brody, J.), the court ruled that proper venue for a motor vehicle accident claim was the federal district where the crashed occurred and not where the injured party received medical treatment. As such, the court granted the Defendant's Motion to Transfer Venue and sent the case to the state of Georgia.

According to the Opinion, the Plaintiff was driving a tractor trailer in the state of Georgia when he was rear-ended by a truck operated by the Defendant's driver, who is also apparently operating a tractor trailer. The Defendant tractor trailer companies were both organized and headquartered in the state of Georgia.

The Plaintiff filed the cause of action in the Eastern Federal District of Pennsylvania, i.e., in Philadelphia.

The Defendants moved to transfer the case to a federal district court in Georgia, arguing that the Eastern District of Pennsylvania was an improper venue. The Plaintiff opposed the motion by asserting that his medical treatment had occurred in Pennsylvania and that, since liability was not

in dispute and the only issue was damages, he should be permitted to keep the case in Pennsylvania.

As noted above, the court rejected the Plaintiff's arguments and granted the Defendants' Motion to Transfer.

Timing for Proper Removal of Case to Federal Court

In the case of *Berry v. Wal-Mart Stores*, East, L.P., No. 21-3496 (E.D. Pa. Feb. 2, 2022 Slomsky, J.), the court granted a Plaintiff's Motion to Remand the case back to state court.

The court noted that the case would be remanded because the Defendants failed to remove the matter to federal court within thirty (30) days of being able to ascertain that the amount in controversy to establish diversity jurisdiction was met.

The court noted that, even though the Complaint did not directly state the amount in controversy, the facts pled noted that the Plaintiff had sustained a crush injury to her foot and that the Plaintiff was still undergoing continuing medical treatment. The court felt that, from these allegations, the Defendants could have reasonably and intelligently concluded that the jurisdictional amount was exceeded.

As such, the court reiterated the rule that the removal period began to run at the time the suit was filed, and not when the Plaintiff may have later specified damages in a Case Management Memorandum.

While the court noted that the Case Management Memorandum could qualify as an "other paper" under the removal statute for purposes of attempting to ascertain the amount in controversy, the Complaint in this case was found to have provided enough information to start the running of removal period.

In this regard, the court noted that an *ad damnum* clause for a dollar amount less than the jurisdictional amount does not necessarily preclude a finding that the Plaintiff is seeking more than that amount.

The court in this *Berry* case stated that, since the Plaintiff did not agree to stipulate to limit damages to the jurisdictional amount, the Defendants had other bases upon to believe that more money than the jurisdictional limit was being sought by the Plaintiff.

Remand to State Court from Federal Court

In the case of *Miller v. State Farm Mut. Auto. Ins. Co.*, No. 3:21-CV-1433-RDM (M.D. Pa. Dec. 14, 2021 Mariani, J.), the court granted a Plaintiff's Motion to Remand a UIM breach of contract case back to the Lackawanna County Court of Common Pleas.

In this matter, the Plaintiff had UIM coverage with State Farm in the amount of $25,000.00 per person. In her Complaint, the Plaintiff demanded judgment against State Farm in an amount in excess of $50,000.00 plus interest, costs, and other such relief the court may deem appropriate.

With her Motion for Remand, the Plaintiff asserted that the amount in controversy did not exceed the federal jurisdiction limit of $75,000.00 and that, as such, the action must be remanded to the state Court of Common Pleas.

Judge Mariani reviewed the removal statute and noted that this statute was required to be strictly construed, with all doubts to be resolved in favor of a remand.

The court additionally noted that the test for determining whether a case involved the requisite federal jurisdictional amount is whether, from the allegations in the pleadings, it is apparent, "to a legal certainty" that the Plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the Plaintiff never was entitled to recover that amount. ***See* Op. at 3-4.**

Judge Mariani also noted that the United States Supreme Court has long held that Plaintiffs may limit their claims in order to avoid federal subject matter jurisdiction.

Moreover, where a Plaintiff has not specifically alleged in the Complaint that the amount in controversy is less than the jurisdictional minimum, the case must still be remanded if it appears to a legal certainty that the Plaintiff cannot recover the jurisdictional amount.

The court also noted that, where a Complaint does not limit its request for damages to a precise monetary amount, the District Court must make an independent appraisal of the potential value of the claim.

Judge Robert D. Mariani

M.D. Pa.

Judge Mariani noted that it was alleged in the Complaint that the Plaintiff's UIM policy provided UIM benefits in the amount of $25,000.00 per person. The court also emphasized that there was no companion claim for bad faith or punitive damages asserted in the Complaint. It was additionally noted that, relative to this Motion for Remand, the Plaintiff conceded that the Defendant's only exposure was to $25,000.00 UIM policy limits.

The court rejected the defense argument that federal court jurisdiction had been met under the analysis that the tortfeasor had $100,000.00 in liability coverage which required the Plaintiff to prove her damages were in excess of that liability coverage in order to gain access to the UIM benefits, which necessarily placed the amount in controversy above the $75,000.00 jurisdictional requirement.

Judge Mariani stated that there was no case law in support of this argument. The court reiterated that the Plaintiff's breach of contract recovery was restricted to the $25,000.00 limits set forth in her State Farm policy.

As such, where the court deemed that it appeared to a "legal certainty" that the Plaintiff could not recover the jurisdictional amount necessary to confer subject matter jurisdiction on this federal court, and given that the federal court is required to strictly construe removal statutes with all doubts to be resolved in favor of a remand, the decision was made to remand the case to the Lackawanna County Court of Common Pleas.

In a footnote at the end of his decision, Judge Mariani again emphasized "the importance of the fact that Plaintiff's Complaint only alleges a claim for underinsured motorist benefits/breach of contract." ***See* Op. at p. 7, fn.3**. In that same footnote, Judge Mariani stated that, "[i]f Plaintiff had included a claim for bad faith, the Court would find that remand was not appropriate." ***Id.***

Remand to State Court from Federal Court

In the case of *Dayton v. The Auto Ins. Co. of Hartford, Conn.*, No. CV-3:20-1833 (M.D. Pa. Nov. 5, 2021 Mannion, J.), the federal court applied the *Reifer* factors and refused to remand this automobile insurance coverage action involving a dispute over the application of the regular use exclusion relative to the Plaintiff's underinsured motorist coverage.

The court found that, as of the date of its decision in this case, the law of Pennsylvania and regular use exclusion appeared to be settled and, as such, this issue did not constitute a reason in support of remanding the matter to the state court.

Judge Malachy E. Mannion
Federal Middle District Court of PA

Judge Malachy E. Mannion otherwise granted the Defendant's carrier's Motion to Dismiss the Complaint for failing to plead specific facts sufficient to make out a plausible bad faith claim. The court did allow the Plaintiff an opportunity to file an Amended Complaint.

DISCOVERY

Speaking Objections at Depositions Prohibited

In the case of *The Fiduciary Trust Co. Int'l of Pa v. Geisinger-Community Medical Center*, No. 20-CV-4775 (C.P. Lacka. Co. March 4, 2022 Nealon, J.), Judge Terrence R. Nealon tackled the issue of speaking objections during the course of depositions that were conducted in this medical malpractice action.

According to the Opinion, after a nurse who was being deposed had demonstrated an understanding of information on fetal monitoring strips and had defined certain medical terms in that regard during her testimony, a Plaintiff's attorney displayed the fetal monitoring strips to the nurse and attempted to question her regarding the findings on the same.

The record before the court revealed that, following suggestive interjections by her counsel, the nurse, who had worked as a labor and delivery nurse for almost 40 years until her retirement in 2008, indicated that she did not know if she would be able interpret the fetal monitoring strips satisfactorily.

When the Plaintiff's attorney then attempted to explore the nurse's ability to review and comprehend the strips, the nurse's attorney objected and instructed the nurse not to answer any questions regarding the fetal monitoring strips.

In response, the Plaintiff filed a discovery motion seeking to compel the nurse to answer the questions presented. Plaintiff's counsel also sought monetary sanctions due for requiring the Plaintiff to file this Motion.

Judge Terrence R. Nealon

Lackawanna County

After reviewing Pennsylvania law on the issues presented, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas noted that the Plaintiff was entitled to adequately probe the legitimacy and extent of any claimed incompetency by the nurse deponent regarding her ability to read or understand the fetal monitoring strips. The court noted that the issue of whether the nurse's claim that she had no such abilities should be left to the jury to determine.

In so ruling, the court noted that counsel for a deponent "may direct the witness not to answer a specific question only if that instruction is necessary to (a) protect a recognized privilege, (b) enforce an evidentiary limitation established by an earlier court ruling in the case, or (c) present a motion for a protective order based upon grounds identified in Pa. R.C.P. 4012(a).

The court found that the instruction issued in this case by the attorney to the witness not to answer the Plaintiff's questions were not based on any of the above noted reasons and, as such, the court granted the Plaintiff counsel fees incurred in preparing and presenting the discovery motion.

The court also directed the nurse to submit to an additional deposition within the next thirty (30) days to answer the questions regarding her interpretation of the fetal monitoring strips and her ability to do so.

Pleading the Fifth at a Deposition

In the case of *Sweet v. The City of Williamsport*, No. 20-CV-00512 (C.P. Lyc. Co. June 27, 2022 Linhardt, J.), the court addressed the circumstances under which a civil litigant may properly assert his or her Fifth Amendment rights against self-incrimination at a deposition.

According to the Opinion, this case arose out of a fatal motor vehicle accident.

When the opposing parties requested the deposition of the Defendant driver, counsel for the Defendant driver advised opposing counsel that the Defendant driver would be asserting his Fifth Amendment rights against self-incrimination relative to any questions regarding the facts of the accident.

The opposing parties challenged the ability of the Defendant driver to assert his right against self-incrimination at the deposition, in part, due to the fact that the Defendant driver had already been previously convicted of several summary traffic offenses arising out of the subject incident and that the provisions of 18 Pa. C.S.A. §110(1)(ii) would bar future prosecutions against the Defendant driver thereby vitiating the Defendant driver's need to assert his Fifth Amendment rights at the deposition.

The opposing parties filed a motion to compel the Defendant driver to attend a deposition and to answer the questions that would be presented relative to the accident.

In its Opinion, the court affirmed that, under §110, in most cases, a past conviction would bar a future prosecution based upon the same conduct or arising from the same criminal episode. The court noted that the Pennsylvania Supreme Court had recently confirmed that this rule applies even when the previous conviction was for traffic summaries rather than misdemeanors or felonies.

However, it was acknowledged by the court that there was an exception that allowed further prosecutions for situations in which evidence in support of an additional offense was not known to the prosecuting officer at the time of the commencement of the first criminal trial.

In this matter, the Defendant driver voiced a concern about the possibility of his being prosecuted for new charges arising out of the subject accident if his testimony at a deposition revealed evidence that would support new offenses not previously known by the prosecuting officer at the time of his trial on traffic summaries.

In that regard, the question became whether the Defendant driver had a reasonable basis to fear self-incrimination. In assessing this question, the court in this case noted that the Pennsylvania Supreme Court has stated that "for the court to properly overrule the claim of privilege, it must be perfectly clear from a careful consideration of the circumstances that the witness is mistaken in the apprehension of self-incrimination."

The court concluded that the Defendant driver in this case did have a reasonable fear of self-incrimination and, as such, could not be compelled to testify at the deposition in the case without retaining the right to assert his Fifth Amendment rights.

More specifically, the court noted that the prosecutor could interpret deposition testimony by the Defendant driver to show possible recklessness in the Defendant driver's actions which could support additional criminal offenses in a matter where the prosecutor may have only been aware of conduct amounting to carelessness before the deposition was completed.

In its Opinion, the court emphasized that the Defendant driver need not establish what he might testify to at a deposition, and that the court could not obviously compel the Defendant driver to explain the factual basis of his fear of self-incrimination, as such a compulsion would pervert the Fifth Amendment right against self-incrimination. Rather, the court allowed the Defendant driver in this case to explain why, at least theoretically, his fear of self-incrimination was reasonable in an effort to establish that it is not "perfectly clear" that the Defendant driver was "mistaken in his apprehension of self-incrimination…."

After a review of the submitted arguments, the court ruled that the Defendant driver could not be compelled to complete a deposition at which he was not entitled to assert his Fifth Amended rights against self-incrimination.

However, the court also noted that the parties were exploring the possibility of the Defendant driver securing an immunity agreement from the prosecutor at issue.

It was confirmed by the court that, if the Defendant driver secured an immunity agreement from the district attorney, the Defendant driver would have no further fear of future prosecution based upon any deposition testimony in which case the Defendant driver would be compelled to attend the deposition and not be permitted to assert his Fifth Amendment rights against self-incrimination.

Changes on Errata Sheet

In the case of *In Re Injectafer Products Liability Litigation*, No. 19-276 (E.D. Pa. Sept. 15, 2022 Beetlestone, J.), the court addressed the propriety of the completion of deposition errata sheets under Federal Rule of Civil Procedure 30(e).

In reviewing Rule 30(e), the court noted that, only "some reason" is needed to support the use of a deposition errata sheet following the completion of a deposition. As such, one word changes and other short explanations are not considered to be deficient and are allowed.

However, the court found that efforts to add into the deposition by way of an errata sheet material beyond the scope of what the witness actually testified to will be stricken as such information are not clarifications.

The court additionally noted that errata changes that are contradictory to the testimony that was completed, such as changes a "yes" answer to a "no" answer would be stricken.

It was noted by the court that while a deponent may regret certain testimony, even if a statement was made in jest, this is not a sufficient reason to alter or remove that testimony by way of an errata sheet.

Lastly, the court also noted that numerous other types of errata may be permissible as reviewed on a case by case basis. Yet, while testimony may be modified through the use of an errata sheet, the original testimony contained in the deposition transcript is to be preserved as well.

Discovery of Excess Insurance Allowed

In the case of *Butler v. Scranton Manufacturing Co., Inc.*, No. 18-CV-5167 (C.P. Lacka. Co. Feb. 18, 2022 Nealon, J.), the court addressed issues regarding discovery of excess insurance information.

This case arose out of an incident during which a Dunmore, PA borough garbage collector was injured when he was riding a garbage truck on its rear riding step and that step allegedly snapped and detached from the truck while the truck was moving, resulting in injuries to the Plaintiff.

At issue in this particular decision was the Plaintiff's Motion to Compel the Defendant to disclose excess carrier's insurance information.

Judge Nealon noted that, "[a]lmost 50 years ago," the Pennsylvania Supreme Court declared that the Plaintiff is entitled to pre-trial discovery of the identity of a Defendant's liability carrier and the maximum coverage limits for any such liability coverage.

That rule was more recently codified by the Pennsylvania Supreme Court under Pa. R.C.P. 4003.2, which became effective back in 1979 and provides, in pertinent part, that a "party may obtain discovery of the existence in terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment...."

The court noted that, based upon this law, the Pennsylvania Supreme Court has held that full and complete information regarding insurance coverage is essential to the settlement process and has long been held to be discoverable.

Judge Terrence R. Nealon

Lackawanna County

Judge Nealon found that the law was so well-established that "no Defendant or attorney can seriously argue in a court filing, without running a fowl of Pa. R.C.P. 1023.1, or the pertinent rules of professional conduct, that the existence, terms, and coverage limits of any liability insurance policy affording primary, excess or umbrella coverage to a named Defendant is not clearly discoverable." *See* Op. at 3.

Based upon this law, the court granted Plaintiff's Motion to Compel the Defendant to disclosure the excess carrier's insurance information.

Spoliation Sanction Relative to Cell Phone Denied

In the case that keeps on giving, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas issued yet another notable decision in the case of *Barbarevech v. Tomlison*, No. 18-CV-4821 (C.P. Lacka. Co. March 11, 2022 Nealon, J.). This time, the court addressed a Motion In Limine filed by the Plaintiff for spoliation sanctions in the form of an adverse inference charge and preclusion of testimony and evidence relating to the failure to retain Defendant, Nicole Tomlinson's cell phone records.

In issuing his decision, Judge Nealon reviewed the current status of the law on spoliation at evidence and the discretion of trial court judges to impose a range of sanctions based upon the circumstances presented.

Citing to the famous spoliation cases of *Schroeder v. Com. Dept. of Transp.*, 710 A.2d 23, 27 (Pa. 1998) *citing Schmid v. Milwaukee Elect. Toll Corp*., 13 F.3d 76, 79 (3d. Cir. 1994), Judge Nealon noted that, in determining whether a sanction is warranted for the spoliation of evidence, the court should consider: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct.

Interestingly, in footnote 2 of the Opinion, Judge Nealon cited to my article entitled "New Wine In An Old Bottle: The Advent of Social Media Discovery in Pennsylvania Civil Litigation Matters," 60 Vill. L.Rev. *Tolle Lege* 31, 44 (2015) for the proposition that parties typically utilize a litigation strategy of securing a 'litigation hold' court order against an opposing party in a lawsuit in order to prevent that other party from deleting evidence.

After applying the law of spoliation to the case presented, the court noted that neither of the Defendants at issue ever had custody of the cell phone records in question prior to their destruction.

It was also emphasized that neither party had obtained or even requested a court order directing that the cell phone records be preserved.

Nor was there any evidence that the Defendants knew that the cell phone records would be deleted under a retention policy of the cell phone owner's carrier.

Moreover, Judge Nealon indicated that, since there was no evidence that the Defendant's cell phone was in use at the time of the subject accident, and given that there was no eyewitness testimony that the cell phone was being held or used by the cell phone's owner, the court found that it could not be reasonably concluded that the cell phone's owner had any affirmative duty to unilaterally contact her cell phone carrier to direct that the carrier preserve her cell phone records.

As such, based upon the record before the court, Judge Nealon found that the Defendants could not be characterized as the destroyers of the cell phone records in question. It was also reiterated that neither of the Defendants at issue had any knowledge that the cell phone records would have been deleted. As such, the court ruled that a spoliation sanction was not warranted.

Discovery Sanctions

In the case of *Barbarevech v. Tomlinson*, No. 18-CV-4821 (C.P. Lacka. Co. Oct. 29, 2021 Nealon, J.), Judge Terrence R. Nealon provided lessons on the current law for deciding motions for sanctions on discovery issues and regarding civility amongst counsel.

This matter arose out of a motor vehicle accident. During the course of discovery, a dispute arose over the Defendant's apparent refusal to respond to discovery requests seeking liability insurance documents.

Despite the trial court issuing multiple Orders compelling the Defendant to respond to various discovery requests, the requested information was allegedly not forthcoming. As such, the Plaintiffs filed a Motion for Sanctions.

In reviewing the Motion for Sanctions, the court reviewed the current status of Pennsylvania law with regards to the imposition of sanctions under Pa. R.C.P. 4019 when a trial court's discovery Orders are not obeyed.

Judge Nealon noted that, under Pennsylvania law, while the trial court judges are afforded great discretion in fashion and remedies or sanctions for violations of discovery Rules and Orders, the law does require that the court select a punishment that "fits the crime."

Judge Nealon reviewed the five (5) separate factors that are considered to be a necessary part of the consideration when reviewing a request for sanctions based upon a discovery violation.

Those five (5) factors are:

(1) the nature and severity of the discovery violation;

(2) the defaulting party's willfulness or bad faith in failing to comply with discovery;

(3) the resulting prejudiced to the other party;

(4) the non-offending party's ability to cure any prejudice; and,

(5) the number of discovery violations by the non-compliant party.

After applying these factors to the case before him, the judge confirmed that the Defendant had continuously ignored its discovery obligations, willfully disobeyed the discovery Orders of Court, and unnecessarily strained the limited judicial resources by the Defendant's actions.

As such, the court granted the Plaintiff's Motion and awarded counsel fees and reasonable expenses in connection with the preparation of the Motion for Sanctions. The court did grant the Defendant the right to contest the reasonableness and necessity of the fees that may be put forth by the Plaintiff.

The court also noted that the conduct at issue in this case was violative of the Pennsylvania Code of Civility's aspirational provisions advocating civil, respectful, and courteous discourse, and also discouraging acrimonious speech and disparaging personal remarks.

Party Cannot Be Compelled to Produce That Which They Do Not Have

In the case of *Fost v. Kennedy*, No. 5:21-CV-03262-JMG (E.D. Pa. July 11, 2022 Gallagher, J.), the court addressed various discovery issues in response to a Motion to Compel filed in a trucking accident case.

In its decision, the court ruled that a Plaintiff is entitled to timely answers to its punitive damages discovery.

However, the court also noted that a Defendant cannot be compelled to produce documents that do not exist.

The court otherwise found that the Plaintiff's demand for hundreds of hours of videotape of the employee's truck driving was denied as being disproportionate.

The court additionally found the Plaintiff's request for the production of information regarding similar incidents for years predating the hiring of the employee that the Plaintiff's claims were negligently hired was also disproportionate.

Video of Accident Must be Produced Prior To Plaintiff's Deposition

In the case of *Capenos v. Greentree Hardware & Electric, Inc.*, No. GD-20-010087 (C.P. Alleg. Co. Dec. 17, 2021 Ignelzi, J.), the court issued an Order ruling that surveillance footage of an

automobile accident was required to be produced to Plaintiff's counsel prior to the completion of the Plaintiff's deposition.

According to one of the litigating attorneys, it does not appear that there is any Pennsylvania state appellate court decision on this particular issue.

GENERAL CIVIL LITIGATION ISSUES

New Venue Rules for Medical Malpractice Cases

Under an Order dated August 25, 2022, the Pennsylvania Supreme Court approved amendments to the medical malpractice venue rules that govern such lawsuits filed in the state court. Under the new venue rules, set to go into effect on January 1, 2023, plaintiffs will have more options as to forum shopping in terms of where they can file their medical malpractice lawsuits.

The amendments undo a 20 year old rule. Under the old rule, plaintiffs were required in medical malpractice cases to sue their medical providers in the counties where the treatment was completed.

Under the new rules, plaintiff's will be allowed to sue providers in any of the counties where the providers regularly do business or have significant contacts.

New Monetary Limit for Rule 1311.1 Appeals From Arbitrations

In an Order that went into effect on July 1, 2022, the Pennsylvania Supreme Court will put into place a new rule amending Pennsylvania Rule of Civil Procedure 1311.1 to change the maximum limit of what a plaintiff may elect as the value of damages that they can recover in a trial on appeal from an arbitration award.

Under the prior rule, that limit was set at $25,000.

Under the new rule, the maximum limit will be changed to "an amount equal to the jurisdictional limit for compulsory arbitration of the judicial district in which the action was filed."

While different judicial districts have differing jurisdictional limits for arbitration, that limit is capped at $50,000 under Section 7361 of the Judicial Code.

Pennsylvania Superior Court Testing Out Pilot Program of Remote Arguments

The Pennsylvania Superior Court is conducting a trial of fully remote Oral Arguments in this upcoming December as a test to determine the possible continued use of fully remote arguments in the future.

To ensure public access, the Court has set up the arguments to be streamed live on YouTube.com.

To present remote argument, counsel must execute and return a Motion for Leave to Appear Remotely at Argument. See below for a Form for that Motion as created by the Superior Court. The granting of the requests for remote Arguments are on a first come, first served basis. It appears that there are 30 openings for remote Arguments for the December pilot program.

Coordinate Jurisdiction Rule

In the case of *Rellick-Smith v. Rellick*, No. 23 WAP 2020 (Pa. Oct. 20, 2021), the Pennsylvania Supreme Court addressed issues regarding the coordinate jurisdiction rule in terms of judges of the same jurisdiction overruling the decision of another judge from the same jurisdiction.

According to the Opinion, at the trial court level, one judge had first ruled that a defendant had waived a statute of limitations defense by failing to plead it, and a second trial court judge from the same court later allowed that defendant to amend the Answer and New Matter to plead the statute of limitations as an affirmative defense.

At the Pennsylvania Supreme Court level, the Court in this decision found that a second judge's Order allowing the amendment to a first judge's Order necessarily conflicted with the first Order. The Supreme Court also found that the second decision by the second judge was actually precluded by the wording of the first Order that had been entered.

The Pennsylvania Supreme Court additionally confirmed that the coordinate jurisdiction rule could not be avoided by any claims that the first Order was erroneous or that there had been some intervening change in the law.

Negligent Infliction of Emotional Distress Claims

In the case of *Russell v. Educ. Comm'n For Foreign Med. Graduates*, No. 2:18-CV-05629-JDW (E.D. Pa. May 19, 2022 Wolson, J.) (Mem. Op.), the court addressed a unique issue with regard to a claim for negligent infliction of emotional distress in a medical malpractice setting.

This case involved a class of plaintiffs who had received treatment from an individual who had allegedly used fraudulent documents to assert that he was a medical doctor who had completed all of the requirements to practice medicine. This person had been certified by the Defendant commission as a valid doctor.

The Plaintiffs in the class had received treatment from the individual between 2012 and 2016.

Thereafter, the Plaintiffs learned about the individual's identity in 2017 and 2018.

The Plaintiffs filed suit against the Defendant commission who had incorrectly certified the individual as a valid member of the medical profession. In that Complaint, the Plaintiffs asserted claims for negligent infliction of emotional distress as a part of a class action involving numerous Plaintiffs.

The court in this matter confirmed that Pennsylvania Supreme Court had not addressed the particular issue, that is, whether Plaintiffs could raise a negligent infliction of emotional distress claim when they learned new information about some previous event.

The court in this *Russell* case stated that, under Pennsylvania law, Plaintiffs had been limited in their ability to pursue negligent infliction of emotional distress claims given that the court had required Plaintiff to suffer physical impact, be in a zone of danger, observe a tortious physical injury to a close relative, or to cases where the Defendant had a special contractual or fiduciary duty owed to the Plaintiff.

The court additionally noted that the only cases that had relaxed the requirements that the emotional distress at issue be contemporaneous with a physical impact were those cases involving an exposure to disease.

In this *Russell* case, the Plaintiff alleged that they suffered physical impacts when they received medical treatment from the individual.

However, the court noted that the emotional distress did not accompany that impact. Rather, the alleged emotional distress arose later when the Plaintiffs learned about the individual's arrest and about his background. The court additionally noted that, between the physical impact and the gathering of the knowledge about the individual's arrest and background, there was no ongoing threat or risk that caused any of the Plaintiffs' distress.

Rather, the alleged emotional distress of the Plaintiffs was a product of their re-conceiving their memories in light of the new information gathered.

Judge Wolson in this *Russell* case predicted that the Pennsylvania Supreme Court would not recognize a negligent infliction of emotional distress claim under these types of facts. The court noted that, while the Plaintiffs' alleged emotional trauma was real, the Pennsylvania Supreme Court had repeatedly made clear that not everyone who experiences an emotional trauma has a legal remedy under Pennsylvania law.

In Pari Delicto **Rule**

In the case of *Dinardo v. Kohler*, No. 1905 EDA 2020 (Pa. Super. Jan. 26, 2022 Stabile, J., Bowes, J., Musmanno, J.) (Op. by Stabile, J.), the Superior Court reversed in part a lower court's decision on Preliminary Objections in a case where the parents of a convicted criminal asserted claims against allegedly negligent medical personnel for not preventing their child's criminal behavior.

The Pennsylvania Superior Court noted that the "no felony conviction recovery rule" is a subpart of the *in pari delicto* ("in equal part") doctrine, and that the application of this law precluded recovery under the case presented.

The court otherwise noted that the Pennsylvania courts do not assist convicted felons in collecting money damages that would not have occurred absent the criminal conviction. The Pennsylvania Superior Court further noted that Pennsylvania follows the common law principle that a person should not be permitted to benefit through wrongdoing, particularly through criminal activity.

As such, Pennsylvania law prevents a Plaintiff from recovering losses which flow from those criminal acts. The court otherwise stated that it would violate public policy to permit a person convicted of a serious crime to collect damages that would not have occurred absent the criminal conviction.

The court additionally noted that a criminal's emotional distress from being convicted, along with the family's litigation expenses due to such crimes, are not recoverable under Pennsylvania law. A Plaintiff's attempt to call such damages "compensation" is immaterial, since those alleged damages flow from the criminal conduct of the Plaintiff and, therefore, are not recoverable.

The court also noted that there is no medical malpractice exception to the *in pari delicto* doctrine.

***In Pari Delicto* Rule**

In the case of *Albert v. Sheeley's Drug Store, Inc.*, No. 5 MAP 2021 (Pa. Dec. 22, 2021) (Maj. Op. by Wecht, J.)(Dissenting Op. by Dougherty, J.), the Pennsylvania Supreme Court addressed the issue of whether claims brought against a pharmacy on behalf of a decedent who overdosed on illegally obtained prescription drugs are barred by the doctrine of *in pari delicto*.

The Pennsylvania Supreme Court ruled that the trial court in Lackawanna County correctly applied the *in pari delicto* doctrine and, as such, the lower court's decision was affirmed.

According to the Opinion, the Plaintiff's decedent was struggling with substance abuse issues. The decedent had a friend who had a mother who was suffering from blood cancer. The friend's mother had been prescribed several opioid pain medications which she filled at a particular pharmacy. Family members called the drug store and placed a restriction on who could pick up the mother's prescriptions.

The decedent and/or his friend allegedly were allowed by the pharmacy to pick up the sick mother's medication. The decedent then allegedly ingested some of that medication and allegedly passed away as a result.

The Pennsylvania Supreme Court noted that the doctrine of *in pari delicto* is an equitable doctrine that precludes plaintiffs from recovering damages if their cause of action is based, at least partially, on their own illegal conduct. Other jurisdictions call this doctrine the wrongful conduct rule. The Latin phrase translates to English to "in equal fault."

The rule of the doctrine is rooted in the theory that the court should not lend their aid to a Plaintiff whose cause of action stems from his or her own illegal conduct.

The trial court below in this matter entered judgment for the pharmacy concluding that the *in pari delicto* doctrine barred recovery given that the decedent's death was caused, at least partially, by his own criminal conduct, i.e., possessing and consuming a controlled substance that was not prescribed to him.

After reviewing the case before it, the Pennsylvania Supreme Court found that the lower courts had correctly applied the *in pari delicto* on the facts presented.

Dead Man's Rule

In the case of *Frazer v. McIntyre*, 2021 Pa. Super. 211 (Pa. Super. Oct. 20, 2021 McCaffery, J.), the Pennsylvania Superior Court provided its latest pronouncement on the Dead Man's Rule, 42 Pa. C.S.A. §5930.

In this decision, the court noted that the Dead Man's Act provides that one whose interest is adverse to the interest of a decedent is not a competent witness to any matter which occurred before the decedent's death.

In order for the Deadman's Rule to apply such that a surviving witness is disqualified, the following three (3) conditions must be met:

First, the decedent must have had an actual right or interest in the matter at issue.

Second, the interest of the witness, and not simply the testimony of that witness, must be adverse.

Third, a right of the deceased must have past to a party of record who represents the decedent's interests.

The court also reviewed the *devisavit vel non* exception further provides that witnesses are competent to testify in disputes arising over the passage of property, through will or intestacy, although their testimony might otherwise be rendered in competent through the operation of the general rule under the Dead Man's Act.

This exception was noted to apply to disputes involving transfer of the decedent's estate both by operation of law or by will and renders competent all witnesses claiming the decedent's property by reason of his death.

No Cause of Action For Spoliation of Evidence, But Can Sue For Negligently Failing to Preserve Evidence

In the case of *Atlantic States Ins. Co. v. Copart, Inc.*, No. 5:22-CV-1177 (E.D. Pa. June 30, 2022 Leeson, J.), the court denied in part, the Plaintiff insurance company's Motion for Summary Judgment on a claim of a breach of duty on the part of Copart to preserve a vehicle.

In this matter, a worker's compensation carrier, had paid over a million dollars to compensate an injured employee. The employee had been involved in an accident while driving a Mack truck. By way of subrogation, the compensation carrier brought suit against several alleged tortfeasor to recover the monies the carrier had paid out to the injured employee.

The truck at issue had been sold by Copart before the compensation carrier could complete an expert inspection of the vehicle. As such, the carrier had to discontinue its action against the tortfeasors.

The carrier then sued Copart for the damages the carrier suffered from having to discontinue the action against the tortfeasors. The Defendant responded with a Motion to Dismiss.

The court noted that the Pennsylvania Supreme Court has not recognized a cause of action for negligent spoliation of evidence.

However, Judge Leeson held that, while Pennsylvania law does not impose on third parties a duty to preserve evidence, the Plaintiff could still have a cause of action for negligence generally if the court found that another duty, either contractual or otherwise, to maintain the truck involved in the accident was implicated by the facts of the case.

As such, the court denied, in part, the Plaintiff's Motion for Summary Judgment on this basis in this matter.

Summary Judgment Granted on Claims of Recklessness

Although the judges in the Court of Common Pleas of Lackawanna County have followed the minority line of trial court decisions that have gone against appellate precedent in overruling Preliminary Objections with respect to claims of recklessness in personal injury Complaints, as the recent decision in the case of *Lentes v. Hayden*, No. 17-CV-3947 (C.P. Lacka. Co. Feb. 16, 2022 Nealon, J.), proves, the judges of the Lackawanna County Court of Common Pleas are willing to grant summary judgment on claims of recklessness once discovery has been completed and it has been confirmed that the discovered facts of the case do not support a claim of recklessness.

According to the Opinion in *Lentes*, this personal injury action arose out of a motor vehicle accident. The facts indicate that the accident occurred as the Plaintiff was making a left hand turn into his driveway and was involved in a collision with an oncoming vehicle that was operated by the Defendant.

The Plaintiff alleged that the impact occurred after he had exited the roadway and had entered his driveway. The Defendant maintained that the initial impact took place in the roadway when the Plaintiff suddenly and negligently turned left in front of the Defendant's vehicle without yielding the right-of-way to the Defendant.

Other evidence developed during the course of discovery confirmed that the Defendant admitted at his deposition that he was traveling at 50 mph in a posted 45 mph speed zone at the time of the accident.

The Defendant filed a Motion for Summary Judgment seeking the entry of judgment in his favor on a Plaintiff's claims of recklessness and negligent conduct.

The court allowed the claims asserted by the Plaintiff in negligence to proceed to the jury given the disputed facts and testimonial differences.

Relative to the claims of recklessness, the court found that the record lacked sufficient facts of an outrageous nature so as to support a finding of recklessness on the part of the Defendant. As such, summary judgment was granted with respect to the claims of recklessness but denied in all other respects.

In his Opinion, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas offered a detailed recitation of the law of Pennsylvania on claims of recklessness and the type of evidence necessary to prove the same in order to get beyond a Motion for Summary Judgment and thereby proceed to a jury on such claims.

Punitive Damages

In the case of *Barbarevech v. Tomlinson*, No. 18-CV-4821 (C.P. Lacka. Co. March 25, 2022 Nealon, J.), the court addressed a Motion for Partial Summary Judgment filed by a Defendant in a motor vehicle accident case seeking to dismiss punitive damages asserted against the Defendant on the ground that the evidence presented by the Plaintiff was insufficient as a matter of law to sustain the Plaintiff's claims of recklessness.

The employer Defendant also sought to dismiss the Plaintiffs' direct liability claim for negligent hiring, training, and supervision of the employee under an argument that the employer's admission that the employee was acting within the scope of her employment at the time of the accident.

Relative to the punitive damages claims, after noting that there was no evidence in the record that the Defendant driver was speeding, driving while impaired or distracted by cell phone use, or otherwise engaged in unreasonable conduct manifesting a conscious disregard of a known or obvious risk posing a high probability of harm to others, the court granted the Defendant's Motion to Dismiss the claim for punitive damages.

The court additionally noted that, based upon the facts of this "run-of-the-mill intersectional collision," the Plaintiffs' expert was not permitted to express a legal opinion that the Defendant driver was chargeable with "reckless indifference" as defined by Pennsylvania law, particularly since the record did not contain an adequate basis in fact for that opinion.

The court also rejected the Plaintiffs' attempt to assert that the Defendant employer's post-accident investigation of the collision did not cause or contribute to the accident or the harm that the Plaintiff had suffered and, as such, could not serve as a basis for the Plaintiff's punitive damages claims. Judge Nealon otherwise stated that there was no other evidence in the record that the Defendant employer acted in a willful, wanton, or reckless manner.

As such, the Motion to Dismiss the Punitive Damages Claim was granted.

On the separate claim of direct employer liability for the alleged negligence in selecting, training, and supervising employees and their activities, the court allowed this claim to proceed after finding that Pennsylvania case law provides that a Plaintiff may pursue such a claim against an employer on theories of direct and vicarious liability, either at the same time or alternately, and Plaintiffs need not surround a direct liability claim against the employer if the employer acknowledges an agency relationship with the employee. As such, the employer's Motion for Partial Summary Judgment with regards to the independent claim for negligent hiring, training, and supervision was denied.

Punitive Damages

In the case of *Ceresko v. Keystone Container Service, Inc.*, No. 18-CV-3361 (C.P. Lacka. Co. Nov. 19, 2021 Nealon, J.), the court addressed a Motion for Summary Judgment filed by the defense in a motor vehicle accident case in which the Plaintiff had asserted claims of negligence and recklessness by the driver along with negligence and recklessness by the Defendant-driver's employer in its hiring, training, and supervision of the driver and in its negligent entrustment of a vehicle to that driver.

In this matter, the Plaintiff alleged claims of negligence against a driver for neglecting to activate his left turn signal when he turned left across the path of the vehicle operated by the Plaintiff, that the Defendant driver failed to yield the right-of-way, that the Defendant driver was driving in excess of the posted speed limit, and that the Defendant driver was operating his vehicle while distracted due to alleged cell phone use.

Before the court were the Defendants' Motion for Partial Summary Judgment seeking to dismiss the Plaintiffs' punitive damages claim under an argument that the record evidence was insufficient as a matter of law to establish a case of willful, wanton, or reckless conduct to justify the claim for punitive damages.

Judge Terrence R. Nealon

Lackawanna County

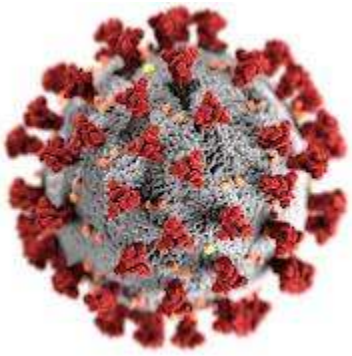
Judge Nealon found that, even when reviewing the record in a light most favorable to the Plaintiff, there was insufficient direct or circumstantial evidence to support an allegation that the driver was speeding or using a cell phone at the time of the collision. The court also found that there was no proof in the record of the driver's alleged subjective appreciation and conscious disregard of a risk of harm.

The court additionally found that the evidentiary record also lacked any evidence, either in the form of expert opinion or lay witness testimony, of willful, wanton, or reckless conduct by the employer Defendant.

Rather, the record before the court only reflected evidence of alleged negligence on the part of the driver and his employer, which evidence was found to be insufficient to sustain any claim for punitive damages based upon any allegations of recklessness.

As such, the court granted the Defendants' Partial Motion for Summary Judgment and the punitive damages claims asserted by the Plaintiff against both the driver and the driver's employer were dismissed.

Delay Damages Not Impacted By COVID-19 Court Closures



In the case of *Yoder v. McCarthy Construction, Inc.*, May Term 2018, No. 0769 (C.P. Phila. Co. Feb. 10, 2022 Foglietta, J.), the trial court issued Rule 1925 Opinion requesting the Superior Court to affirm the trial court's rulings during the course of a personal injury trial that resulted in a $5 million dollar verdict of the Plaintiff.

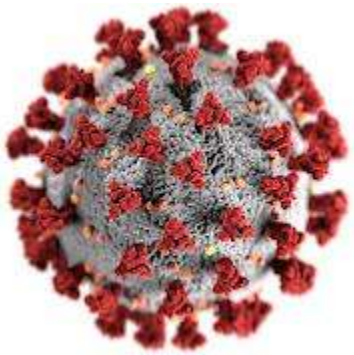
Of note, the court rejected the Defendant's assertion that the trial court erred in awarding delay damages for the period that the court was closed due to the COVID-19 pandemic.

The court ruled that the plain language of Rule 238 indicates that delay damages are appropriate due to the delay that is not the fault of any party. The court found that a court closure due to a pandemic falls within this definition.

The court additionally noted that the trial court's closure during the pandemic "did not prevent defense counsel from picking up the telephone, scheduling a Zoom hearing, or sending a text message to opposing counsel indicating the desire to make an offer to settle this case." *See* Op. at 11.

The trial court judge indicated that the court's closure could have served as an encouragement to the parties to settle and that, the fact that it did not, did not entitle the Defendant to a reward when the underlying purpose of delay damages is to discourage dilatory conduct.

Personal Injury Claim Based On Worker Who Died From COVID-19 Dismissed Under Workers' Compensation Act



In the case of *Barker v. Tyson Foods, Inc.*, No. 21-223 (E.D. Pa. Dec. 6, 2021 Diamond, J.), the court ruled that a claim that an employer willfully or wantonly exposed its employees to the COVID-19 virus was insufficient to overcome the exclusivity provisions of the Workers' Compensation Act. As such, the Defendant's Motion to Dismiss was granted.

In this matter, the Plaintiff's decedent passed away allegedly due to complications from the COVID-19 virus.

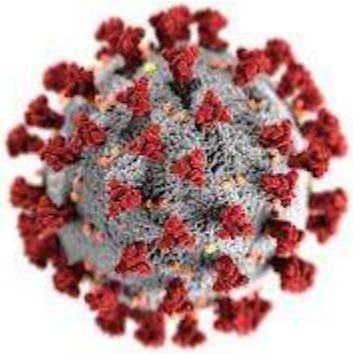
The Plaintiff alleged that the decedent's employer caused the decedent's wrongful death by failing to implement any safety measures after the outbreak of the COVID-19 pandemic. The Plaintiff also asserted that the Defendant allegedly maintained a work-while-sick policy.

The federal court granted the Defendant's Motion to Dismiss after finding, in part, that the Plaintiff's claims were barred by the Pennsylvania Workers' Compensation Act.

The court more specifically held that willful or wanton disregard for employee safety was insufficient to overcome the exclusivity provisions of the Act.

Instead, the court noted that an employee could fall outside of the Workers' Compensation Act only upon a showing that an employer's fraudulent misrepresentation caused an aggravation of a pre-existing injury. In this case, the court found that the Plaintiff's allegations did not amount to any showing that any alleged wrongful conduct on the part of the employer caused any aggravation of any pre-existing conditions of the Plaintiff's decedent.

Personal Injury Claim Based on COVID-19 Exposure Allowed to Proceed



In the case of *Stiver v. Senior Health Care Solutions, LLC*, No. 21-CV-842 (C.P. Lacka. Co. July 8, 2022 Nealon, J.), the court addressed various issues arising out of a COVID-19 personal injury claim.

In this matter, a nursing home employee, who claimed to have contracted work-related COVID-19 that allegedly caused permanent pulmonary and cardiac damage and required inpatient hospitalization, filed a corporate liability lawsuit against the owner and operator of the facility which allegedly declined to follow federal agency guidelines for the prevention and mitigation of the COVID-19 virus.

The Defendant owner/operator filed Preliminary Objections.

In part, the Defendant asserted that it was immune from suit as the Plaintiff's "statutory employer" under §302(a) of the Worker's Compensation Act, 77 P.S. §46, or based upon the common law "borrowed employee" doctrine.

The court found that issues of fact prevented it from fully deciding whether the Defendant was entitled to such tort immunity. Accordingly, that argument was overruled without prejudice to the Defendant's right to raise the issue again at this summary judgment stage of the litigation.

The Defendant owner/operator also filed a demurrer to the Plaintiff's corporate negligence claim on the basis that the Defendant allegedly did not owe any duty of care to the Plaintiff.

Judge Nealon noted that, since the Plaintiff alleged that the Defendant owner/operator had breached its duty to formulate and implement adequate safety procedures and policies and to provide a safe work environment, this demurrer was denied.

The Defendant requested, pursuant to Pa. R.C.P. 1006(d)(1), a transfer of venue to the Cumberland County Court of Common Pleas based upon forum non conveniens grounds.

The court noted that, given that the Defendant has not submitted any affidavit from any prospective witness, or some other form of evidence, establishing that Lackawanna County is a vexatious or oppressive forum, the Defendant had not satisfied its heavy burden of proof warranting a transfer of venue from the Plaintiff's chosen forum. As such, this petition seeking a transfer of venue under Rule 1006(d)(1) was denied.

Personal Injury Claims Based on Covid-19 Exposure Allowed to Proceed

In the case of *Testa v. Broomall Operating Co., L.P.*, No. 21-5148-KSM (E.D. Pa. Aug. 18, 2022 Marston, J.), the court denied a Defendant's Motion to Dismiss a Plaintiff executrix's lawsuit over her mother's death that allegedly resulted from contracting COVID-19 while residing at the Defendant's nursing and rehabilitation facility.

The court found that the Defendant was not shielded from liability by the Public Readiness and Emergency Preparedness Act, or the Pennsylvania Emergency Management Services Code.

Workers' Compensation Carrier Cannot Force Plaintiff To Take Action Against a Third Party

In the case of *Loftus v. Decker*, No. 611 WDA 2021 (Pa. Super. March 10, 2022 Olson, J., Murray, J., and Pellegrini, J.) (Op. by Pellegrini, J.), the Pennsylvania Superior Court quashed an appeal by a worker's compensation carrier who had appealed the trial court's denial of its Motion to Intervene in a personal injury case.

The record before the Court indicated that the injured party was a school bus driver who was injured during a motor vehicle accident. During the course of the underlying matter, the injured party incurred a worker's compensation lien in excess of $196,000.

According to the Opinion, the worker's compensation carrier attempted to intervene after the Plaintiff-employee filed a Writ of Summons against an alleged tortfeasor.

The appellate court found that §319 of the Worker's Compensation Act did not give a party any right, directly or indirectly, to take any action against a third-party tortfeasor. As such, the appellate court found that a worker's compensation carrier could not force a Plaintiff employee to seek a recovery to satisfy a worker's compensation statutory lien.

The Superior Court also noted that the Order from which the worker's compensation carrier had appealed was not an appealable collateral Order. Notably, the Pennsylvania Superior Court stated that it was addressing the issue of whether the Order at issue was an appealable collateral Order within its decision on the merits. As such, the Court in this decision addressed the merits of the issues presented in this case relative to the ability of the worker's compensation carrier to intervene in the action.

As noted, this appeal was quashed.

An Insured May Have More Than One Residence Under Definition of 'Residency'

In the case of *Isenberg v. State Farm Fire & Cas. Co.*, No. 21-CV-1147 (W.D. Pa. May 27, 2022 Schwab, J.) (Mem. Op.), the court addressed issues of insurance coverage in the context of a house fire.

In this case, the carrier asserted that it was entitled to summary judgment because the Plaintiff was not using the house as a residence at the time of the fire.

According to the facts of the case, the Plaintiff had purchased the house in 2018, and continued to live in her apartment during the renovations at the house, which renovations turned out to the more extensive than anticipated. Then, in 2020, a fire destroyed the home. The Plaintiff filed a claim under her homeowner's policy.

The carrier rescinded the policy, alleging that the Plaintiff was not using the house as a residence.

The Plaintiff filed suit in state court and the carrier removed the case to federal court. After discovery was completed, the Defendant carrier moved for summary judgment.

As noted, the carrier asserted that was not using the property as a residence at the time of the fire. The insurance company additionally argued that a person could only have one "residence."

The court ruled in favor of the Plaintiff. In part, the court found that Pennsylvania courts and federal courts applying Pennsylvania law had agreed that a person was not limited to only being able to have one residence.

Rather, the case law suggested that residency was a question of physical fact and not the policyholder's intention.

In this case, the record before the court revealed that the Plaintiff was physically present at house on an almost daily basis. There was also evidence that she had meals there, slept at the house on occasion, and had personal belongings in the house during the course of the renovations.

As such, the carrier's Motion for Summary Judgment was denied.

TRIAL ISSUES/EVIDENTIARY ISSUES

Pennsylvania Supreme Court Expands the Rules on Jury Notetaking

At the end of 2021, the Pennsylvania Supreme Court issued an Order that rolled out amendments to Pa.R.C.P. 223.2, pertaining to juror notetaking.

The amendments served to expand the Rule in this regard.

Under the amendments, a trial court judge is no longer able to prohibit juror notetaking in trials that are anticipated to take less than two days to complete.

Also, the amendments expand the Rule to now allow for note taking by jurors during both the Opening Statement of a trial as well as the Closing Argument of a trial.

Rules on Compelling Parties Or Witnesses To Attend Trial

In the case of *Snyder v. North American Partners in Anesthesia*, No. 19-CV-83 (C.P. Lacka. Co. Nov. 19, 2021 Nealon, J.), the court addressed a Pre-Trial Motion to Quash a Notice to Attend directed to witnesses to appear at a medical malpractice trial.

In his Order, Judge Nealon emphasized that the Defendant had served a Notice to Attend under Pa.R.C.P. 234.3, and not under Pa.R.C.P. 234.1, to the Plaintiff's brother-in-law and the Plaintiff's adult daughter to testify as witnesses at trial regarding issues related to the medical history of the Plaintiff and work issues.

The Plaintiffs objected and the issue came before the court.

Judge Nealon noted that the "Pennsylvania Rules of Civil Procedure contain straightforward provisions governing the practice to be followed in compelling the attendance of parties and non-party witnesses to testify at trial.

The Notice to Attend addressed to the non-party witnesses in this case was presented by the defense under Pa. R.C.P. 234.3.

Judge Nealon confirmed that a review of that rule confirmed that it only pertained to Notice to Attend requiring the trial attendance of "another party or an officer or managing agent thereof" for trial. As such, the court found that the defense was erroneously proceeding under the wrong Rule of Civil Procedure and attempting to compel the attendance of a non-party witness.

Judge Nealon noted that non-party witnesses can be compelled to attend trial under a "Subpoena to Attend and Testify" as provided by Pa. R.C.P. 234.1.

The court additionally noted that, when sending a Subpoena to Attend and Testify at trial to a non-party witness, the rule requires that the subpoena be served reasonably in advance of the date upon which attendance was required.

Based upon these errors, the court granted the Plaintiff's Motion to Quash the Notice to Attend sent by the Defendants.

Hearsay Within Hearsay

In response to a post-trial motion filed in the case of *Huertas v. El Bochinche Restaurante*, Oct. Term, No. 02851 (C.P. Phila. Co. 2022 Hill, J.), the court addressed hearsay issues that arose during the course of a premises liability trial.

According to the Opinion, the Plaintiff attended a party at a restaurant where she was allegedly attacked in a bathroom.

The Plaintiff was subsequently seen at an emergency room for a facial fracture and other injuries. The records from that visit indicate that the Plaintiff informed the treating physician that she was "punched in the face while walking down a street."

The Plaintiff later visited a different hospital, stating there that she was injured in the restaurant.

The Plaintiff eventually brought a lawsuit against the restaurant for negligence.

As the case proceeded to trial, the Plaintiff had filed a Motion In Limine requesting the trial court to exclude any possible statements the Defendant would make regarding other claims the Plaintiff had filed.

As to the statements from the hospital records, the court held that the statements were properly admitted under several exceptions to the hearsay rule.

First, under Pa.R.E. 803.4, hearsay statements “made for diagnoses or treatment" are allowed. The court found that the Plaintiff’s statements at the hospital clearly fell within this exception.

Also, the court referenced precedent holding that statements made by an opposing party are allowed, which was the case with the statements at issue in this matter. More specifically, the Defendant was seeking to enter statements by the Plaintiff, who was the party opponent.

The court additionally held that the statement at issue was admissible under the business records exception in Rule 803.6. In this regard, the court found that the statement was made and recorded during a regularly conducted activity by the hospital, was recorded contemporaneously close to the time of the alleged incident, and was maintained during the normal course of business.

On a separate but related issue, the Plaintiff argued that the court erred at trial by denying her request to admit the statement by the Plaintiff at the second hospital visit that she had been injured in the restaurant. The Plaintiff felt that she should have been allowed to introduce that statement in an effort to rehabilitate her testimony and credibility. However, the court clarified that the Defendant had not impeached the Plaintiff, but rather had offered their evidence as substantive evidence excluded from the rules of hearsay.

Federal Court *Daubert* Motion on Admissibility of Expert

In the case of *DiDonato v. Black & Decker (U.S.), Inc.*, No. 20-CV-4425-JMY (E.D. Pa. Feb. 9, 2022 Younge, J.), the court denied a Motion for Summary Judgment and a Motion regarding the admissibility of expert testimony under Rule 702 in a products liability case.

According to the Opinion, the Plaintiff was allegedly injured while cleaning a vehicle and using a power buffer/polisher manufactured by the Defendant.

Relative to the issues raised by the defense with respect to the Plaintiff's expert testimony, the court found that the Plaintiff's expert's testimony about an alternative design was admissible under Rule 702. The court noted that the reliability analysis with respect to an expert testimony looks at the reliability of the methodology as opposed to the conclusions of the expert. To be admissible, the expert's testimony must also assist the trier of fact in resolving a factual dispute.

The court noted that it is not essential that an expert be able to recreate the facts of the accident. The court reasoned in this case that, while the accident in this case happened quickly while the Plaintiff was allegedly distracted while using the Defendant's power tool, those facts did not preclude the Plaintiff's expert from opining on the issue of causation.

In another important ruling, the court noted that experts are allowed to rely upon the testimony of witnesses, even where that testimony is disputed.

The court ultimately found that, since the Plaintiff's expert's testimony was admissible, the Plaintiff's risk/utility theory of a designed defect survived the Motion for Summary Judgment. However, summary judgment was granted with respect to the Plaintiff's claims of a manufacturing defect, and with regards to the breach of express warranties and failure to warn claims.

The court additionally noted that the extent to which the Plaintiff's alleged carelessness and alleged failure to follow instructions caused the accident was an issue for the jury to decide.

Expert Testimony Not Required Where Causation is Obvious

In some personal injury cases, the relationship of a plaintiff's injury to an alleged act may be so obvious that expert testimony on causation may not be necessary.

Such was the case in the matter of *Schweikert v. Eagle*, No. 20-4310 (E.D. Pa. Feb. 9, 2022 Goldberg, J.), in which the court denied a Defendant's Motion for Summary Judgment in a motor vehicle accident versus pedestrian case. The Defendant filed the Motion on the basis that the Plaintiff had not produced an expert report on causation.

According to the Opinion, the pedestrian Plaintiff was allegedly struck by the Defendant's vehicle while the Plaintiff was in a crosswalk at 30th and Chestnut Streets in Philadelphia. There was no dispute that the Defendant's vehicle struck the Plaintiff.

The Plaintiff was immediately transported to the emergency room where she was treated for complaints of back pain and a fracture to her wrist. The Plaintiff then went on to continue to treat with various medical providers for complaints of neck pain, back pain and wrist pain and residual limitations.

According to the Opinion, the Defendants filed a motion for summary judgment after the Plaintiff failed to produce an expert report within the Court's deadline.

In this regard, the court ruled that, while a plaintiff is required in most cases to produce an expert report to prove causation, expert testimony on causation is not always required in personal injury actions. Rather, under an exception to the general rule, where there is an obvious causal connection between the injury and the alleged negligent act, expert testimony may prove unnecessary.

Here, the Plaintiff alleged physical injuries as a result of being struck the Defendant's vehicle. The court noted that there was evidence of an obvious causal relationship between the injury and the alleged negligent act.

More specifically, the Plaintiff's alleged injuries were immediate, the Plaintiff was taken to the hospital complaining of pain, and the injuries sustained were the type that were the natural results of being hit by a vehicle.

The court otherwise noted that the issue of whether the obvious causal connection extended to the Plaintiff's claim of spinal injuries was a disputed issue of fact to be left to the jury.

With regards to the Plaintiff's failure to produce an expert report, the court noted that, although the expert report deadline had passed, the Plaintiff could rely upon the testimony of her treating physicians as lay witnesses. The court noted that the Plaintiff had not missed any deadline for describing the substance of such testimony by her treating physicians. The court additionally noted in this federal court case that the Defendants had the opportunity to depose the treating doctors prior to trial as well.

No Medical Expert is Needed Where Causation is Obvious

In the case of *Bixler v. Lamendola*, No. 3:20-CV-01819-CCC (M.D. Pa. July 5, 2022 Connor, J.), the court denied a Defendant's Motion for Summary Judgment in a motor vehicle accident case after finding that expert medical testimony was not required to establish causation given that the driver's testimony would allow the jury to infer that the claimed injuries resulted from the accident.

According to the Opinion, at the time of the accident, the Plaintiff was driving an empty tractor trailer at a speed of approximately 45-50 mph when the Defendant, who was traveling in from of the Plaintiff in the same direction, attempted to make a U-turn. More specifically, the Defendant's vehicle moved towards the right side of the road and/or the right shoulder and then, as the Plaintiff's vehicle approached, the Defendant pulled back onto the road and attempted to turn his vehicle into the opposing lane of travel. The Plaintiff was unable to avoid a collision which occurred while the tractor trailer was still moving at about 25-30 mph.

It was noted that the vehicle that the Plaintiff was operating at the time of the accident was rendered inoperable for about four (4) months following the accident due to the damages sustained.

The Plaintiff testified that, although he was wearing a seat belt at the time of the accident, he believed he struck parts of the interior of his vehicle because he had a bump on his head as well as bumps and bruises on his knees and arm. The Plaintiff did admit that he did not immediately notice any pain and declined medical treatment at the scene of the accident.

Approximately two (2) days later, the Plaintiff began to experience left hand numbness and then sought out medical treatment with his family doctor the day after that at which point he was referred to a neurologist and then began to treat on a continuing basis thereafter.

Post-accident diagnostic tests including x-rays, an MRI, and a nerve test lead the neurologist to diagnose the Plaintiff with a bulging disc in his neck, causing a pinched nerve, which was noted to explain the complaints of left hand numbness.

During the course of the matter, the Defendant filed a Motion for Summary Judgment arguing, in part, that the Plaintiff's failure to produce an expert medical opinion on causation defeated the Plaintiff's claim.

The court cited to the law of Pennsylvania generally requiring expert medical opinion testimony to prove causation in personal injury cases.

However, the court noted that expert opinion is not required if there is an obvious causal relationship between the alleged negligent act and the injury complained of. The court stated that a causal relationship is "obvious" if the injury is "either an 'immediate and direct' or the 'natural and probable' result of" the alleged negligence.

The court further noted that, in those cases in which expert testimony is not required, there are typically two common traits, that is, (1) the Plaintiff began to exhibit symptoms of the injury immediately after the accident or within a relatively short time thereafter, and (2) the alleged injury is the type that one would reasonably expect to result from the accident in question.

The court applied that law to this case and held that the record revealed facts under which expert medical testimony on causation was not required. As such, the Defendant's Motion for Summary Judgment in this regard was denied as a jury could easily find that the Plaintiff's injuries were the natural and probable consequence of the accident.

Nurses Permitted to Testify As Experts Regarding Future Medical Expenses

In the case of *Jones v. Nicolani*, No. CV-2018-007110 (C.P. Del. Co. Oct. 4, 2021 Eckel, J.), the court denied a Defendant's Motion In Limine filed in a motor vehicle accident seeking to preclude the testimony of two (2) of the Plaintiff's experts, who were registered nurses who were retained by the Plaintiff to testify as to the estimated future medical costs the Plaintiffs may incurred as a result of the accident.

The Defendants asserted that certain medical cost projections from which these experts' opinions derived were based upon a source, known as "Context4Healthcare," that, according to the Defendant, was similar to another source (Fairhealth.org) that had been found by two other courts to be unreliable.

The court in this matter reviewed the record before it, including the Plaintiff's arguments that the Plaintiffs' experts had relied upon other sources as well to render their opinions. In the end, the court noted the Plaintiff's experts had relied upon multiple sources of information and that the Defendants were free to cross-examine these experts on their reliance upon the data in question.

Fair Scope of Expert Report Rule Does Not Apply To Treating Doctors

In the case of *Merrifield v. Bonacuse*, No. 16-CV-3420 (C.P. Lacka. Co. Dec. 8, 2021 Nealon, J.), the court addressed the scope of expert testimony for trial as being beyond the fair scope of the pre-trial reports offered by the expert.

After referring to Pa. R.C.P. 4003.5(c), which limits the direct testimony of any expert to the "fair scope" of the pre-trial reports authored by the experts, the court limited the defense IME doctor from referencing the Plaintiff's medical billings or Medicare's lien given that the expert did not identify in his report that he had reviewed any such records and where that expert did not make any reference to the reasonableness of the medical providers' charges for the amounts actually paid by Medicare.

The court found that, in light of the discrepancy between the defense expert's pre-trial reports and his proffered testimony, the Plaintiff is found to be unable to prepare a meaningful cross-examination to challenge any opinions with regards to the reasonableness of the medical expenses or Medicare's Conditional Payments. As such, the Plaintiff's Motion In Limine was granted.

Relative to the defense objections to the Plaintiff's treating doctor's testimony as being beyond the fair scope of any reports, Judge Nealon found that the "fair scope" of the report limitation set forth in Rule 4003.5(c) only applies to expert witnesses whose opinions were acquired or developed in anticipation of litigation or for trial.

Given that the Plaintiff's expert formulated his opinions in his capacity of a treating doctor, rather than as an expert hired by a party in anticipation of litigation or trial, the court found that that expert was not obligated to author a pre-trial report and that his trial testimony was not subject to the "fair scope" rule. As such, the Defendant's Motion In Limine seeking to strike the Plaintiff's expert's direct testimony was denied.

Plaintiff's Expert Allowed To Testify As To Possibility of Future Medical Care

In the case of *Hamm v. Perano*, No. 20-CV-00598 (C.P. Lyc. Co. June 22, 2022 Lindhart, J.), the court denied Defendants' Motion In Limine seeking to exclude the expert testimony of the Plaintiff's medical doctor who was expected to testify as to the "possibility" that the Plaintiff would need future medical care.

This matter arose out of a premises liability incident. The Plaintiff was alleging performing yard work on property that she rented from the Defendants when she fell through an unsecured manhole cover and allegedly sustained injuries.

The Defendants asserted in their Motion in Limine that an expert opinion as to the "possibility" of medical care to take place in the future was not admissible.

However, the court agreed with the Plaintiff's argument that, under Pa. R.C.P. 223, the Plaintiff's expert's testimony was relevant to the Plaintiff's claim for future non-economic pain and suffering damages.

The court more specifically noted that the relevant jury instructions incorporate Pa. R.C.P. 223.3 and instruct the jury to consider the type of medical treatment a Plaintiff has undergone and how long the treatment will be required in the future when considering whether to award future damages.

The court also emphasized that the Plaintiff clarified that she was not seeking to introduce the cost of the future treatment for direct reimbursement. Rather, she was seeking to have her expert testify as to her need for continued treatment, which the Plaintiff asserted was relevant to her pain and suffering claim.

While the court denied the Defendant's Motion In Limine, the court noted that it would consider a request at trial for a limiting a jury instruction to clarify to the jury how they were permitted to take the evidence at issue into account in their deliberations.

Impeachment by Prior Criminal Conviction Allowed

In the case of *Barbarevech v. Tomlinson*, No. 18-CV-4821 (C.P. Lacka. Co. March 17, 2022 Nealon, J.), Judge Terrence R.Nealon of the Lackawanna County Court of Common Pleas addressed a pre-trial Motion In Limine seeking to preclude evidence or testimony regarding a witness' prior arrest, guilty plea, and incarceration.

According to the Opinion, the subject witness was a friend of the Plaintiff and was anticipated as a fact witness at trial. That witness pled guilty in 2018 to stalking.

The Plaintiffs filed a Motion In Limine seeking to preclude the impeachment information on this witness for the Plaintiff by asserting that Pa. R.E. 609(a) permits a witness' credibility to be attacked with evidence that the witness has been convicted of a crime only if the crime involves "dishonesty or false statement." The Plaintiff asserted that the witness pled guilty to stalking, which did not constitute a *crimen falsi* crime.

In response, the defense asserted that the federal stalking statute does encompass allegations of dishonesty. The defense also asserted that the criminal acts that the Defendant pled guilty to also, in fact, involved elements of dishonesty.

Judge Terrence R. Nealon
Lackawanna County

After his review of the applicable law as applied to the facts before the court, Judge Nealon ruled that, while the witness's cyber stalking offense was not inherently a *crimen falsi* since neither dishonesty nor a false statement was an essential in stated element of that crime, the court noted that, based upon the "underlying facts" that supported the witness' conviction under the federal statute involved dishonesty and falsehoods committed by the witness to during the course of his crime.

The court therefore ruled that, since the witness utilized dishonesty and false statements in committing his cyber stalking crime, the underlying facts sustaining his conviction supported the classification of the offense as a *crimen falsi* offense for purposes of the admissibility of this information to impeach the witness at trial pursuant to Pa. R.E. 609(a).

As such, the Plaintiffs' Motion In Limine was denied by the court.

Evidence of 20 Year Old Crimini Falsi Conviction Precluded

In the case of *Lett v. SEPTA*, No. 2:19-CV-03170-KSM (E.D. Pa. Feb. 10, 2022 Marston, J.), the court issued an evidentiary ruling regarding a prior criminal conviction of a Plaintiff in a disability discrimination lawsuit that the Plaintiff filed against his former employer.

The Plaintiff filed a Motion In Limine to preclude the Defendants from introducing evidence at trial regarding the Plaintiff's 20 year old fraud convictions. The Plaintiff asserted that the probative value of this evidence was outweighed by the prejudicial effect of the conviction due to their age.

The court granted the Plaintiff's Motion In Limine.

Judge Marston noted that, while a criminal conviction involving a dishonest act or false statement could be admitted to attack a witness' credibility, if the conviction occurred more than ten (10) years ago, the admitting party must prove that its probative value substantially outweighed any prejudice effect.

The court emphasized that the Plaintiff's criminal convictions occurred twenty (20) years ago.

The court found that, while the Plaintiff's convictions were indeed probative of the Plaintiff's character for truthfulness because fraud crimes implied dishonesty, the court ruled that the age of the conviction meant that their probative value did not outweigh the risk of prejudice.

As such, the Plaintiff's Motion was granted and the evidence precluded.

Non-Settling Defendants Precluded From Referencing Joint Tortfeasor Settlement with Another Defendant

In the case of *Snyder v. North American Partners in Anesthesia*, No. 19-CV-83 (C.P. Lacka. Co. Nov. 12, 2021 Nealon, J.), the court granted a Plaintiff's Motion In Limine in a medical malpractice case and precluded a non-settling Defendant and an Additional Defendant from referencing a joint tortfeasor settlement that the Plaintiff had entered into with a non-party. The Court also precluded any reference to the Plaintiffs' previous assertion of a malpractice claim against that former party.

The court noted that the former Defendant, who had secured a joint tortfeasor settlement had previously secured a Discontinuance relative to this action and a removal as a named Defendant.

In so ruling, the court referred to 42 Pa. C.S.A. §6141(c) which provides that, "[e]xcept in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment…shall not be admissible in evidence on the trial of any matter." Judge Nealon noted that, based upon the plain language of this provision, evidence of any prior settlements is inadmissible at any trial on any matter.

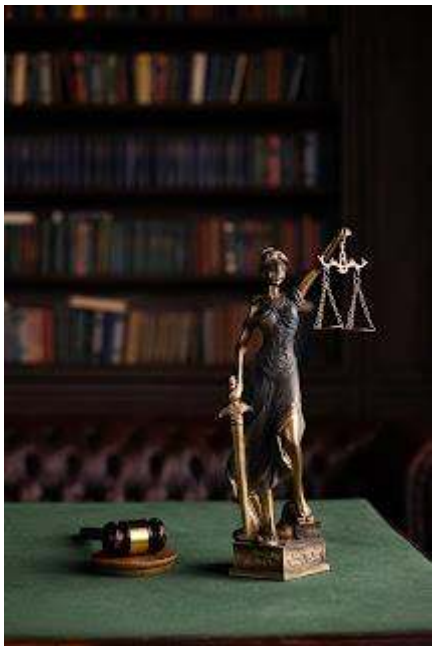
The court additionally noted that Pennsylvania Rule of Evidence 408(a)(1) similarly prohibited the admissibility or use of any offer or acceptance of valuable consideration in compromising or attempting to compromise a claim. The court noted that, under the comment of that Rule of Evidence, it is indicated that "Pa.R.E. 408 is consistent with 42 Pa.C.S. §6141 in excluding any evidence of a joint tortfeasor settlement."

On the basis of this law, the court granted the Plaintiff's Motion In Limine.

The court additionally granted the Plaintiff's Motion seeking to prohibit the non-settling Defendants from mentioning the fact that the Plaintiff's originally asserted a malpractice claim against the settling Defendant. In this regard, the court made a distinction between factual allegations, which could be deemed to be judicial admissions, and allegations of legal conclusions, which could not be deemed to be judicial admissions.

As such, the court noted that certain factual allegations regarding specific documentation created by the relevant medical witnesses and parties may be offered as judicial admissions but any allegations by the Plaintiffs concerning the causal negligence by the settling Defendant or its agents would not be allowed to be introduced into evidence.

Fair Share Act



In the case of *Anderson v. Motorists Mut. Ins. Co.*, No. 2:21-CV-00493-CCW (W.D. Pa. June 22, 2022 Wiegand, J.), the court addressed the issue raised by the parties as to the amount of the credit to which the UIM carrier was entitled in this particular claim. As part of the analysis the Court addressed novel arguments raised under the Fair Share Act.

According to the Opinion, this case arose out of a fatal motor vehicle accident.

After the accident, the Plaintiffs sued the third party tortfeasor and settled those claims. The Plaintiffs then filed a claim for UIM benefits with Motorists Mutual.

Motorists Mutual denied the claim on the basis that the value of the claim did not exceed the combined $5.1 million liability limits of the various third party tortfeasors.

With regards to the coverages at issue in the third party liability side, the Plaintiff was a passenger in a vehicle in which the operator of that vehicle was covered under a liability policy providing $100,000.00 in liability coverage.

The other vehicle involved in the accident was owned by a trucking Defendant who had liability limits of $1 million dollars as well as an umbrella policy with an additional $4 million dollars in coverage.

The Plaintiff settled the third party claim securing the $100,000.00 policy limit that covered the vehicle in which the Plaintiff was located at the time of the incident. The Plaintiff also settled against the trucking company for $55,000.00. Motorist Mutual consented to those settlements.

The court noted that, under the Motorist Mutual UIM endorsement, it was provided that the carrier would pay UIM benefits if "[t]he limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgements or settlements…."

In this matter, Motorists Mutual contended that it should receive a credit of $5.1 million dollars, which was the sum of all of the liability limits at issue (accepting a City of Pittsburgh policy limit, which was handled by the parties and the Court separately).

The Plaintiff was seeking a partial summary judgment under an argument that, unless Motorists Mutual could prove that the trucking Defendants' percentage of fault equaled or exceeded 60%, Motorists Mutual should only be entitled to a credit equaled only to the amount the Plaintiff was legally entitled to recover from the joint tortfeasors, that is, $650,000.00, which was the sum of the amounts actually paid in settlement on the third party side by the operator of the vehicle in which the Plaintiff is located and the trucking Defendants.

More specifically, the Plaintiff was contending that the UIM carrier must prove that the trucking Defendants' liability equaled or exceeded 60% in order for the UIM carrier to claim the full credit of $5 million dollars under that third party Defendants' policies. The Plaintiff went on to argue that, if the UIM carrier was unable to establish this proof, then the UIM carrier should only be entitled to a credit of the amount paid pursuant to the settlements because the Plaintiff would have been unable to recover the full amount of damages from the trucking Defendants under the Pennsylvania Fair Share Act.

The court applied Pennsylvania law and noted that there was no controlling Pennsylvania Supreme Court precedent on the issue of the enforcement of exhausting clauses concerning UIM benefits. However, it was noted that the Pennsylvania Superior Court had decided a number of cases in this regard, including the case of *Boyle v. Erie* in which the Superior Court held that a UIM carrier was entitled to the full amount of any liability limits that were available on the third party side.

The Plaintiff attempted to assert that the *Boyle* decision was inapplicable, in part, due to the underlying policy concerns and *Boyle* being no longer applicable due to the passage of the Pennsylvania Fair Share Act.

The court in this matter held that it did not need to decide whether the Pennsylvania Fair Share Act altered *Boyle*'s holding.

The court more specifically stated that, even assuming that the enactment of the Pennsylvania Fair Share Act altered *Boyle*'s holding, the Plaintiff's argument was still noted to fail because "it is not clear that the Pennsylvania Fair Share Act applies where the Plaintiff's negligence is not in question, as is the case here." *See* Op. at 13.

In this regard, the court in this matter pointed to the case of *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021). The court in this *Anderson* case stated that, in the *Spencer* case, the Pennsylvania Superior Court found, "as an alternative holding," that for the "Fair Share Act to apply, the Plaintiff's negligence must be an issue in the case." *See* Op. at p. 13, *citing Spencer* at 559.

The court additionally pointed to another Pennsylvania Superior case on that similar issue and citing to the *Spencer c*ase. *See Snyder v. Hunt,* No. 851 EDA 2020, 2021 Pa. Super. Unpub. LEXIS 2993, at *14-15 (Pa. Super. Nov. 10, 2021).

The court in this *Anderson* case predicted that "because the decedent's negligence is not at issue in this case, the Pennsylvania Supreme Court would find that the Fair Share Act does not apply in cases such as this one, where the Plaintiff's negligence is not an issue, and, as a result, that the traditional principles of joint and several liability would control." *See Anderson* Op. at 14.

Under this analysis, the court in *Anderson* held that it did not need to decide whether the Fair Share Act altered *Boyle*'s holding.

The court went on to find that the language of the exhaustion clause in this case compelled the court to rule that the UIM carrier was indeed entitled to a credit for the full amount of the liability limits available in the underlying third party case (excepting those liability limits possessed by the City of Pittsburgh).

Zero Verdict

In the case of *Fertig v. Horace Mann Ins. Co.*, No. 16-CV-4801 (C.P. Lacka. Co. Jan. 18, 2022 Nealon, J.), the court granted in part and denied in part a Plaintiff's Motion for Post-Trial Relief in a case involving an uninsured motorist claim against a carrier.

According to the Opinion, the jury in this UIM benefits trial rendered a verdict awarding the Plaintiff $75,000.00 for future medical expenses but $0 for past and future non-economic damages.

The jury entered this verdict even though the defense medical expert testified that the Plaintiff had unresolved injuries to her head, neck, and knee that were casually related to the accident. The court noted that the jury had been instructed, without objection, that it must award at least some damages for those uncontested injuries in this admitted liability case. Nevertheless, the jury awarded $0 for pain and suffering.

After the verdict was molded to $0 to reflect the stipulated credit for the tortfeasor's liability insurance coverage of $100,000.00, the Plaintiff filed a post-trial motion seeking a new trial on the issue of non-economic damages on the grounds that the verdict was against the weight of the uncontroverted medical evidence. The Plaintiff additionally requested an award of delay damages based upon the verdict of $75,000.00, that is, on the amount before the verdict was molded to zero.

The Defendant contended that the Plaintiff waived her right to secure a new trial by failing to object at the time the verdict was announced and by failing to request that the jury be sent back to resume its deliberations to correct a $0 verdict. The Defendant also asserted that the Plaintiff was not entitled to a new trial even if she did preserve her weight of the evidence challenge.

The defense additionally asserted that the Plaintiff cannot recover delay damages on a verdict that was molded to $0.

In addressing whether or not the Plaintiff had waived any arguments against the $0 verdict, the court cited, in part, to the article entitled "Litigating the Zero Verdict," written by Daniel E. Cummins and Stephen T. Kopko which appeared in the *Pennsylvania Lawyer* magazine for the proposition that one option a party has in a case involving a $0 verdict is to request the court to send the jury back out to deliberate further in an effort to avoid any post-trial issues that may be created by the entry of that $0 verdict. However, as noted below, where a claim is made that a verdict was against the weight of the evidence, it is not required that such a request be made for the issue to be preserved.

The court in this case emphasized that the Plaintiff was asserting that the jury's award was contrary to the weight of the evidence and shocked one's sense of justice. The court noted that, where a party has asserted a weight of the evidence challenge, an objection filed of record before the jury is discharged is not required in order to preserve the issue for review during post-trial motions.

The court found that, since a verdict must bear some reasonable relation to the harm suffered as demonstrated by the uncontroverted medical evidence, and given that an award of $0 for past and future non-economic damages was found to be so disproportionate to the uncontested medical evidence so as to the defy common sense and logic, the court granted the Plaintiff's request for a new trial non-economic damages.

On the issue of delay damages, Judge Nealon ruled that, given that delay damages under Rule 238 are to be calculated based upon a molded verdict, and given that the verdict in this case was molded to $0 following the stipulated offset for the liability insurance coverage limit, the Plaintiff was not entitled to any delay damages under Rule 238 and that, as such, this request was denied.

Pennsylvania Supreme Court Applies General Verdict Rule to Favor Plaintiff

In the case of *Estate of Cowher v. Kodali*, No. 77 MAP 2021 (Pa. Sept. 29, 2022) (Op. by Dougherty, J.), the Pennsylvania Supreme Court reviewed waiver issues with respect to an appeal from the entry of a jury verdict.

According to the Opinion, the jury in this medical malpractice case awarded the Plaintiff a lump sum amount of damages under the Pennsylvania Survival Act and did not itemize the amount of pain and suffering damages or other components of its lump sum award.

During the course of the appellate history in this case, the Pennsylvania Superior Court had granted certain Defendants a new trial on the survival damages based upon those Defendants' claims that the admission of the Plaintiff's expert testimony on the pain suffering issues was erroneous.

The issue before the Pennsylvania Supreme Court was whether the Defendants had waived their right to a new trial under the general verdict rule.

According to the Opinion, the general verdict rule applies and mandates a finding of a waiver of issues for appeal when a general verdict rests upon both valid and invalid grounds, and the appellant challenging the verdict failed to request a special verdict slip at trial that would have clarified the basis of the verdict.

In this case, the Pennsylvania Supreme Court concluded that those circumstances existed in this case and, as such, the Pennsylvania Supreme Court held, under the general verdict rule, that the Defendants had waived their request for a new trial. As such, the Superior Court's Order for a new trial was reversed.

AUTO LAW UPDATE

Household Exclusion Is Still Valid and Enforceable

The Pennsylvania Superior Court held in *Erie Ins. Exch. v. Colebank*, No. 1244 WDA 2021 (Pa. Super. April 20, 2022 Bender, P.J.E., Lazarus, J., McCaffery, J.)(Op. by McCaffery, J.), a decision which the Court listed as a Non-Precedential decision, that a household exclusion was enforceable in a situation where a claimant was injured while driving a vehicle on which all UIM coverage had been rejected.

In the *Colebank* case, the claimant was injured while driving a vehicle insured by State Farm. Notably, the claimant had rejected all UIM coverage on the State Farm policy.

After an accident with an allegedly underinsured driver, the claimant made a claim for stacked UIM coverage under his parents' separate Erie Insurance policy.

Coverage was denied by Erie Insurance on the basis of the household exclusion contained within the Erie Insurance policy. Erie asserted that the *Gallagher v. GEICO* case was not controlling because the claimant had knowingly rejected UIM coverage under his own State Farm policy and, therefore, the issue of stacking was not in play.

The claimant argued that the claimant's rejection of stacking under the State Farm motorcycle policy was irrelevant as to the issue of whether he was entitled to stacked coverage under the Erie policy. The claimant asserted that he was still entitled to stacked coverage under the terms of the Erie policy possessed by his parents as he was a resident relative. The claimant also argued that the household exclusion was contrary to the mandates of the MVFRL and was, therefore, void and unenforceable.

The court disagreed. The Pennsylvania Superior Court ruled that enforcing the household exclusion in the parents' policy was consistent with the legislative intent of MVFRL and with *Gallagher* because such enforcement will have the effect of holding the claimant to his voluntary choice of coverage or a lack thereof.

Moreover, the Pennsylvania Superior Court ruled that, because the claimant had rejected UIM coverage on his motorcycle policy, "Gallagher is not applicable and did not invalidate the household exclusion." Rather, the Court found that, where the injured party did not purchase stacked coverage under his own policy, he did not have the requisite coverage on which to stack the UIM coverages under his parents' separate household policies.

Notably, the Superior Court noted that this analysis "is consistent with the MVFRL as the [claimant] voluntarily chose not to purchase UIM coverage in his automobile policy, and in return received reduced insurance premiums." **See Op. at p. 25.**

Regular Use Exclusion Ruled Unenforceable

In the Federal Court case of *Evanina v. The First Liberty Ins. Corp*., No. 3:20-CV-00751-MEM (M.D. Pa. Feb. 25, 2022 Mannion, J.), the Court denied a carrier's motion for summary judgment on a Plaintiff's UIM claim in which the carrier was attempting to rely upon the Regular Use Exclusion.

According to the Opinion, the Plaintiff, who was a home health worker, was in a motor vehicle accident and secured the minimal policy limits available under the tortfeasor's policy.

At the time of the accident, the Plaintiff was operating a vehicle that was owned by her employer. That vehicle was insured by Philadelphia Indemnity Insurance Company.

At the time the Plaintiff was also covered under another UIM policy issued by First Liberty Insurance Company, which presumably covered her personal vehicle (the Opinion does not so state or specify).

The Plaintiff settled for the minimal policy liability limits possessed by the tortfeasor.

The Plaintiff then submitted a first-tier UIM claim to Philadelphia Indemnity and a second-tier UIM claim with First Liberty.

The second-tier carrier, First Liberty, denied coverage to the Plaintiff under the Regular Use Exclusion contained in its policy.

Thereafter, the Plaintiff commenced this breach of contract claim against First Liberty. A motion for summary judgment was eventually filed by First Liberty which resulted in this decision being issued by Judge Mannion.

Judge Malachy E. Mannion

M.D. Pa.

The court confirmed that the issues in this case were being addressed after the previous issuance of the Pennsylvania Superior Court's decision in *Rush v. Erie Ins. Exchange*, 256 A.3d 794 (Pa. Super. 2021), in which that court held that regular use exclusions were not enforceable because they run counter to Pennsylvania's Motor Vehicle Financial Responsibility Law.

In this Federal Court matter, the carrier attempted to argue that the regular use exclusion was still valid even though the Superior Court invalidated it in *Rush*. The insurance company attempted to cite to the Pennsylvania Supreme Court Opinion in *Williams v. Geico Govt. Emp. Ins. Co.*, 32 A.3d 1195 (Pa. 2011).

Similar to Judge Schwab's decision in Western District Court case of *Johnson v. Progressive Adv. Ins. Co.*, Judge Mannion in this Middle District Court case of *Evanina* decided not to follow the *Williams* decision and found that the *Williams* decision was only a public policy based decision and not statutorily based decision as the more recent *Rush* decision was relative to the MVFRL.

Judge Mannion noted that the Pennsylvania Supreme Court had not yet addressed the validity of the Regular Use Exclusion in the context of whether that exclusion runs afoul of Pennsylvania's MVFRL. As such, Judge Mannion stated that he was required to attempt to predict how the Pennsylvania Supreme Court might rule on this issue if faced with this issue.

Judge Mannion reviewed certain recent Pennsylvania Supreme Court decisions such as the *Gallagher v. GEICO* decision and the *Donovan v. State Farm* decision in both of which the Pennsylvania Supreme Court had ruled that the household exclusion was invalid and, therefore, unenforceable. The Court in this *Evanina* case noted that the household exclusion was "a substantially similar exclusion [as compared] to the regular use exclusion." **See Op. at p. 15 [bracket inserted here].**

As such, Judge Mannion predicted that, "considering the trend of the Pennsylvania Supreme Court in its rulings," if faced with the issue of the validity of the Regular Use Exclusion, the Pennsylvania Supreme Court would find this exclusion to be invalid and, therefore, unenforceable. **See Op. at p. 16.**

Accordingly, Judge Mannion ruled in the same fashion and denied the UIM carrier's motion for summary judgment as a result.

Regular Use Exclusion Ruled Unenforceable

In the case of *Jones v. Erie Insurance Exchange*, No. 690 WDA 2022 (Pa. Super. Sept. 7, 2022 Stabile, J., Murray, J., and McLaughlin, J.) (Op. by Murray, J.), the Pennsylvania Superior Court reversed a trial court's decision entering judgment on the pleadings in favor of the carrier based upon the carrier's argument that the Plaintiff's UIM claims were barred by the regular use exclusion. The Superior Court reversed, found the regular use exclusion to be unenforceable, and remanded the case for further proceedings.

In its decision, the Pennsylvania Superior Court determined that the carrier's regular use exclusion violated the Pennsylvania Motor Vehicle Financial Responsibility Law.

In this decision, the Jones' court cited and relied upon the Pennsylvania Superior Court's previous decision in the case of *Rush v. Erie Insurance Exchange*, in which the regular use exclusion was also found to be unenforceable.

Note that the *Rush* decision is currently pending before the Pennsylvania Supreme Court for a decision.

In the *Jones* case, the Pennsylvania Superior Court again agreed with the Plaintiffs' argument that the regular use exclusion was unenforceable in light of the *Rush* decision.

In this *Jones* case, the Plaintiff sought UIM coverage under his own personal automobile insurance policy for injuries he sustained in an accident that occurred while driving his employer's vehicle. When the carrier denied the claim, the Plaintiff filed a Complaint asserting that the Plaintiff had breached its contract. It was noted that, at the time of the trial court's Opinion, the Superior Court had not yet issued its *Rush* decision.

After the trial court ruled in the *Jones* case, the Plaintiffs appealed the decision but the matter was stayed in anticipation of the Superior Court's decision in the *Rush* case.

In the end, the Pennsylvania Superior Court in the *Jones* case remanded that matter back to the trial court for further proceedings.

Regular Use Exclusion Ruled Unenforceable

In the Federal Court case of *Johnson v. Progressive Adv. Ins Co.*, No. 2:21-CV-01916-AJS (E.D. Pa. Feb. 23, 2022 Schwab, J.), the Court denied a carrier's motion to dismiss a Plaintiff's UIM claim in which the carrier was attempting to rely upon the Regular Use Exclusion.

According to the Opinion, the Plaintiff was in a motor vehicle accident and secured the minimal policy limits available under the tortfeasor's policy.

At the time of the accident, the Plaintiff lived with her sister, was a regular user of her sister's vehicle, and was driving her sister's vehicle at the time of the accident. The Plaintiff sought UIM coverage under the policy that covered her sister's vehicle. The Plaintiff asserted that she was a resident relative in relationship to her sister.

The UIM carrier denied coverage to the Plaintiff under the regular use exclusion.

After the issuance of the Pennsylvania Superior Court's decision in *Rush v. Erie Ins. Exchange*, 256 A.3d 794 (Pa. Super. 2021), in which that court held that regular use exclusions were not enforceable because they run counter to Pennsylvania's Motor Vehicle Financial Responsibility Law, the Plaintiff reiterated the request for UIM coverage.

The Defendant carrier denied the UIM claim again and the Plaintiff filed this lawsuit.

In its decision in this *Johnson* case, the Federal Court noted that the *Rush* decision had been appealed to the Pennsylvania Supreme Court but that the Pennsylvania Supreme Court had not yet indicated if it would be accepting that appeal for review.

In this Federal Court matter, the carrier attempted to argue that the regular use exclusion was still valid even though the Superior Court invalidated it in *Rush*. The insurance company attempted to cite to the Pennsylvania Supreme Court Opinion in *Williams v. Geico Govt. Emp. Ins. Co.*, 32 A.3d 1195 (Pa. 2011).

The District Court in *Johnson* decided not to follow the *Williams* decision and found that the *Williams* decision was only a public policy based decision and not statutorily based decision as the more recent *Rush* decision was relative to the MVFRL.

The Court in Johnson accepted the Plaintiff's argument that the regular use exclusion runs afoul of Section 1731 of the MVFRL, 75 Pa.C.S.A. Section 1731. As such, the District Court denied the carrier's motion to dismiss without prejudice to the carrier's right to re-raise the matter should the Pennsylvania Supreme Court take up the issue and reverse the Superior Court decision in *Rush*.

Rejection of UIM Coverage At Inception of Policy Carries Through

In the case of *Koch v. Progressive Direct Ins. Co.*, No. 1302 MDA 2021 (Pa. Super. Aug. 4, 2022 Bender, P.J.E., Stabile, J., and Stevens, P.J.E.), the Pennsylvania Superior Court reversed a trial court's Order which both denied the carrier's Motion for Summary Judgment and granted a Plaintiff's Motion for Summary Judgment on issues regarding the availability of UIM benefits under the circumstances presented.

According to the Opinion, this matter arose out of a motor vehicle accident during which the Plaintiffs were located on a motorcycle. The third party tortfeasor paid the available liability limits of $15,000.00 to each of the two Plaintiffs.

At the time of the accident, the Plaintiff's motorcycle had been covered by a policy which provided bodily injury coverage of $100,000.00 each person and $300,000.00 each accident. However, uninsured and underinsured motorist coverage had previously been rejected on the policy.

The Plaintiffs presented at demand to the carrier for bodily injury and UIM benefits. Progressive refused to pay the requested UIM benefits based upon its assertion that the Plaintiff had signed a valid waiver form rejecting UIM coverage.

When the carrier denied coverage, the Plaintiff filed a breach of contract action in which action it was requested that the trial court make a determination as to the availability of the UIM coverage.

By way of background, the carrier asserted that the Plaintiff originally rejected UIM coverage at the inception of the policy. At the time the policy was sold, the carrier was then identified as Progressive Halcyon Insurance Company. Although Progressive Halcyon changed its name to Progressive Direct thereafter, the Plaintiff maintained his policy with this company for various motorcycles.

Progressive asserted that the Plaintiff's rejection of UIM coverage at the inception of the policy remained effective and carried forward through the addition and deletion of different motorcycles to the policy as the Plaintiff never affirmatively changed this designation of rejecting UIM coverage.

The Plaintiff presented evidence of a telephone conversation he had with a representative of Progressive Direct about nine months before the accident during which the Plaintiff sought out information on purchasing additional coverage for his motorcycle. However, during that phone conversation only uninsured motorist coverage was discussed and not underinsured motorist coverage. At the end of the phone call, the Plaintiff added uninsured motorist coverage to his motorcycle policy.

At the trial court level, the trial court found that the Progressive representative had misled the Plaintiff during this phone call and created and incongruous uninsured motorist coverage and underinsured motorist coverage selection process when the representative discussed uninsured protection but failed to advise the Plaintiff of the option of underinsured motorist coverage in response to the Plaintiff's inquiry about purchasing additional coverage. As such, the trial court concluded that the Plaintiff had not made a "knowing waiver" of UIM coverage. The trial court therefore found that the rejection of UIM form that the Plaintiff had signed years before during the inception of the policy was void under the Motor Vehicle Financial Responsibility Law. As such, the trial court had determined that there was available UIM coverage under the policy that was in place at the time of the accident.

As noted, the Pennsylvania Superior Court reversed on appeal.

On appeal, with regards to the allegation that the Plaintiff was misled, the appellate court noted that the Plaintiff's Complaint did not seek to find the carrier liable on a tort theory of misrepresentation, but rather was a Complaint based on a claim of breach of contract.

Moreover, the Plaintiff did not allege that the Progressive representative was negligent or had established a fiduciary relationship with the Plaintiff during the telephone call regarding possible increased insurance coverages. As such, the appellate court limited its review as to whether summary judgment was appropriate in the context of a breach of contract claim.

The Superior Court reviewed §1731 of the Motor Vehicle Financial Responsibility Law, which requires carriers to provide the insured with specific information as to the availability of uninsured and underinsured motorist coverage. That statute also mandates that a rejection of uninsured and/or underinsured motorist coverage must be confirmed in writing with certain stated language in prominent type and location. Section 1731 requires carriers to secure this written waiver of coverage in order to confirm a knowing and voluntary rejection of each type of coverage by the insured.

Here, in this case, the appellate court noted that the carrier had produced a valid, signed rejection form from the Plaintiff that complied with §1731. The court noted that the record confirmed that, although the carrier changed its name over the years, that name change did not result in the creation of a new company. It was also noted that the Plaintiff's policy remained the same throughout the years.

It was also emphasized at the appellate level that the carrier had presented evidence that it had consistently sent the Plaintiff policy renewals which repeatedly advised the Plaintiff that the Plaintiff had rejected UIM coverage.

The Superior Court noted that, in interpreting §1731, the appellate courts of Pennsylvania have held that an insured's affirmative decision to waive UIM coverage is presumed to be in effect throughout the lifetime of that policy until that decision on coverage is "affirmatively changed" by the insured. *See* Op. at 13.

The appellate court also emphasized that the language of §1731 specifically provides that any person who completes a valid waiver form rejecting uninsured or underinsured coverage under §1731(b)-(c) is "precluded from claiming liability of any person based upon inadequate information." *Id*.

Furthermore, the Court also noted that, under §1791 of the Motor Vehicle Financial Responsibility Law, once the mandates of §1731 are met in terms of a valid waiver form, no other notice or rejection shall be required. *Id*.

In the end, the court found that, based upon Pennsylvania case law and the language of §1731, the UIM rejection forms signed by the Plaintiff at the beginning of the policy remained valid such that the Plaintiff was not entitled to UIM coverage at the time of the accident. As such, the trial court's decision was reversed.

Court Upholds Employer's Rejection of UIM Coverage Where Employee Sought UIM Benefits

In the *Grenell v. Zurich American Ins. Co.*, No. 2:21-CV-36 (W.D. Pa. Sept. 22, 2022 Cercone, J.), the court addressed challenges to UM and UIM rejection forms.

According to the Opinion, the Plaintiff was involved in a motor vehicle accident in August of 2019.

The Plaintiff settled with the tortfeasor for the liability limits and then secured UIM benefits from his own insurance company, which was the Agency Insurance Company.

The Plaintiff thereafter sought additional UIM benefits on the vehicle that he was operating at the time of the accident and which vehicle was provided to him by his employer. That vehicle was covered under an automobile insurance policy issued by Zurich American Insurance Company.

The record before the court confirmed that the Plaintiff was permitted to use the vehicle for business and personal use. The record also confirmed that the Plaintiff paid taxes on the benefits he received from the personal use of the vehicle.

According to the Opinion, the employer had rejected UIM coverage on the vehicle.

The Plaintiff challenged the validity of this UIM rejection under an argument that he was never notified of the rejection.

Cross Motions for Summary Judgment were filed.

The court held that the UIM rejection form was valid and enforceable. The court noted that the waiver was executed by someone with authority at the employer's office to reject the coverage on behalf of the employer. As such, the court rejected the Plaintiffs' arguments in opposition.

Federal Court Addresses Issues of Intra-Policy and Inter-Policy Stacking

In the case of *Metropolitan Group Prop. and Cas. Ins. Co. v. McGinnis*, No. 1:19-CV-00927 (M.D. Pa. Aug. 22, 2022 Wilson, J.), the court denied the Plaintiff's Motion to Dismiss the Defendant's class action Counterclaim.

According to the Opinion, this matter involved a dispute between the parties over UIM stacking issues.

The Plaintiff is involved in a motor vehicle accident after which he secured the tortfeasor's liability limits and the limits of a UIM policy that he had purchased. However, the Plaintiff alleged those sums were insufficient to fully compensate him for his injuries.

As such, the Plaintiff then made a claim for additional UIM coverage through two (2) more UIM policies that were issued to his parents, with whom the Plaintiff lived at the time of the incident.

The injured party alleged that, although the insured under the policies at issue had signed a rejection of stacked limits of UIM coverage, the injured party asserted that that document only served to waive intra-policy stacking of UIM benefits, but still allowed for inter-policy stacking of UIM benefits.

The UIM carrier asserted that it had properly denied the injured party's claim for UIM benefits under the parents' policy. The UIM carrier filed a Complaint seeking a declaratory judgment that it was not liable on the injured party's UIM claim.

The injured party filed an Answer along with a class action counterclaim seeking a declaration and compensatory relief on behalf of two (2) subclasses of persons who were injured in a motor vehicle accident as a result of the negligence of an uninsured or an underinsured motorist and who were the named insured or a resident relative insured under an automobile insurance policy issued by the carrier where the carrier had denied a claim by reason of a household exclusion and/or a owned, insured exclusion under the policy.

The issue came before the court by way of a Motion to Dismiss the class action counterclaim filed by the UIM carrier. As noted, the court denied the Motion to Dismiss.

In the court's decision in this *McGinnis* case, it was noted that the decision had been stayed pending the issuance of a decision in the case of *Donovan v. State Farm Mut. Auto. Ins*. The Donovan decision issued by the Pennsylvania Supreme Court can be found at 256 A.3d 1145 (Pa. 2021) or by way of a link contained in a Tort Talk blog post found HERE.

The court in this *McGinnis* case noted that the UIM carrier was proceeding, in part, with an argument that the injured party should be precluded from proceeding on a class action claim based on the household exclusion issue. The UIM carrier additionally argued that the injured party was precluded from recovery under the "regular use" exclusion contained in the policy.

The injured party countered with an argument that the UIM carrier should have paid his claim for UIM benefits under his parents' policy because both Pennsylvania and Third Circuit case law have invalidated the household exclusion. The injured party additionally argued that the policy did not contain a regular use exclusion.

The court here ultimately framed the issue as being whether the injured party could stack his coverage under his own policy with the coverage provided under his parents' policies.

The court in this *McGinnis* case went on to note that the parties in this matter agreed that the parents had executed a stacking waiver consistent with the language of 75 Pa. C.S.A. §1738(d). The court also noted that the Pennsylvania Courts have stated that the stacking waiver only serves to waive intra-policy stacking, but not inter-policy stacking, because there was more than one (1) vehicle covered by the parents' policy.

Accordingly, the court found that, under Pennsylvania law, the injured party was presumed to be eligible for inter-policy stacking, absent some applicable exclusion.

After reviewing the language of the parents' policy, the court in this case noted that the carrier conceded that it would not deny coverage on the basis of the household exclusion because that exclusion was viewed as having been invalidated under the *Donovan* case.

With regard to the argument raised by the carrier relative to a "regular use" exclusion, the court found that this argument had been waived by the carrier for failing to raise it in its original Brief. As such, the court denied the Motion to Dismiss the class action counterclaim in this regard without prejudice to the carrier's right to renew its "regular use" exclusion argument at the summary judgment stage.

Arbitration Clause From Uber Not Enforceable Where Plaintiff Did Not Click On it – Right to Jury Trial Upheld

In the case of *Chilutti v. Uber Technologies, Inc.*, No. 1023 EDA 2021 (Pa. Super. Oct. 12, 2022 Stabile, J., Dubow, J., McCaffery, J.)(Maj. Op. by McCaffery, J.(Dissenting Op. by Stabile, J.), the Court held that an arbitration agreement offered by the Defendant via a set of hyperlinked "terms and conditions" on a website or smartphone app that was never clicked on, viewed or read by the Plaintiff was not enforceable against the Plaintiff.

The Plaintiff was wheelchair bound and injured while riding in a car provided by Uber on his way home from a medical appointment.

The Plaintiff filed a negligence claim in the court of common pleas but Uber argued that the case was subject to a mandatory arbitration agreement found in the hyperlinked terms and conditions.

The trial court upheld the arbitration agreement as being applicable and granted Uber's motion to compel arbitration.

Emphasizing the importance of the constitutional right to a jury trial, the Superior Court reversed and held that the arbitration agreement could not be asserted against the Plaintiff as the Plaintiff had not affirmatively agreed to the arbitration clause. The appellate court instead found that the injured party could invoke his constitutional right to a jury trial.

In so, ruling the Superior Court also issued a new standard of review to be applied to the question of whether or not a party had unambiguously manifested an intent to assent to an arbitration clause. **See Op. at p. 30-31.**

Law Passed Regarding Peer-to-Peer Carshare Rentals and Insurance Requirements

In a new law passed by the Pennsylvania Legislature, effective immediately, new insurance ground rules were set for peer-to-peer carshare rentals.

The law defines "Peer-to-peer carsharing" as "[t]he authorized use of a vehicle by an individual other than the vehicle's owner through a peer-to-peer carsharing program. The term does not include a rental car obtained through a rental car company."

The law outlines the insurance coverage requirements for companies engaging in peer-to-peer carsharing, and mandates an additional layer of insurance so that injured third parties won't be left uninsured if a car owner's policy includes exceptions for livery (for-hire vehicles) activities or business activities.

It appears that, under the law, insurers are allowed to exclude coverage to an insured in the event the insured rents a peer-to-peer car, such that the renter would have to utilize the insurance coverage secured by the peer-to-peer carshare company, which coverage is permitted to be provided at the minimum levels required by the Motor Vehicle Code.

Forum Selection Clause Addressed in Post-Koken Case

In the case of *Coello v. Fitzgerald and Erie Insurance Exchange*, No. 7019-CV-2021 (C.P. Monroe Co. Feb. 11, 2022 Zulick, J.), the court addressed the issue of proper venue in a post-Koken motor vehicle accident litigation.

Relative to the Preliminary Objections filed by the UIM carrier Defendant asserting improper venue, the court noted that, although venue is proper in Monroe County under Pa. R.C.P. 2179, which allows for an injured party to bring a civil action against an insurance company/

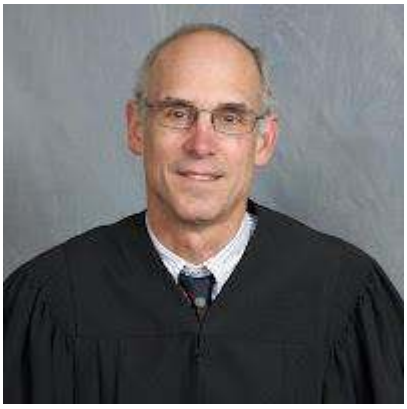
corporation in a county where that company or corporation regularly conducts business, in this matter, Erie Insurance was relying upon a forum selection clause in the parties' insurance contract.

Under that forum selection clause, the parties agreed that any suit to enforce the terms of the policy would be filed in the county of the Plaintiff's legal domicile at the time the suit was filed. The record in this case confirmed that the Plaintiff alleged in his Complaint that he resided in Scranton, Lackawanna County.

The court upheld the forum selection clause and carved out the UIM case and transferred that portion of the case to Lackawanna County but kept the Plaintiff's case against the tortfeasor in Monroe County.

As such, the UIM carrier Defendant's Preliminary Objections with regards to venue was sustained.

In so ruling, the court found that the Plaintiff's argument that it would be unreasonable to put him to the expense of securing a medical expert for two (2) separate trials did not outweigh the contract provision on venue.



Judge Arthur L. Zulick

Monroe County

In his Opinion, Judge Arthur L. Zulick of the Monroe County Court of Common Pleas also addressed the tortfeasor Defendant's demurrer against the Plaintiff's claims against punitive damages. The tortfeasor Defendant asserted that the Plaintiff failed to allege sufficient facts to support such a claim and that the Plaintiff had only merely alleged that a motor vehicle collision had occurred.

Relative to the allegations of recklessness, Judge Zulick referred to Rule of Civil Procedure 1019(b), which provides that conditions of the mind may be averred generally. The court noted that, under the case of *Archbald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. 2009), an allegation of recklessness is an allegation as to a condition of the mind which could be averred generally.

As such, the court denied the Defendant's demurrer to the Plaintiff's claim for punitive damages and noted that such a decision should be left to the jury in terms of whether the Plaintiff's case met the burden of proof in this regard.

No Duty on UIM Carrier To Advise Plaintiff of Change in the Law

In the case of *Devine v. Geico General Ins. Co.*, No. 5:21-CV-02679-JMG (E.D. Pa. Jan. 7, 2022 Gallagher, J.), the court addressed claims of breach of contract, breach of the implied covenant of good faith and fair dealing, statutory bad faith claims and claims of a violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL) in a UIM case in which the household exclusion was relied upon by the carrier.

At issue before the court was a Motion to Dismiss the Complaint filed by the carrier. This motion was largely based on statute of limitation arguments.

The court found that the event triggering the running of the statute of limitations was the original denial of the claim and not a later refusal to pay after a renewed demand was submitted by the Plaintiff.

The court applied the four (4) year statute of limitations on the contract claims, including a breach of the covenant of good faith and fair dealing. The court found that these claims were barred based upon the allegations on the face of the Complaint.

The court also noted that the statutory bad faith claims asserted by the Plaintiff was subject to a two (2) year statute of limitations. As such, those claims were also found to be time-barred.

Relative to the Plaintiff's bad faith claims, the court found that the Plaintiff had failed to allege any specific facts to support these claims, even if they were not barred by the statute of limitations.

Notably, the Plaintiff also asserted that the carrier had violated the UTPCPL because the carrier allegedly breached a duty to notify the insured that the Pennsylvania Supreme Court had changed the law regarding the household exclusion by way of the Supreme Court's decision in the case of *Gallagher v. Geico*.

The court in this *Devine* case found "no support in Pennsylvania law for such an extraordinary duty" as alleged by the Plaintiff.

Judge Gallagher also noted in the *Devine* case that the "Courts that have addressed the issue of whether a company has a duty to inform its customers of a change in the law have uniformly held that no such duty exists."

Given that the court found that any effort to amend their Complaint would be futile, the Complaint in this matter was dismissed with prejudice by the court.

Credit Due to UIM Carrier

In the case of *State Farm Mut. Auto. Ins. Co. v. Griffiths*, No. C.A. 20-202 Erie (W.D. Pa. Aug. 23, 2022 Baxter, J.), the court granted the Plaintiff insurance company's Motion for Summary Judgment. In this case, the injured party was seeking underinsured motorist benefits after settling with both the third party tortfeasors.

The court found that the non-duplication provision found in the liability policy that covered one of the tortfeasor drivers was unenforceable as against public policy.

The court additionally found that the UIM insurance carrier was entitled to a credit in the full amount of the available policy limits against any UIM benefits to which the injured party might be entitled to pursue under the UIM policies at issue.

In its decision, the court noted that *Boyle v. Erie Ins. Co.*, 656 A.2d 941 (Pa. Super. 1995), governed the amount of the bodily injury credit a UIM carrier was entitled to claim when an injured party settles a liability claim against the tortfeasor. That decision holds that a UIM carrier is entitled to a credit in the full amount of the liability limits.

The court also noted that a secondary UIM carrier is entitled to a credit of not only the liability limits but also for the full amount of the UIM limits of the primary UIM carrier regardless of the terms of an underlying settlement.

As such, the court found that the UIM insurance company in this matter was entitled to a credit of the third party liability limits and the first level UIM limits.

Limited Tort

In the case of *Devoue v. American Sitework, LLC*, No. 2:20-CV-06003-KSM (E.D. Pa. March 4, 2022 Marston, J.), the court addressed whether or not a Plaintiff should be considered to be a limited tort Plaintiff or a full tort Plaintiff under a given set of circumstances.

According to the Opinion, the Plaintiff was driving an uninsured vehicle when he was allegedly injured in an accident that occurred when pebbles allegedly fell from the back of the Defendant's vehicle which was registered in New Jersey.

Ordinarily, under Pennsylvania law, the Plaintiff would be deemed to be a limited tort Plaintiff under §1705(a)(5) because he was the owner of a registered but uninsured vehicle.

However, in this case, the court held that, in the third party case, the Plaintiff would be considered a full tort Plaintiff under §1705(d) because the Plaintiff was allegedly injured as a result of the alleged negligence of a driver of a vehicle that was registered in another state. As such, the court ruled that the Plaintiff need not show that he sustained a serious injury in order to cover non-economic damages.

A review of the court's detailed Order revealed that the court came to this conclusion through its construction of the statutory language.

Res Ipsa Loquitur Doctrine Applied in Motor Vehicle Accident Case

In the case of *Houck v. WLX, LLC*, No. 3:19-CV-275 (M.D. Pa. March 10, 2022 Mariani, J.), the court denied summary judgment after finding that a Plaintiff had created enough of a record in a circumstantial case as to the justify the application of the *res ipsa loquitur* doctrine in a case where an item allegedly fell off a Defendant's truck, bounced, and went through the windshield of the Plaintiff's decedent's vehicle with fatal results.

The court noted that, although there were no witnesses, the facts of the case, viewed in a manner most favorable to the Plaintiff as required by the applicable standard of review, established that an item from the Defendant's truck could have possibly fallen off of the truck, bounced on the roadway, and ended up through the windshield of the decedent.

Punitive Damages Claim Against Bus Driver Based On Cell Phone Use Allowed to Proceed

In the case of *Brown v. White*, No. 2:21-CV-01387-KSM (E.D. Pa. May 25, 2022 Marston, J.), the court denied a Partial Motion for Summary Judgment seeking the dismissal of claims of punitive damages in a bus accident case.

According to the Opinion, this matter involved a Plaintiff passenger who filed suit against a Greyhound bus driver and his employers alleging, in part, that the driver was reckless in using his cell phone while driving a bus on an overnight trip with 22 passengers.

The record before the court also indicated that, while the Plaintiff slept for most of the trip, she allegedly woke up twice when the bus veered onto rumble strips on the edge of the road. She was also allegedly awoken again at 4:45 a.m. when the bus rear-ended a tractor trailer. It was alleged that the tractor trailer was illuminated and clearly visible but that the bus driver allegedly did not see the tractor trailer until immediately before impact. It was also asserted that the bus was traveling at 72 mph at the time.

In its Opinion, the court noted that, under Pennsylvania law, punitive damages are an extreme remedy that may be awarded only when a Plaintiff has established that a Defendant has acted in any outrageous fashion due to either the Defendant's evil motive or his or her reckless indifference to the rights of others. The court further noted that a Defendant acts recklessly where his or her conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his or her conduct negligent. Judge Marston noted in her Opinion that, while cell phone usage while driving, without more, is typically insufficient to support a finding of recklessness, courts applying Pennsylvania law have

held that cell phone usage may rise to the level of recklessness where aggravating factors render the cell phone usage particularly egregious.

In this case, the court found that a reasonable jury could find that the bus driver was using his cell phone while driving. The court noted that a dash cam video from ten (10) seconds before the accident appeared to show a glowing light in the bus driver's lap near his left hand, which a reasonable jury could understand to be from a cell phone.

The court additionally noted that the bus driver's cell phone records showed that he used a substantial amount of data in the three (3) hour window around the accident.

The court additionally emphasized that the bus driver was driving a large bus with twenty-two (22) passengers on an overnight trip and that the bus driver was driving a fast as the bus could possibly go, that the bus driver was possibly driving with one (1) hand on the steering wheel. The court also pointed to evidence that the bus driver never tapped the brakes prior to the subject rear-end collision.

The court noted that there were several aggravating factors present in the case that could render the bus driver's cell phone usage particularly egregious. As such, since the court found that a reasonable jury could find that the bus driver was reckless under the circumstances, the court refused to dismiss the Plaintiff's punitive damages claims by way of this partial Motion for Summary Judgment.

Third Party Release Serves to Bar UIM Claim

In the case of *Richards v. Nationwide Prop. & Cas. Ins. Co.*, No. 289 of 2019, G.D. (C.P. Fay. Co. Feb. 23, 2022 George, J.), the court granted the Defendant insurance company's Motion to Dismiss a Plaintiff's UIM claims on the basis that the Plaintiff had signed a Release which discharged the carrier Defendant from all past, present, and future claims arising out of the accident at issue.

According to the Opinion, the Plaintiff and her husband were in a motor vehicle accident after the Plaintiff's husband lost control of the vehicle, struck a center divider, and then were struck by another vehicle.

At the time of the accident, there were two (2) policies issued by Nationwide that existed for the Plaintiff's household. The first policy covered the Plaintiff and her husband as well as the car involved in the accident and the second policy covered other household vehicles.

As the husband was the allegedly at-fault driver in the accident, the Plaintiffs made a third party bodily injury negligence claim against her husband under the first policy, under which the Defendant carrier paid the policy limits.

The Plaintiff, who then assisted by counsel, signed a Release with respect to that tortfeasor Defendant in terms of the accident.

The Plaintiff then attempted to assert a claim for UIM benefits under the second Nationwide policy, claiming that there was a mutual understanding of the parties that the above noted Release would not affect this request.

The Defendant carrier denied this claim and argued that the UIM policy did not provide coverage for any motor vehicle furnished for the regular use of the Plaintiff, the Plaintiff's resident, or the Plaintiff's relative.

The Plaintiff then brought suit against the Defendant alleging that the regular use exclusion in the policy conflicted with Pennsylvania's Motor Vehicle Financial Responsibility Law.

The Defendant carrier responded by filing a Motion for Summary Judgment in which it was separately also asserted that the Plaintiff had previously settled all claims by executing an unambiguous Release.

The defense argued that, although the Plaintiff argued that there was a mutual mistake at the time of the signing of the settlement agreement, the court held that Pennsylvania law treats releases as contracts and that the Plaintiff was represented by counsel at the time of the signing of the settlement agreement at which point she indicated that she understood the nature of the contract.

Based on this analysis the court granted the Defendant's Motion for Summary Judgment. The court emphasized that the Plaintiff was admittedly aware of the existence of the additional insurance policies when she signed the Release under which she agreed to settle all claims.

Delay Damages To Be Calculated After UIM Verdict Molded Down to Limits

In the case of *Fertig v. Horace Mann Ins. Co.*, No. 16-CV-4801 (C.P. Lacka. Co. Aug. 19, 2022 Nealon, J.), the court addressed issues regarding the molding of a jury verdict to the amount of the UIM carrier's policy limits and how to handle a claim for delay damages based upon the verdict in this context.

According to the Opinion, there were two (2) separate jury trials in this matter given issues that were raised following the first trial.

After the juries in the separate UIM benefits trial awarded the Plaintiff $75,000.00 in economic damages and $175,000.00 in non-economic damages, for an aggregate gross award of $250,000.00, the combined verdicts were reduced to a net UIM award of $150,000.00 after the application of a credit for the tortfeasor's liability insurance coverage limits of $100,000.00.

Thereafter, the UIM Defendant filed a Post-Trial Motion pursuant to Pa. R.C.P. 227.1(a)(4) seeking to mold the $150,000.00 net award further downward to the amount of the UIM coverage available of $100,000.00.

At the same time, the Plaintiff filed her own Post-Trial Motion requesting an award of delay damages under Pa. R.C.P. 238 based upon the higher net award of $150,000.00.

Judge Terrence R. Nealon
Lackawanna County

Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas reviewed Pennsylvania precedent and confirm that, absent bad faith liability on the part of the UIM carrier, the law of Pennsylvania limits the maximum legally recoverable damages in a UIM trial to the UIM policy limits set forth in the insurance contract and requires that an award that is in excess of those policy limits be molded down to the amount of the UIM policy limits.

As such, the court agreed to grant the UIM carrier's Motion to Modify the Net UIM Verdict of $150,000.00 down to the UIM policy limit of $100,000.00.

Relative to the claim for delay damages presented by the Plaintiff, the carrier initially asserted that delay damages are not recoverable in connection with a UIM benefits claim.

Judge Nealon disagreed and noted that, although arbitrators in a UIM Arbitration proceeding do not have the authority to award delay damages under Rule 238 unless the insurance contract grants the arbitrators that authority, the parties in this case chose to litigate the UIM claim in a civil action in the Court of Common Pleas, thereby rendering Pa. R.C.P. 238 applicable to the matter.

Judge Nealon further held that, since the UIM carrier did not make a written settlement offer and did not establish that the Plaintiff caused any delay of the trial, the Plaintiff's Motion for Delay Damages was granted.

However, the court noted that the delay damages would be calculated upon her legally recoverable damages of the $100,000.00 UIM policy limits, rather than the net award of $150,000.00.

PREMISES LIABILITY UPDATE

Exculpatory Clause in Gym Membership Agreement Upheld

In the case of *Milshteyn v. Fitness International, LLC*, 2022 Pa. Super. 30 (Pa. Super. Feb. 18, 2022 Panella, P.J., Kunselman, J., and Stevens, P.J.E.) (Op. by Panella, P.J.), the Pennsylvania Superior Court found that the trial court properly granted summary judgment to a fitness facility in a Plaintiffs' slip and fall action where the membership agreement signed by the Plaintiff was not found to be a contract of adhesion.

The court also found that the release in the agreement clearly foreclosed the Plaintiff from proceeding on the claim presented.

The court additionally found that the Plaintiffs' claim for gross negligence found in an Amended Complaint constituted a wholly distinct claim from the claim presented in the original Complaint. The court noted that the Plaintiffs had attempted to add a claim of gross negligence after the expiration of the applicable statute of limitations in an effort to get around the release in the membership agreement given that a claim for gross negligence would not have been barred by the membership agreement. As such, the court stated that, in this context, the Plaintiff's claims for gross negligence should be deemed to constitute a new cause of action.

As such, the appellate court affirmed the trial court's entry of summary judgment.

Trivial Defect Doctrine Not Applicable To Private Property

In the case of *Ramsey v. Buchanan Auto Park, Inc.*, No. 1:16-CV-01879-CCC (M.D. Pa. March 7, 2022 Connor, J.), the court granted in part and denied in part, post-trial motions in a slip and fall case after a verdict was entered in favor of the Plaintiff.

In one notable ruling, the court held that the trivial defect jury instructions that were developed in the context of public sidewalks was not applicable in the context of alleged defects on private property that allegedly injured business invitees.

The court noted that, in any event, this topic of liability was adequately covered by the jury instructions under which the jury was advised that, in order for the Plaintiff to recover, the property must have a condition which amounted to an unreasonable risk of harm to the Plaintiff.

This decision is also notable in that the Court found that photographs of the area where the Plaintiff fell that were taken in 2017 were admissible even though there were slight variations in the conditions of the area since the Plaintiff's 2014 fall down event. The Court noted that the photos were authenticated by a witness and that any variations were pointed out to the jury by the witness and in the jury instructions.

The court otherwise noted that damages for lost wages awarded by a jury is not necessarily excessive merely because the award exceeds the amount of the worker's compensation lien. The court noted that the lien is not a cap on the Plaintiff's claim for past wage loss.

However, the court did find that the award entered by the Plaintiff for the Plaintiff's claim for loss of future earnings was against the weight of the evidence where the Plaintiff failed to present any evidence in this regard.

The court ordered a new trial on the issue of damages after finding that the jury may have erroneously included non-economic damages in its future earnings award.

"There Must have Been a Substance" That Caused Plaintiff to Fall – Case Dismissed

In the case of *Staiger v. Weis Markets, Inc.*, No. 5:21-CV-03709 (E.D. Pa. Nov. 2, 2021 Leeson, J.), the court granted a Defendant's Motion to Dismiss a Plaintiff's slip and fall action where the court found that the Plaintiff failed to allege facts that would plausibly support a claim that a dangerous condition was the cause of the Plaintiff's fall. Leave to file an Amended Complaint was granted.

According to the Opinion, the Plaintiff allegedly slipped and fall in the supermarket while shopping. The Plaintiff asserted that she believed that some substance on the floor in an aisle of the store caused her to fall.

The court noted that the Plaintiff's Complaint largely relied upon legal conclusions to suggest the existence of a dangerous condition.

The lone factual allegation found in the Complaint was that "as [the Plaintiff] has no medical conditions, [the Plaintiff] believes and avers that there must have been a substance in the aisle which caused her to fall."

Lack of Actual or Constructive Notice Leads To Entry of Summary Judgment

In the case of *Hendershot v. Wal-Mart, Inc.*, No. 5:21-CV-02422-JMG (E.D. Pa. July 11, 2022 Gallagher, J.), the court granted summary judgment in favor of the Defendant in a slip and fall case.

According to the Opinion, the Plaintiff asserted that she tripped and fell on a rolled up mat in the entryway of the Wal-Mart store. At her deposition the Plaintiff admitted that she could only speculate as to how the mat became in a rolled up state. The Plaintiff also admitted that she could not testify as to how long the mat had been in that condition before she encountered it.

The court noted that the record did not establish that the Defendant had any actual or constructive notice of any alleged condition that allegedly caused the Plaintiff to fall. Moreover, the court stated that there was no evidence presented by the Plaintiff that the Defendant was responsible for the alleged condition that allegedly caused the Plaintiff to fall.

The court additionally found that the lack of any evidence that the condition was a recurring one precluded any finding of actual notice on the part of the Defendant.

It was also emphasized by the Court that the Plaintiff had not presented any evidence of the passage of time that was sufficient to support a claim of constructive notice on the part of the Defendant.

As such, summary judgment was granted in favor of the Defendant.

Customer Hit By Shopping Cart

In the case of *Glidewell v. Giant Food Stores, Inc.*, No. 335-CV-2018 (C.P. Col. Co. Feb. 15, 2022 Norton, J.), the court granted a Defendant's Motion for Summary Judgment in a supermarket premises liability case.

In so ruling, the court found that there were no genuine issues of any material facts in the record to demonstrate that the Defendant supermarket's actions or inactions were a substantial factor in bringing about the injuries the Plaintiff alleged suffered when another patron allegedly hit the Plaintiff accidentally with a shopping cart while the two (2) individuals were standing in a check out line.

The court noted that the Plaintiff did not have any expert reports to suggest that a long line of shopping carts or individuals in the cash register area was a dangerous condition in a supermarket check out area.

There was also evidence presented in the record that there were several witnesses who indicated that there was sufficient room for the person who struck the Plaintiff with the shopping cart to navigate her shopping cart around where the Plaintiff was standing at the time of the incident.

As noted, based upon the record before the court, summary judgment was granted in favor of the store.

Trip and Fall On Toy in Store Aisle

In the case of *Pickett v. Target Corp.*, No. 3:20-CV-00237 (M.D. Pa. Nov. 5, 2021 Mannion, J.), the court granted summary judgment in a store slip and fall case. According to the Opinion, the Plaintiff fell as a result of encountering a children's grabber toy that was on the floor in a well lit aisle of the store.

In so ruling, the court primarily accepted the defense that the incident involved an open or obvious danger. More specifically, the court found that the presence of an easily visible fallen object in a well-lit aisle in the store is an obvious as a matter of law.

The court also reaffirmed the basic rule of law that a person must watch where he or she is walking.

Judge Malachy E. Mannion

M.D. Pa.

Judge Mannion also ruled that, in a slip and fall case, the fact that a type of incident allegedly occurred frequently cannot be generally utilized to establish actual notice of a particular condition allegedly involved in a particular accident.

The court additionally rejected, as a circumlocution, the argument that the Defendant did not adequately monitor an area of the store because, if it had, the accident would not have occurred.

The court otherwise rejected the argument of constructive notice by confirming that the Plaintiff did not offer any evidence as to how long the object at issue was on the floor.

Claims Against Stort Barred By Open and Obvious Doctrine

A U-Boat

In the case of *Doundas v. Redner's Market, Inc.*, No. 2020-CV-1747 (C.P. Leh. Co. May 9, 2022 Pavlack, J.), the court entered summary judgment in favor of a Defendant supermarket after finding the Defendant was not liable for the alleged personal injuries suffered by a Plaintiff while a business invitee in the Defendant's store given that the condition involved was allegedly open and obvious and would be recognized by a reasonable person in the position of the Plaintiff, exercising normal perception, intelligence and judgment.

According to the Opinion, while the Plaintiff was in the Defendant supermarket, there was a "u-boat," that is, a cart used to stock shelves, positioned in close proximity to the refrigerators in the dairy aisle.

According to the Plaintiff, when she took a step to get between the u-boat and the refrigerator door to get an item, her foot got caught under the u-boat, causing her to fall to the ground.

The Plaintiff filed a Complaint alleging that the store was negligent and caused the Plaintiff to fall and be injured. The Plaintiff alleged that the store created an unreasonable risk of harm when the store employee positioned a u-boat in a dangerous manner because the position of the u-boat allegedly funneled patrons, including the Plaintiff, towards and against the refrigerators and that caused her foot to go underneath the u-boat, which allegedly led to her fall.

The defense filed a Motion for Summary Judgment arguing that the condition was open and obvious and that, therefore, the store did not owe the Plaintiff any duty in this regard as a matter of law.

According to the Opinion, the record more specifically revealed that the Plaintiff attempted on multiple times to retrieve yogurt out of the refrigerator but that the door would only partially open because of the position of the u-boat. As such, the court concluded from the record that the Plaintiff was aware of, and understood, the position of the u-boat. The record also confirmed that the Plaintiff admitted that she had noticed the u-boat from the time she began walking down the dairy aisle and walked up to it.

The court found from the evidence that the u-boat and its position was therefore known and obvious to the Plaintiff. The court additionally found that any risk related to the u-boat or its position would be apparent to a reasonable person because a reasonable person would understand that a temporary cart could pose a risk if a person walks so close to the cart that she came into contact with it.

As such, the Defendant's Motion for Summary Judgment was granted under the doctrine of an open and obvious condition.

Discovery of Store Surveillance Video Footage

In the premises liability case of *Dietzel v. Costco Wholesale*, No. 22-CV-0035 (E.D. Pa. July 12, 2022 Sitarski, J.), the court ruled that an incident report in a slip and fall matter was not privileged where it was a standard incident form prepared in the ordinary course of business and where there was no evidence that legal counsel ordered the preparation of the report or was involved in its preparation. As such, the Plaintiff's Motion to Compel Discovery was granted in this regard.

According to the Opinion, the Plaintiff allegedly tripped and fell on a sidewalk as he entered the Defendants' store.

In this matter, the Plaintiff also moved to compel the Defendant to produce surveillance footage.

The Defendants asserted that the fall was not captured on video because there were no nearby cameras. However, claim notes produced during discovery confirmed instructions to the Defendant to preserve footage from the nearest camera.

During the course of discovery, the Plaintiff requested the surveillance and, when it was refused, filed a Motion to Compel the Defendants to produce any footage from the property or to confirm that they failed to preserve footage as directed.

The court found that the Plaintiff's request for all security footage from the store to be an overbroad request. Instead, the court ruled that a more reasonable scope would be to allow for footage from thirty (30) minutes before and after the subject incident and/or to require the Defendant to certify that they had no such footage.

In its Opinion, the court also ordered the Defendant to provide more specific Responses to the Plaintiff's Interrogatories. However, the court denied the Plaintiff's request for the identity of all employees working anywhere on the property on the date of the incident. The court found no basis for the Plaintiff to need to know the identity of the more than 100 workers who were working at the store on the date of the incident.

Spoliation of Store Surveillance Video Footage Serves to Defeat Motion for Summary Judgment

In the case of *Defrehn v. TJX Co*., No. 20-5762 (E.D. Pa. July 26, 2022 Robreno, J.), the court denied summary judgment in a premises liability case.

The court noted that the record revealed that the Defendant failed to retain surveillance video that could have established notice on the part of the Defendant of the spill upon which the Plaintiff allegedly slipped and fell. As such, the court found that the Plaintiff was entitled to adverse inference that the video was not preserved because it contained evidence that was unfavorable to the Defendant.

The court noted that this adverse inference served to defeat the Defendant's Motion for Summary Judgment.

The court additionally generally noted that, while footprints through a spill, standing alone, are not sufficient to preclude summary judgment, in this case the Plaintiff testified that she not only saw footprints through the spill but that there was a mop, bucket, and a "Wet Floor" sign in the area prior to the Plaintiff's fall.

As such, the Plaintiff asserted that the Defendant had taken remedial steps, which created an inference of notice. The court agreed and found that this evidence could lead a reasonable jury to conclude that the Defendant had notice of the condition prior to the Plaintiff's fall and failed to remedy it. The court found this to be an additional basis upon which to deny the Motion for Summary Judgment.

Crack in the Sidewalk

In the case of *Noga v. Wal-Mart Stores East, L.P.*, No. 10170 of 2019, C.A. (C.P. Lawr. Co. March 24, 2022 Hodge, J.), the court denied a Defendant store's Motion for Summary Judgment in a trip and fall case.

The Defendant filed a Motion for Summary Judgment asserting that Plaintiff was speculating as to the cause of the Plaintiff's fall in that the Plaintiff had allegedly not provided any evidence that any alleged defect in the sidewalk was the cause of her fall.

The court found that the Defendant was not entitled to summary judgment as there was sufficient evidence in the records, including a store manager's deposition testimony regarding an alleged crack in the sidewalk where the Plaintiff fell, for a jury to conclude that the crack in the pavement was the cause of the Plaintiff's fall.

As such, the Defendant's Motion for Summary Judgment was denied.

Slip and Fall on Snow Covered Grassy Area

In the case of *Mertira v. Camelback Lodge & Indoor Waterpark*, No. 2031-Civil-2021 (C.P. Monroe Co. March 30, 2022 Williamson, J.), the court granted the Defendant's Motion for Summary Judgment in a winter slip and fall case.

In this matter, the Plaintiff alleged that the Defendants were negligent in allowing ice and snow to remain on their property, which allegedly caused the Plaintiff to slip and fall and become injured.

Of note, the court stated that the record confirmed that there was no dispute between the parties that freezing rain and/or snow was falling as the Plaintiff entered the premises, while the Plaintiff and her family dined within the premises, and for several hours even after the Plaintiff fell.

The court also noted that, as the Plaintiff and her family left the restaurant, they chose to walk on a grassy strip and not on a sidewalk or parking lot surface.

After applying the hills and ridges doctrine, the court stated that none of the Plaintiffs or the witnesses identified any hill or ridge formed by ice or snow. The court also reiterated that it was precipitating the entire time that the Plaintiff was on the premises, including several hours after she fell.

The court also emphasized the rule of law that a property owner has no obligation to correct snow and ice conditions until a reasonable time after a winter storm has ended.

The court additionally noted that there is no duty on a property owner to clear snow or ice from grassy areas as they are not intended to be traversed by pedestrians.

Retained Control Theory

In the case of *Miller v. Kinley*, No. CV-20-1214 (C.P. Lyc. Co. May 5, 2022 Tira, J.), the court denied a Motion for Summary Judgment filed by Defendant landowners in the case in which a Plaintiff who was hired to cut down a large tree on the property was injured in the process.

According to the Opinion, the Plaintiff alleged, and offered proof, that the Defendant landowners were present at the time of the incident and that they directed the Plaintiff on the manner in which to cut the tree. The Defendants also specifically indicated the area where the tree was to be dropped. It was therefore alleged by the Plaintiffs that the Defendant landowners had retained control of all, or at least, a portion, of the work that the Defendants had requested the Plaintiff to perform.

In his Opinion, Judge Tira referred to the Retained Control Theory found under the Restatement (Second) of Torts §414 to rule that the evidence raised issues of fact that allow the Plaintiff to overcome the Defendant's Motion for Summary Judgment on the liability issues presented.

Exculpatory Clause in Lease Only Applies Inside Apartment, And Not To Parking Lot Slip and Fall

In the case of *Lower v. Nevil*, No. CV-153-2020 (C.P. Snyder Co. May 6, 2022 Sholley, P.J.), the court denied a Motion for Summary Judgment in a slip and fall case that occurred at an apartment complex.

The Plaintiff allegedly sustained injuries when she slipped and fell as she walked around her car in the parking lot of a small apartment complex at which she resided. She sued the Defendant landowner for personal injuries.

After discovery was completed, the landlord filed a Motion for Summary Judgment relying upon the hills and ridges doctrine and also asserting that an exculpatory clause in the residential lease relieved the Defendant from any liability.

The court found that issues of fact prevented the entry of summary judgment relative to the hills and ridges doctrine.

With regard to the exculpatory clause in the lease agreement, the court rejected the Plaintiff's claim that the lease was a contract of adhesion but accepted the Plaintiff's argument that the exculpatory clause of the lease only applied to release the landlord from any liability for any injuries that occurred inside the specific apartment rented by the Plaintiff and not with respect to the common areas and/or parking lot where the Plaintiff actually fell. As such, the court denied summary judgment in this regard as well.

Summary Judgment Granted in Slip and Fall Case Where Ice Storm Was Still Ongoing At the Time the Plaintiff Fell

In the case of *Nunez v. Johnson & Johnson Consumer, Inc.*, No. 1093-CV-2022 (C.P. Monroe Co. Aug. 15, 2022 Williamson, J.), the court granted the Motions for Summary Judgment filed by Defendants in a slip and fall premises liability matter.

According to the Opinion, the Plaintiff was employed as a security guard at a warehouse facility. As the Plaintiff arrived for work one day, he slipped and fell in the parking lot.

The records before the court revealed that, on the day of the December 17, 2019 incident, it had been raining throughout the day with periods of freezing rain. The weather records before the court indicated that there was precipitation falling in the area from just after midnight that day until at least 2:34 p.m. later that same day, that is, until about forty (40) minutes after the Plaintiff had fallen at 1:50 p.m.

The court additionally noted that the Plaintiff confirmed during his deposition testimony that there had been icy rain falling that day before he left home for work and that such precipitation continued when he drove to work. The Plaintiff further acknowledged that, when he arrived at work and fell, the icy rain was still falling.

It was additionally noted that the snow removal contractor Defendant was still on site performing snow and ice removal services when the Plaintiff fell.

The court also noted that the Plaintiff reported that, when he arrived at the facility, he slipped and fell as he exited his vehicle. He then continued to slip while trying to get up and had to crawl to another vehicle that was parked in front of his vehicle to pull himself up from the ground. The Plaintiff then admittedly continued to slip on the icy ground as he walked to the building where he worked. The Plaintiff described that the entire area was icy, not just an isolated area by his vehicle.

The court noted that not all of the icy conditions that were still being created could be reasonably addressed prior to the time the Plaintiff had encountered those conditions. As such, the court entered summary judgment in favor of both the landowner Defendant and the snow removal contractor Defendant based, in part, upon the fact that there was an ongoing winter weather event still occurring generally throughout the area at the time the Plaintiff fell.

No Liability of Property Owners Association For Location of Bus Stop

Judge David J. Williamson of the Monroe County Court of Common Pleas recently addressed the liability of homeowners associations in the case of *Essington v. Monroe Co. Transit Auth.*, No. 5117-CV-2020 (C.P. Monroe Co. Aug. 15, 2022).

In *Essington*, the plaintiff's decedent was fatally injured when he was hit by an oncoming car at night after exiting a bus at a bus stop that was located just outside of the residential gated community known as the Pocono Country Place Property Owners Association.

The plaintiff asserted that the property owners association was negligent for failing to ensure that the bus stop located outside of their gated community was safe and/or for not allowing the buses to come inside the gated community to drop off passengers.

The court granted summary judgment in favor of the property owners association after finding that the property owners association had no control over the bus company's selection and location of its bus stops and that, therefore, the property owners association owed no duty to the plaintiff's decedent in this regard.

The court additionally confirmed that there was no evidence in the record that the property owners association encouraged or endorsed its residents to use the bus system, let alone to use it at any particular stop.

Dog Bite

In the case of *Wentz v. Blakeslee*, No. 2646-CV-2020 (C.P. Monroe Co. Feb. 7, 2022 Williamson, J.), the court denied a Motion for Summary Judgment in an alleged dog bite case given the presence of material issues of fact.

According to the Opinion, the Plaintiffs and their minor son were guests at the home of a friend. While playing outside, the minor and other children went over to a neighboring residence to say goodbye to a dog that they knew. Apparently, the dog was ill and was set to be put down the next day.

The Plaintiff alleged that, when the minor went into the room where the dog was resting, the dog allegedly attacked and bit the child after he touched the dog.

In response to the Defendant's Motion for Summary Judgment, the court found that there were material issues of fact regarding whether the Defendant had prior knowledge of his dog's alleged dangerous propensities, whether the minor Plaintiff provoked the dog, and whether the Defendant could have done anything to prevent the child from having contact with the dog.

Dog Bite - Punitive Damages

In the case of *Walsh v. Toth*, No. 22-CV-96 (C.P. Lacka. Co. June 28, 2022 Nealon, J.), the court addressed Preliminary Objections in the form of a demurrer asserted by dog owners in a case in which the Plaintiff alleged that she was attacked and injured by her neighbors' dog when she [the Plaintiff] opened the side door of her home.

The Plaintiff filed a Complaint seeking compensatory damages along with punitive damages as a result of the Defendant's alleged negligence and recklessness.

More specifically, the Plaintiff asserted that the dog owners knew of the "dangerous, aggressive, and fearsome" dog's "dangerous propensities" prior to the incident.

The Plaintiff also alleged that the dog owners were aware of other neighbors' concerns regarding the dog.

The Plaintiff additionally asserted that the owners of the dog negligently and recklessness permitted the dog to run unattended and unleashed throughout the neighborhood with reckless disregard for others.

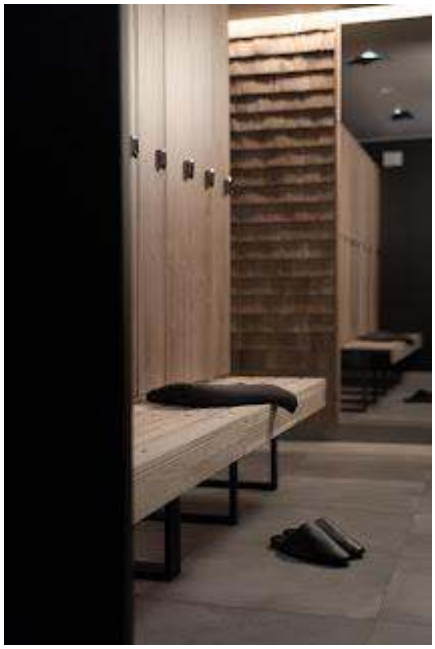
The Plaintiff also alleged that the Defendants violated certain provisions of the Dog Law, in part, by failing to keep the dog confined or firmly secured within the dog owner's premises and/or by harboring a dangerous dog with a propensity to attack people without provocation.

In this decision, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas ruled that the Plaintiff's claims under the Dog Law were permissible. The court additionally noted that, viewing the Complaint as a whole, the Plaintiff had provided the dog owners with adequate notice of the claims against which the Defendants must defend.

Furthermore, Judge Nealon ruled, as he has on numerous previous occasions, that, since the allegations of recklessness may be averred generally under Pa. R.C.P. 1019(b), and given that the related request for punitive damages is not a "cause of action" subject to the factual specificity requirements in Pa.R.C.P. 1019(a), the Defendant dog owners were not entitled to have the recklessness allegations and the demand for punitive damages stricken.

As such, the court overruled the Defendant's Preliminary Objections.

Lack of Concrete Evidence Leads to Summary Judgment in Slip and Fall in Fitness Center Case



In the case of *Rifkin v. Fitness International, LLC*, No. 19-CV-5686 // 20-CV-4547 (E.D. Pa. June 15, 2022 Sitarski, J.), the court granted summary judgment in favor of the possessor of land in this slip and fall case.

According to the Opinion, the Plaintiff slipped and fell in the locker room of the gym.

The court found that, based upon the record developed during discovery, that the out-of-possession landlord did not retain control over the premises and/or the area where the Plaintiff fell.

As such, the court found that the landlord-defendant was entitled to summary judgment.

Anyone wishing to review a copy of this decision may click this LINK. Here is a LINK to the court's companion Order.

In a separate Opinion issued by the same court in the same case on the same date, the court granted summary judgment to the gym, which was the tenant-defendant, as well.

In that decision, the court initially noted that issues of fact on the issue of whether the Plaintiff had signed a waiver form when he joined the gym precluded the entry of summary judgment in favor of the gym in that regard.

However, the court found that the tenant-defendant was entitled to summary judgment on other grounds.

In its decision, the court stated that, absent any evidence of prior similar incidents in the same location, a Plaintiff cannot establish actual notice on the part of the possessor of land in a slip and fall case.

The court additionally found that the Plaintiff failed in proving any constructive notice in this case where the Plaintiff did not know what caused him to fall, let alone how long any such condition was present.

Employer Who Furnishes Alcohol at Employee Event Considered to be a Social Host and, Therefore, Not Liable

In the case of *Klar v. Dairy Farmers of America, Inc.*, No. 1280 WDA 2020 (Dec. 17, 20221 Pa. Super. Olson, J., Nichols, J., and Musmanno, J.) (Op. by Olson, J.), the Pennsylvania Superior Court affirmed the entry of judgment on the pleadings in favor of the Defendant.

The trial court had entered judgment against the Plaintiff and in favor of an employer in a case in which the trial court had ruled that an employer who collects contributions for a social event was still considered to be a social host with respect to any liability claims under the Dram Shop Act. Based upon this ruling, the trial court dismissed the Plaintiff's negligence claims against the employer.

According to the Superior Court's Opinion, the Pennsylvania was injured in a motor vehicle accident when the vehicle operated by the Defendant driver struck the Plaintiff's motorcycle.

The Defendant driver was an employee of Dairy Farmers of America. That employer had sponsored a golf outing and encouraged its employees to attend. The employees made a monetary contribution to offset the cost of the greens fees, food, and alcohol. After collecting the contributions from the employees, the employer paid for the event in its entirety.

The Plaintiff alleged that, at the event, the Defendant driver consumed an amount of alcohol that raised his blood alcohol level beyond the legal limit. The Defendant driver then proceeded to drive and was involved in the accident with the Plaintiff.

The Plaintiff sued the Defendant driver as well as his employer under negligence claims. The employer filed a Motion for Judgment on the Pleadings arguing that it was not liable under the Dram Shop Act because it was a social host.

The Pennsylvania Superior Court ruled that an employer who furnished alcohol at a sponsored employee social event was not a licensee or other party subject to *per se* Dram shop liability but was instead a social host who could not be held proximately liable for an employee causing an alleged drunk driving accident.

<u>Note</u>: Under an Order dated June 27, 2022, the Pennsylvania Supreme Court issued an Order granting an appeal in this case.

BAD FAITH

Bad Faith Claim Dismissed Due to Insured's Failure to Uphold His End of the Bargain

In the case of *Guerrier v. State Farm*, No. 19-2435 (E.D. Pa. June 6, 2022 Pratter, J.) (Mem. Op.), the court granted the carrier's Motion for Summary Judgment and found that State Farm did not act in bad faith by instituting a subrogation action against its insured when the insured failed to notify the carrier about an auto accident and failed to respond to the carrier's request for information seeking to confirm the insured's liability coverage. In light of this ruling the plaintiff's case was dismissed.

Judge Gene E.K. Pratter of the Eastern Federal District Court of Pennsylvania opened her Opinion by aptly stating that "[a] contract is a legal instrument designed to ensure each party holds up his end of the bargain. When one party fails to do so, he cannot expect the other party to pick up his slack and then blame that other party for failing to do so."

Here, the Plaintiff-insured was found to have failed to uphold his end of the bargain and, as such, his case was dismissed by the court.

As noted, this matter arose out of a motor vehicle accident. At the time, the Plaintiff in this matter was insured by State Farm, although he was driving a loaner vehicle while his insured vehicle was being repaired. The carrier covering the loaner vehicle had denied coverage. The court confirmed that, under the terms of the State Farm policy, the Plaintiff was required to give the carrier notice of the accident "as soon as reasonably possible." The Plaintiff did not report the accident to State Farm.

However, the occupants of the other vehicle, which was also insured by State Farm did file a claim. State Farm then contacted the Plaintiff in this coverage case to confirm whether he had auto liability coverage but the Plaintiff failed to respond. As a result, State Farm initiated subrogation proceeds for the benefits it paid to the occupants of the other vehicle, and the carrier ultimately obtained a default judgment. The Plaintiff later learned of the default judgment when he was denied a renewal of his driver's license due to nonpayment of the judgment.

The Plaintiff then filed this action for breach of contract and bad faith and other claims. The Plaintiff argued that State Farm had the information it needed to know that he was one of the companies insureds when the occupants of the other vehicle filed their insurance claim.

In this case, the court granted State Farm's Motion for Summary Judgment. The court found that no reasonable jury could conclude that State Farm acted in bad faith.

Rather, the court held that the Plaintiff breach his obligation under the insurance policy to notify State Farm about the accident as soon as practicable.

The court also found that State Farm acted reasonably under the circumstances by contacting the Plaintiff to confirm his insurance coverage. When the Plaintiff failed to respond, State Farm assumed that he was uninsured and proceeded accordingly.

Moreover, the court noted that, once the Plaintiff did contact State Farm, the carrier promptly investigated the situation and then discontinued the subrogation action after confirming that the Plaintiff's loaner vehicle qualified as a substitute vehicle under his policy.

Based on these findings, the court granted State Farm's motion for summary judgment and dismissed the Plaintiff's case.

UM/UIM Bad Faith Claim Based on "Low Ball" Offer Dismissed

In the case of *Robinson v. Geico*, No. 21-CV-05059 (E.D. Pa. March 4, 2022 Kenney, J.), the court denied a Plaintiff's Motion to Amend a breach of contract Complaint to add a bad faith claim.

The Plaintiff is attempting to amend the Complaint to add a claim of bad faith by the carrier in its evaluation and alleged submission of a low ball settlement offer.

The court noted that the proposed Amended Complaint that was attached to the Motion to Amend only contained broad conclusory allegations related to an alleged bad faith claim and was devoid of any facts as to where any medical records would establish at least $50,000.00 worth of damages in the information that had been provided to defense counsel in support of the Plaintiff's settlement demand in that amount.

As such, the court found that the proposed Amended Complaint failed to state a claim upon which relief could be granted for bad faith and, as such, the Motion to Amend was denied as futile.

In so ruling, Judge Kenney noted that the proposition that the failure to immediately concede to a demand for the policy limits cannot, without more, amount to bad faith on the part of an automobile insurance carrier.

UIM Bad Faith Claim Allowed to Proceed But UTPCPL Claim Dismissed

In the case of *Wingrove v. Nationwide Prop. & Cas. Ins. Co.*, No. 2:21-CV-00940 (W.D. Pa. March 28, 2022 Colville, J.), the court found that a Plaintiff adequately pled a UIM bad faith claim regarding claims handling issues and an alleged delay in payment. However, the Court dismissed claims that were brought by the Plaintiff under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) as well as under the Pennsylvania Motor Vehicle Financial Responsibility Law.

According to the Opinion, the insured brought bad faith claims regarding the carrier's failure to pay UIM benefits and wage loss benefits. The carrier filed a Motion to Dismiss in this federal court matter.

After reviewing the Complaint, the court found that the Complaint described in sufficient detail the facts that described the who, what, where, when, and how questions with regard to alleged bad faith conduct.

More specifically, the court found that the Plaintiff had alleged facts in support of claims of a lack of any investigation or evaluation, alleged repeated failures on the part of the carrier to communicate with the Plaintiff's counsel despite Plaintiff's counsel's attempt to contact the carrier, and also alleged an unexplained delay of seven (7) months between the Plaintiff's demand and the carrier's offer. The court found that these allegations were sufficient to allow the bad faith claim to proceed.

The court otherwise dismissed the Plaintiff's UTPCPL claims after finding that that law did not apply to claims handling, but only to conduct prior to the entry of an insurance agreement. The court noted that the allegations all involved claims handling issues and not the sale of an insurance policy.

The court also agreed that the claims raised by the Plaintiff under 75 Pa. C.S.A. §1716 of the Motor Vehicle Financial Responsibility Law, which addressed first party benefits issues, did not apply to UIM claims. As such, those claims were dismissed as well.

The court otherwise refused to strike references to a fiduciary duty as set forth in the Complaint. In this regard, the court found that the Plaintiff had not specifically asserted any claim for a breach of a fiduciary duty and that there was, therefore, no need for the drastic action of striking allegations sounding in that regard from the case at that early stage of the case.

UIM Bad Faith Claim Allowed to Proceed But UTPCPL Claim Dismissed

In the case of *Defuso v. State Farm Mut. Auto. Ins. Co.*, No. 3:21-CV-507 (M.D. Pa. March 21, 2022), Judge Malachy E. Mannion of the Federal Middle District Court of Pennsylvania found that a Plaintiff had pled sufficient facts to survive a Motion to Dismiss her bad faith claim in a UIM case. However, the Plaintiff's claims for violations under the Unfair Trade Practices and Consumer Protection law were dismissed.

According to the Opinion, the tortfeasor tendered its $100,000.00 liability limits to the Plaintiff and the UIM carrier agreed to consent to that settlement. The Plaintiff had $50,000.00 in stacked UIM coverage.

The record in the case revealed that the Plaintiff participated in discovery, a statement under oath, and an IME over the first seventeen (17) months of the claim. Following the expiration of that time, the carrier made its first offer of $7,500.00.

Judge Malachy E. Mannion

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In his Opinion, Judge Mannion found that the Plaintiff had adequately pled a bad faith claim. Judge Mannion rejected the argument of the defense that the case merely involved a valuation dispute.

In so ruling, the court pointed to allegations by the Plaintiff that there were delays in the claims handling and that the carrier allegedly failed to entirely and appropriately investigate and evaluate the case presented. The Plaintiff also alleged that the carrier had unreasonably undervalued the Plaintiff's claims.

The court did, however, dismiss the Plaintiff's UTPCPL claim after finding that the Plaintiff merely recited the elements of such claim and did not allege facts to support the same. The court additionally noted that a claim of an alleged failure on the part of the carrier to act on an insurance claim in a timely manner was not a valid cause of action under the UTPCPL, as such a claim is a claim for nonfeasance as opposed to a claim of malfeasance.

Motion To Dismiss Granted - Pleadings Inadequate

In the case of *Kelly v. Progressive Advanced Ins. Co.*, No. CV 20-5661 (E.D. Pa. Sept. 27, 2021 Jones, II, J.), the court dismissed a UIM bad faith claim after finding that the Plaintiff had failed to plead sufficient facts. The court did grant the Plaintiff leave to amend the Complaint.

At issue were the Plaintiff's claims of an insufficient claims investigation by the carrier and other poor claims-handling allegations.

While the court emphasized that a bad faith claim against an insurance company can include claims of a lack of investigation, unnecessary or unfounded investigation, failures to communicate with an insured, or failure to properly acknowledge or act upon a claim, as well as other poor claims handling assertions, a Plaintiff cannot merely say that a carrier acted unfairly but instead "must describe with specificity what was unfair."

Judge Jones additionally noted that a Complaint alleging bad faith must specifically include facts to address who, what, where, when, and how the alleged bad faith conduct occurred. The court reiterated that bare bones bad faith pleadings in the federal district courts of Pennsylvania are routinely dismissed.

Turning the Complaint before it, the court in this Kelly case found that the pleadings by the Plaintiff were inadequate and were devoid of facts necessary to infer a plausible bad faith claim. The court noted that, other than the date of the accident, the Complaint did not contain any references to dates or time spans with regards to allegations that the carrier's alleged actions were untimely.

The court additionally noted that the Plaintiff's claims that the carrier's lack of a thorough claims assessment was unreasonable but that the Plaintiff did not provide any indication as to how these alleged deficiencies were unreasonable.

The Complaint was also found to lack any factual content to suggest that the Defendant carrier lacked a reasonable basis for denying the UIM coverage or that the Defendant knew or recklessly disregarded the lack of any reasonable basis, which is the bad faith standard.

The court therefore granted the Motion to Dismiss filed by the carrier but allowed the Plaintiff the right to amend.

Two Year Statute of Limitations

In the case of *Dana Mining Co. of PA v. Brickstreet Mut. Ins. Co.*, No. 2:21-CV-00700 (W.D. Pa. March 9, 2020 Colville, J.), the Western District Federal Court addressed bad faith issues and the statute of limitations related thereto.

According to the Opinion, in this matter, the carrier refused to defend or indemnify its insured against an underlying tort lawsuit. The insured then sought declaratory relief and claimed a breach of contract and bad faith.

The carrier filed a Motion to Dismiss the bad faith claim on statute of limitations grounds.

In this matter, the carrier had denied coverage in May of 2017. The insured instituted a bad faith claim in April of 2021.

The court in this matter confirmed that the statute of limitations for bad faith claims under 42 Pa. C.S.A. §8371 is two (2) years.

The court additionally confirmed that the statute of limitations for claims of §8371 bad faith begins to run when the Plaintiff's right to institute and maintain a lawsuit for bad faith arises. The court reiterated the rule that a lack of knowledge, mistake, or misunderstanding does not serve to toll the running of the statute of limitations.

The court more specifically noted that a bad faith claim can arise when a carrier definitively denies coverage and puts the insured on notice of the same.

Judge Colville noted that an insured cannot avoid the limitations period by asserting that a continuing refusal to cover was a separate act of bad faith. He referred to the law that repeated or continuing denials of coverage do not constitute separate acts of bad faith given rise to a new statutory period of time.

While the court did observe that there was case law in support of a proposition that, if a carrier subsequently denies coverage after the insured brings to the attention of the carrier "new evidence," this may constitute a separate and independent injury that can trigger a new limitations period.

However, in this case, the court found that there were no allegations that the insured presented the carrier with any new facts or evidence regarding the underlying claim such that the carrier should have reconsidered its denial. As such, no new limitations period was found to have been triggered. As such, the case was dismissed.

Plaintiff Can't Sue Tortfeasor's Carrier For Bad Faith

In the case of *Gitelman v. Wilkinson*, No. 2:21-CV-1696 (W.D. Pa. March 24, 2022 Stickman, J.), the court confirmed that a Plaintiff has no standing to sue a tortfeasor Defendant's carrier for bad faith.

In this matter, the Plaintiff had settled her personal injury case and the tortfeasor Defendant's carrier issued a settlement check for over $100,000.00. The Plaintiff never deposited the check and took the position that she was defrauded and that she was entitled to more money from her own carrier and from the Defendant's carrier.

The Plaintiff filed a bad faith claim against the tortfeasor Defendant's carrier on the basis that that insurance company owed her a duty of good faith and fair dealing.

The court granted the Motion to Dismiss this claim and, citing the Pennsylvania Superior Court case of *Strutz v. State Farm*, 609 A.2d 569 (Pa. Super. 1992), confirmed that a tortfeasor's carrier owes no duty of good faith in dealing to third party Plaintiffs.

Accordingly, the court found that the Plaintiff in this matter was found not to have any standing to sue the tortfeasor's carrier for bad faith.

If No Coverage, Then No Bad Faith

In the case of *Walker v. Foremost Ins. Co.*, No. CV-20-4966 (E.D. Pa. March 2, 2022 McHugh, J.), the court followed prior precedent in granting summary judgment on a bad faith claim after finding that there was no coverage due on the policy in question.

According to the Opinion, this case arose out of an incident during which a homeowner's fallen tree damaged her neighbor's property.

The neighbor and the neighbor's carrier sued for damages.

The homeowner's carrier asserted that its policy did not provide liability coverage for the claim at issue.

The neighbor filed for breach of contract and bad faith.

After finding that no coverage was due under the policy and granting the homeowner's carrier's Motion for Summary Judgment on the breach of contract claim, the court likewise granted the summary judgment on the bad faith claim indicating that, since there was no coverage due under the policy, "by definition, the insurer had a reasonable basis to deny the benefits."

No Bad Faith Possible When Policy Not In Effect

In the case of *Gonzales v. State Farm Mutual Automobile Insurance Company*, No. CV 20-4193 (E.D. Pa. Oct. 21, 2021 Schmehl, J.), the court granted summary judgment in favor of the carrier in a breach of contract and bad faith claim in the UIM/medical payments context.

The court noted that summary judgment was entered in favor of the carrier on the basis that the insured failed make all payments necessary to keep the policy in effect.

Given that the policy was not in effect at the time of the incident at issue, the court found that the carrier could not have breached its coverage obligations.

The court noted that, given that the carrier was granted summary judgment on the breach of contract claim, it followed that carrier was also entitled to summary judgment on the bad faith claims as well.

If No Coverage, Then No Bad Faith

In the case of *Miale v. Nationwide Ins. Co. of America*, No. 2:21-CV-00702-CCW (W.D. Pa. Dec. 27, 2021 Wiegand, J.), the federal court dismissed a Plaintiff's UIM bad faith claim given that there was an underlying finding that no coverage existed under the policy at issue such that there was, therefore, no valid breach of contract claim.

The court noted that there was no coverage under the policy at issue given that the Plaintiff was found to have appropriately waived stacking under that policy.

The court reviewed issues surrounding intra-policy stacking and inter-policy stacking questions.

UM Bad Faith Claim Dismissed Where No Breach of Contract Claim Found

In the case of *Nye v. State Farm Mut. Auto. Ins. Co.*, No. 3:21-CV-01029 (M.D. Pa. March 30, 2022 Wilson, J.), the court addressed a Motion to Dismiss an uninsured motorist claim and bad faith claim.

With regard to the Plaintiff's pleading of a claim for uninsured motorists benefits in the Complaint, the defense moved to dismiss given that the Plaintiff had failed to plead the identity of the tortfeasor driver and/or whether that driver was in fact uninsured.

The court found that there was sufficient information from which the Plaintiff could have made this determination and included it in the Complaint. As such, this portion of the Motion to Dismiss was granted but the Plaintiff was allowed leave to amend the Complaint to add the missing details.

With regards to the bad faith claim, the court first observed that there must be some predicate claim against the insurance policy even if the bad faith claim is a distinct claim. More specifically, the court stated that "there must be a predicate contract claim in order for a §8371 claim to proceed."

The court also noted that, while the predicate claim need not be tried together with the §8371 claim, the predicate cause of action must be ripe in order for a bad faith claim under §8371 to be recognized.

Given that the court had dismissed the breach of contract claim relative to the uninsured motorist claim due to the insufficiency of the pleading on that claim, the court found that the predicate cause of action otherwise required to accompany the §8371 bad faith claim was missing.

As such, the bad faith claim was also dismissed but without prejudice, in light of the court allowing the Plaintiff the right to file an Amended Complaint relative to the breach of contract claim.

UIM Bad Faith Claim Dismissed Due to Insufficient Facts

In the case of *Bond v. Geico*, No. 2:21-CV-02966-JDW (E.D. Pa. Oct. 25, 2021 Wolson, J.), the court dismissed a Plaintiff's breach of contract, bad faith, and intentional infliction of emotional distress claims arising out of a motor vehicle accident after finding that legal theories alone are not enough to sustain litigation; rather, a Plaintiff must also plead factual allegations to support his or her legal theories.

More specifically, the court also noted the Plaintiff had failed to identify any policy provisions supporting his claims for coverage or facts demonstrating that the carrier had failed to act reasonably in responding to the claim for coverage.

As such, the Plaintiff's case was dismissed but the Plaintiff was allowed leave to amend.

Bad Faith Claims Based on "Low Ball" Offers Dismissed

In the case of *Robinson v. Geico*, No. 21-CV-05059 (E.D. Pa. March 4, 2022 Kenney, J.), the court denied a Plaintiff's Motion to Amend a breach of contract Complaint to add a bad faith claim.

The Plaintiff is attempting to amend the Complaint to add a claim of bad faith by the carrier in its evaluation and alleged submission of a low ball settlement offer.

The court noted that the proposed Amended Complaint that was attached to the Motion to Amend only contained broad conclusory allegations related to an alleged bad faith claim and was devoid of any facts as to where any medical records would establish at least $50,000.00 worth of damages in the information that had been provided to defense counsel in support of the Plaintiff's settlement demand in that amount.

As such, the court found that the proposed Amended Complaint failed to state a claim upon which relief could be granted for bad faith and, as such, the Motion to Amend was denied as futile.

In so ruling, Judge Kenney noted that the proposition that the failure to immediately concede to a demand for the policy limits cannot, without more, amount to bad faith on the part of an automobile insurance carrier.

In a related decision in the same matter issued by the court five days after this one, the Court *sua sponte* dismissed the Plaintiff's UM/UIM case where the record confirmed that the subject policy only had $50,000 in limits, which amount of potential damages was less than the $75,000 amount necessary for federal court subject matter jurisdiction.

PRODUCTS LIABILITY

No Strict Liability for Manufacturers of Medical Devices

In the case of *McDonald v. Flowonix Medical, Inc.*, No. 21-1404 (E.D. Pa. Jan. 25, 2022 Tucker, J.), the court granted in part and denied in part a Motion to Dismiss in a products liability case involving a medical device. In this case the device was a programmable infusion pump and catheter.

The court in this case found that Pennsylvania law does not allow for strict liability claims against manufacturers of medical devices. The court noted that, under the Restatement (Second) of Torts §402A, comment k applied across the board to bar all strict liability claims against prescription medical products, both drugs and medical devices. Judge Tucker offered her prediction that, if faced with this issue, the Pennsylvania Supreme Court would extend comment k to prescription medical device cases to find that there is no valid claim for strict liability in that regard.

The court additionally found that the Plaintiff failed to plead any fact to supporting the express warranty claim and also failed to attach any written warranty to the Complaint.

The court additionally found that the claim of a breach of implied warranty was a form of a prohibited strict liability claim under the facts and circumstances presented in this case.

Liability of Drug Manufacturers

In the case of *DiCair v. Gilead Sci., Inc.*, No. 21-CV-5486 (E.D. Pa. July 12, 2022 Schiller, J.), the court ruled that negligent failure-to-warn and strict liability product claims against a pharmaceutical manufacturer were barred as a matter of Pennsylvania law. As such, a Defendants' Motion to Dismiss was granted in part and denied in part.

According to the Opinion, the Defendant designed and manufactured a prescription medication sold under the trade name of Harvoni which was used to treat Hepatitis C.

The Plaintiff's decedent was prescribed the medication and, after taking the medication, was diagnosed with a form of liver cancer. The Plaintiff's decedent passed away thereafter.

The Plaintiff filed this lawsuit alleging a failure to warn and design and manufacturing defect claims under both negligence and strict liability. The Plaintiffs claimed that the decedent's development of cancer was caused by his use of the medication.

The court dismissed the negligent failure-to-warn claim, noting that it was well-settled Pennsylvania law that pharmaceutical companies do not owe a duty to warn the public. Rather, manufacturers of medications are only required to warn prescribing doctors of the risk of the medications. The court cited to the learned intermediary doctrine which holds that drug manufacturers are only required to direct required drug safety warnings to physicians who, in turn, are required to relay the same to patients.

However, the court declined to dismiss the Plaintiff's negligent design and manufacturing defect theories, finding that the Plaintiff had asserted a valid cause of action that the Defendants had allegedly negligently designed and manufactured the medication.

Lastly, the court did dismiss the Plaintiff's strict liability claims after holding that strict liability claims against prescription drug manufacturers were barred by Pennsylvania products liability law.

MEDICAL MALPRACTICE

Pennsylvania Supreme Court Broadens Venue Rules for Medical Malpractice Cases

Under an Order dated August 25, 2022, the Pennsylvania Supreme Court approved amendments to the medical malpractice venue rules that govern such lawsuits filed in the state court. Under the new venue rules, set to go into effect on January 1, 2023, plaintiffs will have more options as to forum shopping in terms of where they can file their medical malpractice lawsuits.

The amendments undo a 20 year old rule. Under the old rule, plaintiffs were required in medical malpractice cases to sue their medical providers in the counties where the treatment was completed.

Under the new rules, plaintiff's will be allowed to sue providers in any of the counties where the providers regularly do business or have significant contacts.

Negligent Infliction of Emotional Distress

In the case of *Russell v. Educ. Comm'n For Foreign Med. Graduates*, No. 2:18-CV-05629-JDW (E.D. Pa. May 19, 2022 Wolson, J.) (Mem. Op.), the court addressed a unique issue with regard to a claim for negligent infliction of emotional distress in a medical malpractice setting.

This case involved a class of plaintiffs who had received treatment from an individual who had allegedly used fraudulent documents to assert that he was a medical doctor who had completed all of the requirements to practice medicine. This person had been certified by the Defendant commission as a valid doctor.

The Plaintiffs in the class had received treatment from the individual between 2012 and 2016.

Thereafter, the Plaintiffs learned about the individual's identity in 2017 and 2018.

The Plaintiffs filed suit against the Defendant commission who had incorrectly certified the individual as a valid member of the medical profession. In that Complaint, the Plaintiffs asserted claims for negligent infliction of emotional distress as a part of a class action involving numerous Plaintiffs.

The court in this matter confirmed that Pennsylvania Supreme Court had not addressed the particular issue, that is, whether Plaintiffs could raise a negligent infliction of emotional distress claim when they learned new information about some previous event.

The court in this *Russell* case stated that, under Pennsylvania law, Plaintiffs had been limited in their ability to pursue negligent infliction of emotional distress claims given that the court had required Plaintiff to suffer physical impact, be in a zone of danger, observe a tortious physical injury to a close relative, or to cases where the Defendant had a special contractual or fiduciary duty owed to the Plaintiff.

The court additionally noted that the only cases that had relaxed the requirements that the emotional distress at issue be contemporaneous with a physical impact were those cases involving an exposure to disease.

In this *Russell* case, the Plaintiff alleged that they suffered physical impacts when they received medical treatment from the individual.

However, the court noted that the emotional distress did not accompany that impact. Rather, the alleged emotional distress arose later when the Plaintiffs learned about the individual's arrest and about his background. The court additionally noted that, between the physical impact and the gathering of the knowledge about the individual's arrest and background, there was no ongoing threat or risk that caused any of the Plaintiffs' distress.

Rather, the alleged emotional distress of the Plaintiffs was a product of their re-conceiving their memories in light of the new information gathered.

Judge Wolson in this *Russell* case predicted that the Pennsylvania Supreme Court would not recognize a negligent infliction of emotional distress claim under these types of facts. The courted noted that, while the Plaintiffs' alleged emotional trauma was real, the Pennsylvania Supreme Court had repeatedly made clear that not everyone who experiences an emotional trauma has a legal remedy under Pennsylvania law.

Non-Settling Defendants Precluded From Referencing Joint Tortfeasor Settlement with Another Defendant

In the case of *Snyder v. North American Partners in Anesthesia*, No. 19-CV-83 (C.P. Lacka. Co. Nov. 12, 2021 Nealon, J.), the court granted a Plaintiff's Motion In Limine in a medical malpractice case and precluded a non-settling Defendant and an Additional Defendant from referencing a joint tortfeasor settlement that the Plaintiff had entered into with a non-party. The

Court also precluded any reference to the Plaintiffs' previous assertion of a malpractice claim against that former party.

The court noted that the former Defendant, who had secured a joint tortfeasor settlement had previously secured a Discontinuance relative to this action and a removal as a named Defendant.

In so ruling, the court referred to 42 Pa. C.S.A. §6141(c) which provides that, "[e]xcept in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment…shall not be admissible in evidence on the trial of any matter."

Judge Nealon noted that, based upon the plain language of this provision, evidence of any prior settlements is inadmissible at any trial on any matter.

The court additionally noted that Pennsylvania Rule of Evidence 408(a)(1) similarly prohibited the admissibility or use of any offer or acceptance of valuable consideration in compromising or attempting to compromise a claim. The court noted that, under the comment of that Rule of Evidence, it is indicated that "Pa.R.E. 408 is consistent with 42 Pa.C.S. §6141 in excluding any evidence of a joint tortfeasor settlement."

On the basis of this law, the court granted the Plaintiff's Motion In Limine.

The court additionally granted the Plaintiff's Motion seeking to prohibit the non-settling Defendants from mentioning the fact that the Plaintiff's originally asserted a malpractice claim against the settling Defendant. In this regard, the court made a distinction between factual allegations, which could be deemed to be judicial admissions, and allegations of legal conclusions, which could not be deemed to be judicial admissions.

As such, the court noted that certain factual allegations regarding specific documentation created by the relevant medical witnesses and parties may be offered as judicial admissions but any allegations by the Plaintiffs concerning the causal negligence by the settling Defendant or its agents would not be allowed to be introduced into evidence.

Plaintiff Can Rely Upon Both Concrete Evidence and *Res Ipsa Loquitur* In The Same Case

In the Pennsylvania Supreme Court decision of *Lageman v. Zepp*, No. 21 MAP 2021 (Pa. Dec. 22, 2021) (Op. by Wecht, J.), the Court thoroughly addressed the doctrine of *res ipsa loquitur* and its continuing validity in Pennsylvania.

The court noted that the American law translation of that phrase is "the thing speaks for itself."

Justice Wecht noted in his Opinion that the doctrine of *res ipsa loquitur* has been recognized in Pennsylvania as allowing for a category of circumstantial evidence which may suffice to establish negligence where more specific and concrete evidence of the events leading up to the injury eludes even diligent investigation.

In essence, the doctrine was noted to recognize that one may conclude by the exercise of common sense that an injury could not have occurred under certain circumstances but for the negligence of another person even where that negligence cannot be concretely proven.

Justice Wecht opened his engaging Opinion with the example of a Plaintiff walking on a public street and passing a Defendant's shop at which point a barrel of flour fell upon the Plaintiff from a window above, resulting in serious injuries to the pedestrian Plaintiff. The Court noted that this set of facts represented a classic example of when the doctrine of *res ipsa loquitur* should be applied.

This *Lageman* case arose out of a medical malpractice action. The issue before the Pennsylvania Supreme Court was whether the doctrine of *res ipsa loquitur* is precluded in a case where the Plaintiff has allegedly introduced enough "direct" evidence of the Defendant's negligence such that the doctrine of *res ipsa loquitur* is not the only avenue towards a finding of liability. In other words, whether the two (2) approaches to satisfying the Plaintiff's evidentiary burden of proof are mutually exclusive.

The Pennsylvania Supreme Court held that these avenues of satisfying the Plaintiff's burden of proof are not mutually exclusive and that, therefore, the doctrine of *res ipsa loquitur* may still apply even in a case where a Plaintiff has also produced direct evidence of negligence on the part of a Defendant.

In so ruling, the Majority of the Court noted that it has long been the law of Pennsylvania that a Plaintiff has no obligation to choose one theory of liability to the exclusion of another. The Court reasoned that permitting a Plaintiff to present direct evidence while simultaneously invoking the *res ipsa loquitur* doctrine will only disadvantage a Defendant as to whom the claims becomes more facially meritorious as more competent evidence emerges.

The Court did note that, a Plaintiff must still make out a prima facie case to support a *res ipsa loquitur* jury instruction. In other words, a Plaintiff must prove that he or she has been injured by a casualty of a sort that normally would not have occurred but for negligence on the part of a Defendant.

In this regard, the Court noted that the doctrine of *res ipsa loquitur* would obviously apply in the case of where a surgeon leaves a sponge in a patient and sews up the patient at the end of a surgery, an injury would seemingly not occur in the absence of negligence.

Where, however, a jury is presented with two (2) versions of the event through conflicting evidence and may decide, based upon that evidence, what, in fact, occurred to lead to the injury, then perhaps the doctrine of *res ipsa loquitur* would not be applicable.

Arbitration Provision in Nursing Home Agreement Found to Be Unconscionable

In the case of *Kohlman v. Grane Health Care Company*, No. 103 WDA 2021 (Pa. Super. July 5, 2022 Kunselman, J., King, J., and Collins, J.) (Op. by Collins, J.), the court affirmed a trial court's overruling Preliminary Objections asserted by various Defendants that sought to compel arbitration of the claims asserted against them by the Plaintiffs.

This case arose out of medical malpractice claims related to treatment secured by the Plaintiff at a skilled nursing home.

The court noted that, in connection with her admission to the nursing home, the Plaintiff's decedent had signed a number of documents including an arbitration agreement.

After the Plaintiffs filed suit in the Court of Common Pleas, the Defendants filed Preliminary Objections seeking to compel arbitration. The trial court overruled the Defendant's Preliminary Objections and this appeal resulted.

The appellate court agreed with the trial court that the terms of the arbitration agreement were unconscionable.

The court affirmed despite noting that both Pennsylvania and federal law impose a strong public policy in favor of enforcing arbitration agreements.

The court also acknowledged that the enforcement of an arbitration agreement may be denied only where the party opposing arbitration proves that a contract defense that applies equally to non-arbitration contracts serves to invalidate the agreement to arbitrate. In this matter, the contract defense of unconscionability of the contract terms was raised.

The Superior Court noted that, to invalidate or bar enforcement of a contract based on unconscionability, the party challenging the contract must show both an absence of meaningful choice, also referred to as procedural unconscionability, and that the contract terms that are unreasonably favorable to the other party, known as substantive unconscionability.

The Superior Court additionally noted that procedural and substantive unconscionability are assessed under a sliding/scale approach, with a lesser degree of substantive unconscionability required where the procedural unconscionability is very high.

In this *Kohlman* case, the appellate court agreed with the trial court findings that the arbitration agreement was procedurally unconscionable because the decedent was in pain and was medicated at the time she signed the arbitration agreement, the decedent was alone when she was asked to sign the arbitration agreement, the decedent had no opportunity to read the arbitration agreement and was not given a copy to review prior to her signing the same, and where the provisions of the agreement were not otherwise fully read or explained to the decedent. The court therefore ruled that the process by which the decedent's signature was obtained on the arbitration agreement denied the decedent a meaningful choice and, therefore, the arbitration agreement was found to be procedurally unconscionable.

The appellate court also agreed with the trial court finding that, on the issue of substantive unconscionability, the provision in the agreement requiring that the decedent pay one half of the cost of any arbitration, including one half of the arbitrator's fees, was substantively unconscionable because it imposed additional expenses for bringing a claim that the decedent would not have to bear in a court action. The appellate court agreed that this term of the agreement unreasonably favored the nursing home and, therefore, was sufficient to satisfy the

requirement of showing substantive unconscionability, particularly where, as here, the record, according to the appellate court, established that the decedent was not given full information regarding her choices or any opportunity to inform herself of what she was signing.