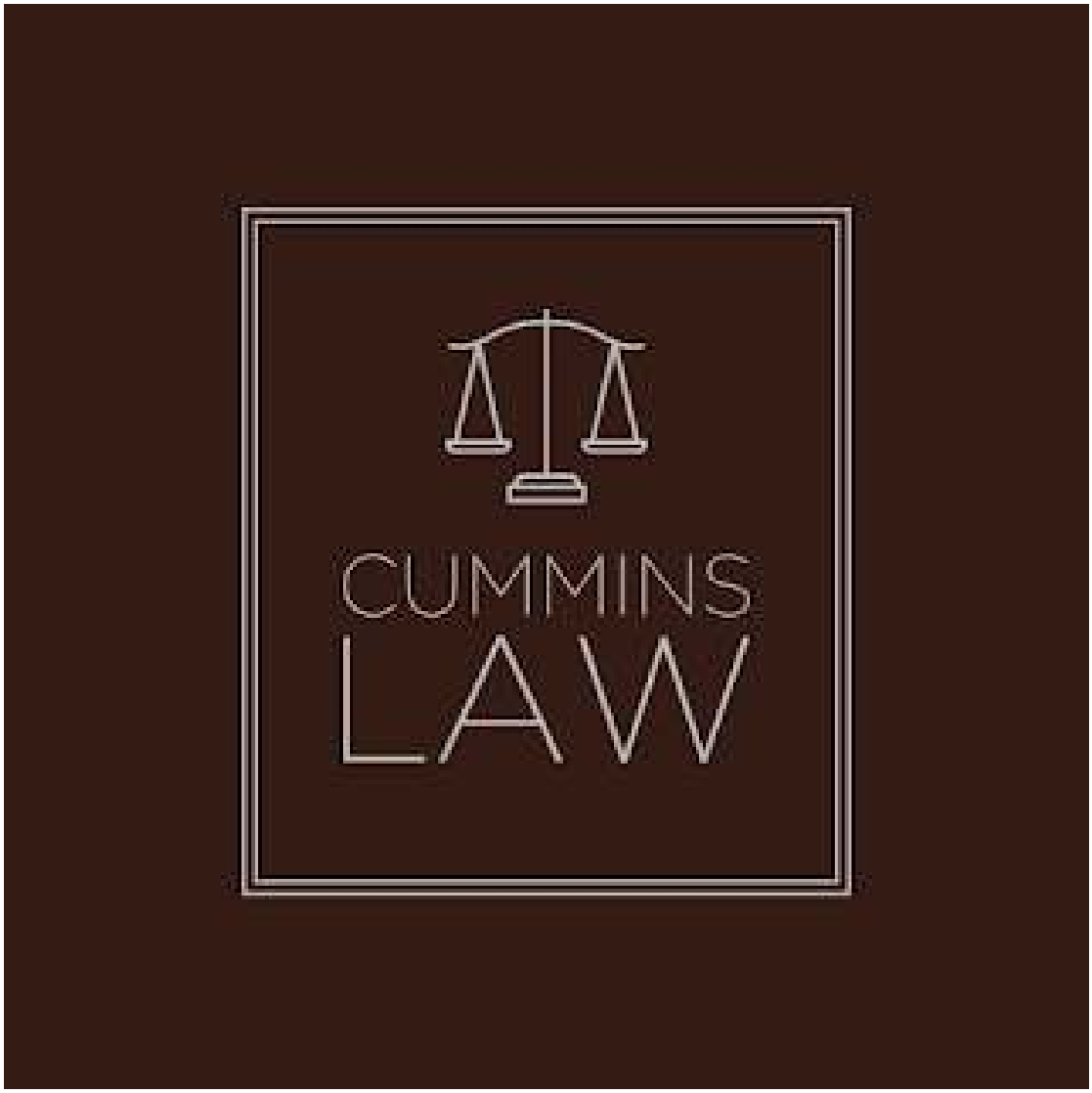
THE TORT TALK

2023

CIVIL LITIGATION UPDATE

DANIEL E. CUMMINS, ESQ.

CUMMINS LAW
610 Morgan Highway
Clarks Summit, PA 18411
P. (570) 319-5899
F. (570) 319-5898
E. dancummins@CumminsLaw.com
Firm Website: www.CumminsLaw.net



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Daniel E. Cummins, Esq.

Email:
dancummins@cumminslaw.net
Phone: (570)-319-5899

Cummins Law
610 Morgan Highway
Clarks Summit, PA 18411

Daniel E. Cummins, Esquire is the founder of the Clarks Summit, Pennsylvania law firm of Cummins Law, which he opened in 2019 with his then 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 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 Pre-Eminent 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 one of only a few attorneys in all of 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 in 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. His articles cover emerging trends in civil litigation in the Commonwealth of Pennsylvania. Over the course of his career, Cummins has published over 187 articles in newspapers, magazines, scholarly publications, and law reviews both in Pennsylvania publications and national publications.

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 presented 67 CLE seminars over the years on a wide variety of civil litigation topics and practice tips, most of which courses he created himself. 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.

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 entire nation.

Attorney Cummins resides in Clarks Summit, 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 2023 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

Complaint Requires Separate Counts Against Separate Defendants

In the case of *Boyd v. Shenango Presb. SeniorCare*, No. 30007 of 2021, C.A. (C.P. Lawr. Co. March 22, 2023 Motto, J.), the court addressed several Preliminary Objections filed by a Defendant to a Plaintiff's Complaint which alleged negligence arising out of the Plaintiff's decedent's treatment at a senior care facility.

The court sustained the Defendant's Preliminary Objection asserting that the Complaint lacked specificity due to the fact that the Plaintiff had pled a number of different causes of action in the same Complaint in violation of Pa. R.C.P. 1020(a). The court noted that, under this Rule of Civil Procedure, each cause of action must be stated in a separate count containing a demand for relief.

In this case, the Plaintiffs' Complaint alleged several causes of action against several Defendants in one (1) count, including alleged claims for negligence, negligence per se, and vicarious liability in a single count.

The court found that such a pleading rendered it impracticable for Defendants to understand which claims were being asserted against which Defendants. Consequently, the Defendants would not be able to properly respond to the Complaint and formulate their defenses.

As such, the Defendants' Preliminary Objection for lack of specificity were sustained.

Several other Preliminary Objections asserted by the defense were overruled.

The court granted the Plaintiff leave to file an Amended Complaint.

Separate Claims Must Be Stated in Separate Counts in Complaint

In the case of *Dolinak v. State Farm Fire & Cas. Co.*, No. 2021-CV-1643 (C.P. Lacka. Co. June 5, 2023 Nealon J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas reviewed the Rules of Civil Procedure regarding proper Complaint drafting in a case involving alleged weather-related damages allegedly sustained to the home of a State Farm insured.

Relative to the claims presented, the Plaintiff filed a Complaint against State Farm and State Farm filed Preliminary Objections stating that, based upon the allegations of the Complaint, it was not able to confirm exactly whether the Plaintiff was asserting simply a breach of contract claim and/or a bad faith claim.

Judge Nealon reviewed the pertinent Pennsylvania Rules of Civil Procedure, and the related case law, regarding Complaint drafting.

The court noted that Pa. R.C.P. 1020 provides that a Plaintiff may state in the Complaint more than one cause of action against the same Defendant and that such claims may be pled in the alternative.

However, under the related case law, a Plaintiff is required to present each claim in a self-sufficient separate count within the Complaint, which count is required to include allegations of facts in support of the particular claim asserted and the relief sought.

Here, the court noted that, even reviewing the allegations of Plaintiff's Complaint as a whole, the Complaint did not provide State Farm with sufficient notice of the claims against which the carrier was required to defend.

As such, the court sustained the Preliminary Objections asserted by the Defendant but allowed the Plaintiff the right to file an Amended Complaint in which the Plaintiff was required to identify the claims asserted and the damages demanded in conformity with the Pennsylvania Rules of Civil Procedure.

John Doe Allegations

In the case of *Meisse v. Cohan*, No. 1821-CV-2022 (C.P. Monroe. Co. March 24, 2023 Higgins, J.), the court sustained in part and overruled in part Preliminary Objections in a medical malpractice action.

According to the Opinion, Plaintiff's decedent was treated by the Defendant physician for symptoms related to Crohn's Disease.

The Defendant physician allegedly prescribed the decedent medicine but allegedly never sought to perform tests to determine if the medication was appropriate for the decedent. The decedent died thereafter, allegedly from liver failure.

The decedent's estate filed this lawsuit and the Defendant filed Preliminary Objections.

In part, the Defendant objected to the "Doe" designations in the Plaintiff's Complaint on the grounds that the Plaintiff failed to maintain the action against Doe Defendants in compliance with Pa. R.C.P. 2005(b) because that rule mandates that a factual description of each unknown Defendant be provided, which was not done in this case.

The Plaintiff asserted that the identities of the Doe Defendants could be revealed through discovery.

Although the court noted that the Plaintiff lacked factual descriptions about the Doe Defendants because that information was within the Defendant's control, the court nevertheless held that that Rule 2005 prohibits the use of a class of Defendants as a placeholder or a catch-all category. As such, these Preliminary Objections of the Defendants were sustained.

The court additionally sustained Preliminary Objections asserted by the Defendant under which it was argued that the Plaintiff failed to adequately plead claims against associated corporations. The court found that, although the Defendant was on reasonable notice of the claims against them in the periods of treatment, the Plaintiff had still failed to identify the corporations and had, instead, similarly used a catch-all category. As such, these objections were sustained as well.

Service of Process

In the case of *Vargas v. United Modular Enter. LLC*, No. 2022-05051 (C.P. Bucks Co. June 30, 2023 McMaster, J.), the Plaintiff filed an appeal challenging the trial court's Order sustaining Preliminary Objections raised by the Defendants with regards to the Plaintiff's failure to properly complete service of a Complaint.

The court determined that the Plaintiff had failed to prove that he had made good faith efforts to timely serve the Defendants and, in this Rule 1925 Opinion, recommended that the Superior Court affirm the trial court's Order.

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

The Plaintiff filed a Complaint eight (8) days before the statute of limitations expired but did not attempt service until well past the thirty (30) day requirement.

The trial court reviewed the case of *Lamp v. Heyman* and its progeny. The court emphasized the importance of a plaintiff demonstrating good faith efforts to serve the Complaint within the required time frame.

Here, the trial court found that there is no concrete evidence produced by the Plaintiff showing that good faith efforts were made to complete service in a timely fashion. According to the Opinion, it did not appear that the Plaintiff attempted to even initiate service attempts over the five (5) months after he filed the original Complaint.

Given that the statute of limitations had effectively expired before proper service was accomplished, the court requested the Superior Court to affirm its Order sustaining of the Defendant's Preliminary Objections.

Service of Process

In the case of *Wakefield v. Wal-Mart Stores East, LP*, No. 10201-CV-2023 (C.P. Beaver Co. Aug. 10, 2023 Ross, J.), the court granted summary judgment in favor of a Defendant after finding that a Plaintiff could not satisfy the requirements of *Lamp v. Heyman* merely by providing a copy of the Complaint to a private attorney who had represented the Defendant in other cases in the past.

The court noted that such informal procedures do not assure that the Defendant will receive actual notice of the lawsuit. The court also more specifically noted that the private attorney who was provided with a copy of the Complaint was neither an employee nor an agent of the Defendant. Furthermore, that attorney did not otherwise agree to accept service on behalf of the Defendant.

The court in this matter found that such informal actions in an attempt to complete service did not represent a good faith effort to complete service.

The court additionally held that, under the current status of Pennsylvania law, in the absence of a good faith effort to complete service upon a Defendant, there is no need to consider whether or not the Defendant was prejudiced due to the failure to complete service in a timely fashion before the case could be dismissed.

The court additionally stated that failing to make a good faith attempt at service need not go so far as to constitute bad faith in order to run afoul of the statute of limitations.

Service of Process

In the case of *Plourde v. Trussel*, No. 2525-CV-2021 (C.P. Monroe Co. May 15, 2023 Zulick, J.), the court denied a Defendant's Preliminary Objections asserting improper service of process.

In this case, the court found that the Plaintiff's attorney and the Sheriff made diligent efforts to rectify any errors of service and that there was no evidence of any intent to delay service or abuse the legal process.

The court noted that the delay in completing service was due to the failed service attempt and the need to involve a neighboring county's Sheriff to complete service.

The court otherwise found that the Plaintiff acted in good faith and made reasonable and prompt attempts to serve the Defendant.

The court also stated that no evidence suggested that the Defendant was prejudiced due to the delay in service.

Service of Process

In the case of *Rosenwald v. Finkelstein*, No. 4813-CV-2022 (C.P. Monroe Co. April 17, 2023 Williamson, J.), the court overruled Preliminary Objections filed by a Defendant to a Plaintiff's Complaint alleging lack of proper service and the expiration of the statute of limitations.

This case arose out of a motor vehicle accident.

The Plaintiff admitted that they mistakenly attempted to complete service via a process server in reliance upon Pa. R.C.P. 400.1, instead of Pa. R.C.P. 400.

The court noted that Pa. R.C.P. 400.1 allows service of original process in the First Judicial District (Philadelphia) by the sheriff or a competent adult.

The court noted that, after realizing their mistake, the Plaintiff promptly filed a Praecipe to Reinstate the Complaint and engaged the local county Sheriff's Office in Monroe County to make personal service which was completed.

Relative to the Preliminary Objections, the court first noted that the central focus of the Defendant's Preliminary Objections was the expiration of the statute of limitations. Judge Williamson initially noted that the defense of the expiration of the statute of limitations is an affirmative defense that is not generally properly raised during Preliminary Objections.

Regardless, the court went on to review the merits of the Preliminary Objections. These objections were denied given that the Plaintiffs sought to remedy their error within days of the filing of the Preliminary Objections.

More specifically, the court found that the procedural history in the case did not suggest a course of conduct by the Plaintiff that was meant to stall the action. Rather, the record revealed that the Plaintiff had made a simple mistake and corrected the same promptly.

The court also noted that the Plaintiffs had informed the Defendant's insurer of the accident so that the Defendant was able to begin working on the defense of the case.

As such, the court found that the Defendant did not suffer any harm.

Service of Process

In the case of *Brown v. Gillman*, No 21-CV-4724 (C.P. Lack. Co. May 11, 2023 Nealon, J.), the court sustained a Defendant's Preliminary Objections pursuant to Pa. R.C.P. 1028(a)(1) asserting a lack of proper service of original process within the two-year statute of limitations.

After reviewing the record before him, Judge Nealon noted that this was not a case where a Plaintiff actually served the Defendant with original process by an improper mode of service within the applicable statute of limitations.

Rather, the court found that the conduct of the Plaintiff in this case was akin to the service efforts seen by Plaintiffs in other cases who were unsuccessful with an initial attempt at service, but then made no further efforts to serve a Defendant by reinstating the Complaint or seeking leave of court to use an alternative form of service under Pa. R.C.P. 430.

Here, the court noted that there was an almost eighteen (18) month period of time between the time that notice was received from the Sheriff that the Defendant was never served with original process before any attempt was made by the Plaintiff to reinstate the Complaint and complete service.

As such, the court found that the Plaintiffs have failed to satisfy their burden of demonstrating that they acted diligently in making a good-faith effort to timely complete service upon the Defendant with original process and notice of the lawsuit.

Judge Nealon also noted that, under Pennsylvania law, providing notice to the Defendant's carrier cannot serve as a substitute to actual service upon a Defendant.

The court emphasized that service of process is the mechanism by which a court obtained jurisdiction over a Defendant and, absent proper service, the court does not possess jurisdiction.

As such, the court sustained Defendant's Preliminary Objections and entered judgment in favor of the Defendant.

Service of Process

In the case of *Kerr v. Sagan*, No. 3:21-CV-0459 (M.D. Pa. Oct. 13, 2022 Mariani, J.), the court denied a Motion to Dismiss in a Federal Court motor vehicle accident matter, which Motion was based upon issues regarding service of process and the statute of limitations.

The defense argued that the Plaintiff's claims were time-barred because the Plaintiff did not effectuate service before the statute of limitations expired. This case initially started in the state court and was then removed to Federal Court.

The defense proceeded with a Rule 12(b)(6) Motion to Dismiss for failure to state a cause of action upon which relief may be granted and a Rule 12(b)(5) Motion to Dismiss for failure to complete service.

The Court noted that because the record confirmed that service was finally completed before the case was removed to Federal Court, the validity of the service upon the out-of-state defendant would be determined under an application of Pennsylvania law.

The court found that the case before it was not facially barred by the statute of limitations.

Judge Robert D. Mariani
M.D.Pa.

Judge Mariani noted that, although the initial effort at service by First Class Mail was technically improper under Pennsylvania law, and although the Complaint was not reinstated until after the expiration of the statute of limitations, in the interim, the Plaintiff had made good faith efforts to try to complete service where the Plaintiff had actually tried to complete service in a timely fashion.

The Court also noted that the parties had engaged in active settlement negotiations which demonstrated that the Defendant had adequate notice of the pendency of the litigation.

The court additionally noted that a Plaintiff who incorrectly but genuinely believes that he or she has effectuated service cannot be expected to make continuing service efforts.

Notably, Judge Mariani distinguished between "a plaintiff who attempts service of process, knows it was a failed attempt, and declines to remedy it, and a plaintiff who incorrectly but genuinely believes he has effectuated service and therefore does not make additional attempts.

In light of the above, the court found that the Plaintiff did not intentionally stall the litigation such that dismissal under the law of *Lamp v. Heyman* was required.

Service of Process

In the case of *Staretz v. Wal-Mart Stores East, LP*, No. 3:22-CV-00967 (M.D. Pa. March 3, 2023 Mehalchick, J.), Federal Magistrate District Court Judge Karoline Mehalchick recommended that

a Defendant's F.R.C.P. 12 (b)(6) Motion to Dismiss be granted on the grounds that the Plaintiff failed to properly serve the Defendant with the lawsuit.

The court pointed out that the return receipt for the purported service by mail was illegible and that the Plaintiff provided no other evidence to establish the authority of the signee to accept service on behalf of the Defendant.

Federal Mag. Judge Karoline Mehalchick
M.D. Pa.

Judge Mehalchick noted that the rules of service must be strictly followed as service of process is how the court obtains jurisdiction over a defendant.

Given that the signature on the return receipt of the attempted service by mail was illegible and given that there was no other evidence that the Defendant received actual notice of the lawsuit, the court found that the Plaintiff's attempt at service could not be considered to have been completed in "good faith" as required by Pennsylvania law and, as such, the failed efforts by the Plaintiff to complete service were not found to have tolled the statute of limitations.

Accordingly, Judge Mehalchick recommended that the Defendant's Motion to Dismiss be granted.

Jurisdiction Over Corporations Registered To Do Business In Pennsylvania

In the case of *Mallory v. Norfolk Southern Railway Co*, ___ U.S.___ (June 27, 2023) in a 4-1-4 plurality decision, the United States Supreme Court upheld the Pennsylvania law allowing state

courts to hear lawsuits against out-of-state companies who had registered to conduct business in Pennsylvania, even when the alleged injury occurred outside of the Pennsylvania.

Personal Jurisdiction

In the case of *Terry v. Aesculap Implant Sys.*, No. 2018-C-1938 (C.P. Leh. Co. Aug. 8, 2022 Caffrey, J.), the court granted a foreign Defendant's Motion to Dismiss based upon lack of personal jurisdiction on the basis that the court lacked both general and specific jurisdiction over the Defendant.

This matter arose out of claims by a number of Plaintiffs alleging that a knee implant device had been negligently designed and manufactured by a German company. According to the Opinion, the knee surgeries at issue actually took place in the State of Texas.

As to general jurisdiction, the court found that the jurisdiction requirements were not met under 42 Pa. C.S.A. §5301(a)(1). Under that statute, a court in Pennsylvania may exercise general jurisdiction over an individual non-resident Defendant when that Defendant is either present in Pennsylvania when process is served or domicile in Pennsylvania at the time when process is served, or where that Defendant consents to the jurisdiction of the court. Neither of these scenarios were implicated under the facts of this case.

With regards to the issue of specific jurisdiction, the court found that the Defendant lacked sufficient minimum contacts within the State of Pennsylvania.

In the end, the court granted the Preliminary Objections and dismissed a Joinder Complaint for lack of personal jurisdiction.

Statute of Limitations Defense

In the case of *Weisberg v. Bansley*, No. 695 MDA 2021 (Pa. Super. Feb. 14, 2023 Bowes, J., King, J., and Stevens, P.J.E.) (Op. by King, J.) (non-precedential), the Pennsylvania Superior Court affirmed a ruling by Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas in which the trial court sustained Preliminary Objections filed by various Defendants that resulted in the dismissal of the Plaintiff's Dragonetti Act claims in a dispute between parties over an alleged claims of wrongful use of civil procedures that arose out an earlier legal malpractice suit.

In this case, relative to the statute of limitations defense raised by the Defendants' Preliminary Objections, the court noted that, generally, a statute of limitations defense is more properly raised as a new matter and not Preliminary Objections.

However, the Court confirmed that where a Plaintiff fails to file Preliminary Objections to strike a Preliminary Objection based upon a statute of limitations, the trial court may address the issues presented relative to a statute of limitations defense. As such, the Superior Court found that the trial court did not err when it addressed the merits of the statute of limitations issues presented in this case.

The Superior Court also found that the trial court's calculation of time relative to the statute of limitations defense was also proper.

Allegations of Recklessness - Superior Court Weighs In

In the case of *Monroe v. CBH2O LP, d/b/a Camelback Ski Resort*, No. 1862 EDA 2019 (Pa. Super. Nov. 21, 2022) (en banc) (per curiam), the Pennsylvania Superior Court, in a split decision, addressed the issue of the propriety of allegations of recklessness in a premises liability case regarding injuries that the Plaintiff sustained while utilizing a zip-line.

In the Majority Opinion of this case, the Pennsylvania Superior Court adopted what appeared to be the rule of law followed by the minority of Pennsylvania trial courts and held that allegations of recklessness are allegations of states of mind and, as mere forms of negligence, such allegations are not to be considered independent causes of action. As such, according to the Majority in this *Monroe* decision, under Pa. R.C.P. 1019(b), given that allegations of recklessness are considered to be allegations of a state of mind, such allegations can be averred generally. In this regard, the court cited, in part, the case of *Archibald v. Kemble*, 971 A.2d 513 (Pa. Super. 2009).

I note that, in footnote 6 of the Opinion, the Majority cited to the review of the split of authority amongst the trial court judges across the Commonwealth on this issue as set forth in my article, "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).

Notably, in that same footnote, the Superior Court pointed to the case of *Koloras v. Dollar Tree* by Judge Terrence R. Nealon of Lackawanna County as an example of a trial court decision that had previously properly decided this issue, i.e., that allegations of recklessness were allegations of a state of mind that could be pled generally.

The Pennsylvania Superior Court also stated in footnote 6 that, with regards to the split of authority amongst the trial courts on the issue of the proper pleading of allegations, the decision in this *Monroe* case should serve to "remove[] any doubt that, so long as a plaintiff's complaint (1) specifically alleges facts to state a *prima facie* claim for the tort of negligence, and (2) also alleges that the Defendant acted recklessly, the latter state-of-mind issue may only be resolved as a matter of law after discovery has closed." *See* Op. at 24, n. 6.

In other words, under the Majority Opinion, a Plaintiff may plead recklessness in any case whatsoever with reckless abandon. The court suggested that a defendant can revisit the issue by way of a summary judgment motion after the discovery in the case has been completed.

In two separate Dissenting Opinions in the case, one by President Judge Emeritus Bender and one by Judge Stabile, the alternative rule was advocated based upon 50 years of precedent, that being that a Plaintiff should have to plead sufficient facts in order to proceed on a claim for recklessness. However, that viewpoint, as found in the Dissenting Opinions, was not adopted by the Majority of the judges on this case.

It is noted that my above-referenced *Pennsylvania Bar Quarterly* article entitled "Pleading for Clarity" was also cited on page 2 of Judge Bender's Dissenting Opinion as outlining the previous existing split of authority on the issue presented in trial courts across the Commonwealth.

That split of authority has been put to rest by this appellate guidance provided by the Pennsylvania Superior Court in the case of *Monroe v. CBH2O LP, d/b/a Camelback Ski Resort*.

Allegations of Recklessness

In the case of *Brooks v. Griffy*, No. 22-CV-3250 (C.P. Lacka. Co. Feb. 3, 2023 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas continued to trend in this county of overruling Preliminary Objections filed by Defendants against claims of recklessness in personal injury lawsuits, only this time, the court had the additional support to rely upon of the recent Pennsylvania Superior Court decision of *Monroe v. CBH20, LP*, 286 A.3d 785 (Pa. Super. 2022) (*en banc*).

Judge Terrence R. Nealon
Lackawanna County

Judge Nealon ruled that, based upon an application of Pa. R.C.P. 1019(b), the separate Superior Court in *Archibald v. Kimble*, and the more recent Superior Court decision in *Monroe*, that the Plaintiff's general allegations of wanton, willful, and reckless conduct, along with the Plaintiff's related demand for punitive damages, was not subject to a dismissal under Preliminary Objections filed pursuant to Pa. R.C.P. 1028(a)(4).

However, the court did note that a claim for punitive damages should not be set out as a separate Count in a Complaint as it is an element of damages and not a separate cause of action. As such, the court dismissed a Count in the Plaintiff's Complaint, in which punitive damages were separately pled as a separate Count, as being procedurally improper. The court allowed the Plaintiff to file an Amended Complaint to otherwise properly list the punitive damages claim in the Complaint.

Allegations of Recklessness

In the case of *Mangieri v. Chen*, No. 22-CV-3149 (C.P. Lacka. Co. Oct. 18, 2022, Gibbons, J.), the court denied Preliminary Objections filed by a tortfeasor Defendant challenging the Plaintiff's allegations of recklessness and for punitive damages in a rear-end accident matter.

The court noted that, in this rear-end accident matter, the Plaintiff alleged that the tortfeasor Defendant operated his vehicle in an outrageous, careless, and reckless manner. The Plaintiff also sought punitive damages.

The tortfeasor filed Preliminary Objections asserting that the Plaintiff's allegations of reckless, willful and wanton conduct were baseless legal conclusions lacking any factual support.

Judge Gibbons followed the trend in Lackawanna County by ruling that recklessness is a state of mind which can be averred generally under Pa. R.C.P. 1019(b) such that the Plaintiff's claims for punitive damages were allowed to proceed. In so ruling, the court again referred to the case of *Archibald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. 2009), appeal denied, 989 A.2d 914 (Pa. 2010).

In concluding his Opinion, Judge Gibbons confirmed that the tortfeasor Defendant would have the opportunity to revisit this argument at a later time of the case at the summary judgment stage. However, in the context of the Preliminary Objections, the same were overruled and the Plaintiff's Complaint was allowed to proceed.

Allegations of Recklessness Allowed to Proceed

In the case of *Shank v. Hanover Intermodal Transport Inc.*, No. 1:23-CV-01080 (M.D. Pa. Aug. 22, 2023 Kane, J.), the court denied a Defendants' Motion to Dismiss Plaintiff's punitive damages claims pled in a motor vehicle accident.

The court found that the Plaintiff's allegations plausibly supported a punitive damages remedy at this early stage of the litigation.

According to Opinion, the Plaintiff alleged that he slowed down for a truck that was turning into a driveway in front of him at which point another truck driver rear-ended the Plaintiff's vehicle.

The Plaintiff asserted negligence claims against the truck driver and the truck company and alleged outrageous conduct in terms of the Defendants' allegedly willfully and recklessly ignoring the safety hazards of driving a commercial vehicle in an unsafe manner and driving a vehicle in a substandard condition for interstate travel.

The Plaintiff additionality alleged that the truck company failed to properly trail its driver, failed to properly equip or maintain trucks, failed to monitor its driver performance, and was negligent in terms of hiring and retaining drivers, and/or in otherwise allegedly violating commercial motor vehicle regulations.

The Plaintiff additionally averred that the Defendant driver "consciously" drove the truck at a high rate of speed under the circumstances and also violated Federal Motor Carrier Safety Regulations.

The court denied the Defendant's Motion to Dismiss the Plaintiff's implicit demand for punitive damages and the allegations of recklessness, gross negligence, and/or willful misconduct as be a premature request at this pleading stage of the litigation.

Allegations of Recklessness Allowed to Proceed in Federal Court Case

In the case of *Guy v. Eliwa*, No. 4:23-CV-00472 (M.D. Pa. Sept. 11, 2023 Brann, C.J.), Chief Judge Matthew W. Brann of the Federal Middle District Court for the Middle District of Pennsylvania reviewed the propriety of claims of recklessness in civil litigation matters in the context of a federal court personal injury suit.

According to the Opinion, this case arose out of a three (3) vehicle accident on Interstate 80 that involved three (3) tractor trailers. Two (2) tractor trailers were involved in an accident on the highway and then struck the Plaintiff's parked tractor trailer.

One of the Defendant tractor trailer drivers fled the scene of the accident without attempting to stop or render aid. That driver was subsequently charged with accidents involving death or personal injury, disregarding the traffic lane, accident involving property damage, failure to stop and give information and render aid, careless driving, and recklessly endangering another person.

The Plaintiff sued the tractor trailer drivers and their employers. In the Complaint, the Plaintiff asserted various allegations of recklessness.

The Defendants filed various motions against the Complaint.

In contrast to the more stringent state court Rules of Civil Procedure requiring fact-pleading in Pennsylvania, under the Federal Rules of Civil Procedure, notice pleading is all that is required.

Relative to the Plaintiff's claims for punitive damages, the court in this case noted that the Plaintiff cited to Pennsylvania case law explaining that the procedural rules allow a Plaintiff to pled gross negligence and recklessness generally.

Chief Judge Matthew W.
Brann
M.D. Pa.

Judge Brann noted that this would mean that a Plaintiff need only allege that a Defendant was "reckless" for punitive damages claims to survive a Motion to Dismiss, so long as the underlying negligence claim also survives.

In reviewing this area of the law, Judge Brann noted that there is a split of authority amongst the Pennsylvania state courts on this point. In noting the split of authority, Judge Brann cited to "Pleading For Clarity: Appellate Guidance Needed to Settle the Issue of the Proper Pleading of Recklessness in Personal Injury Matters" by Daniel E. Cummins, 93 PA Bar Ass'n Q.32 (2022).

Judge Brann noted that "even in Pennsylvania courts which permit recklessness to be averred generally at the Motion to Dismiss stage, the record must ultimately support a finding of recklessness beyond merely claiming recklessness generally. See Op. at 12 citing Monroe v. CBH20, LP, 286 A.3d 785, 780 (Pa. Super. 2022).

In this case, Judge Brann applied Federal Rule of Procedure 9(b). The court noted that Rule 9(b) mirrors Pennsylvania Rules of Civil Procedure 1019(b) by stating that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

With respect to the separate issue of allegations in support of a claim for punitive damages, the court noted that a Plaintiff is required to show that the Defendant had a state of mind such that the Defendant had to be an outrageous manner due to other an evil motive or a reckless indifference to the rights of others.

The court stated that, in order to show reckless indifference sufficient to support a claim for punitive damages, the Plaintiff must present evidence to establish that a Defendant had a subjective appreciation of the risk of harm to which the Plaintiff was exposed and that the Defendant acted, or failed to act, in conscious disregard of that risk.

Judge Brann stated that this means that recklessness - - like negligence - - is a legal standard, with components relating to a Defendant's conduct and a Defendant's state of mind. The court noted that Rule 9(b) only pertains to the Defendant's state of mind.

Accordingly, Judge Brann held that a federal court may dismiss a completely bald allegation of "recklessness" as conclusory when a Plaintiff is requesting punitive damages. However, he emphasized that a federal court is not compelled to dismiss such a claim.

Reviewing the law of the Third Circuit, Judge Brann found that the weight of authority in the Third Circuit has prompted most courts in the District, including the federal courts of the Middle District, to employ the trial court's wide discretion in preserving recklessness claims at the Motion to Dismiss stage and allowing such claims to proceed into discovery.

Judge Brann continued by stating that the courts in the Middle District have more specifically stated that, because the question of whether punitive damages are proper often turns on the Defendants' state of mind, this question frequently cannot be resolved on the pleadings alone but must await the development of the full factual record at trial. As such, such claims are generally allowed to proceed beyond the pleadings stage.

Turning to the allegations asserted by the Plaintiff in this case, Judge Brann found that the Plaintiff had actually alleged outrageous facts to show evidence of reckless indifference on the part of the Defendant in any event so as to allow the claim to proceed into discovery. More specifically, the court noted that flight from the scene of an automobile accident, without attempting to stop or render aid, certainly demonstrates a degree of reckless indifference possibly justifying the application of punitive damages.

Judge Brann's decision in this case is otherwise notable for his addressing various issues with regards to trucking accident cases, including the requirement of the Plaintiff to cite to specific statutes and laws and regulations in the Complaint when making claims of violations of the same.

The Definition of Gross Negligence

In the case of *Johnson v. Keane Group Holdings, LLC*, No. 4:20-CV-00491 (M.D. Pa. May 3, 2023 Brann, C.J.), the court reviewed the definition of "gross negligence."

In this matter, the court denied summary judgment in a personal injury case involving a plaintiff who was injured at a well site in the oil and gas industry.

The court noted that the Defendant's indemnification agreement excluded liability for "gross negligence."

Chief Judge Brann noted that the Pennsylvania Supreme Court has never precisely defined the term of "gross negligence."

The Court found the question before it to involve the issue of whether "gross negligence" requires a finding of recklessness on the part of the defendant. In the end, Judge Brann ruled that "gross negligence" does not require a finding of recklessness.

Judge Brann noted that the difficulty in defining gross negligence arises from the fact that the term's origin is in statutory law rather than common law, which does not recognize degrees of negligence.

Chief Judge Brann stated that gross negligence does not require the intentional indifference or conscious disregard of risks that defines recklessness.

Accordingly, gross negligence was found to require evidence that an actor's conduct was an extreme departure from the relevant standard of care. However, evidence that the actor acted recklessly is not required for a finding of gross negligence.

The court denied summary judgment in this case given the issues of fact presented on and found that summary judgment was not appropriate on the issue of whether or not the Defendant was grossly negligent under the circumstances presented.

Amendment of Complaint at Trial (To Add Punitive Damages Claim)

In the case of *Vanston v. Green Ridge Health Care Group, LLC*, No. 2019-CV-6227 (C.P. Lacka. Co. July 7, 2023 Munley, Julia, J.), the court denied a Defendant's Motion for an Amendment of an Order for the purpose of seeking an interlocutory appeal. This request was made relative to the trial court's underlying Order that had allowed an amendment to the Plaintiff's Complaint at a trial of a negligence case involving a nursing home to add a claim of recklessness and a claim for punitive damages after the completion of the testimony of certain Defendants and even though the statute of limitations had previously expired.

In this regard, Judge Munley found that there were sufficient facts pled in the original Complaint such that the court rejected the Defendant's argument that the claims of recklessness and punitive damages were barred by the statute of limitations.

In her decision, Judge Munley cited to previous decisions by her colleague on the Lackawanna County Court of Common Pleas, Judge Terrence R. Nealon, who had previously ruled that amendments to a Complaint are permitted after the running of the statute of limitations so long as no new causes of action are pled.

Judge Julia Munley
Lackawanna County

In this regard, Judge Munley noted that recklessness is considered an aggravated form of negligence and not a new cause of action. She also noted that, under Pennsylvania law, a request for punitive damages does not constitute a cause of action in and of itself. Rather, a request for punitive damages is merely incidental to an underlying cause of action.

Accordingly, Judge Munley ruled that an amendment to a Complaint to add a claim for punitive damages after the statute of limitations has run is permissible where the main operative facts to support such a claim have been previously alleged in the original Complaint.

Judge Munley noted that a decision was further supported by the fact that the Plaintiffs alleged facts indicative of reckless conduct in the original Complaint. The Court pointed to those cases in which it has been held that recklessness can be pled in any case whatsoever, regardless of the facts pled.

Amended Complaint Filed Outside of 20 Days and Without Leave of Court or Consent of Opposing Party is a Legal Nullity [Non-Precedential]

In the non-precedential decision by the Pennsylvania Superior Court in the case of *Tabb v. Thomas*, No. 72 EDA 2022 (Pa. Super. March 2, 2023 Panella, P.J., Stabile, J. and King, J.) (Mem. Op. by Panella, P.J.), the Pennsylvania Superior Court addressed the ability of a Plaintiff to file an Amended Complaint after the time allowable for the same has expired.

In this case, which arose out of a slip and fall matter, the Plaintiff started the lawsuit with a Writ of Summons and then filed a Complaint. The Defendant responded with Preliminary Objections. When the Plaintiff did not reply to the Preliminary Objections, the court sustained the same and dismissed the Plaintiff's Complaint.

Thereafter, without leave of court, or agreement or consent of the Defendant, the Plaintiff filed an Amended Complaint raising essentially the same claims. The Defendant again filed Preliminary Objections raising the same issues as raised before and adding an argument that Amended Complaint was untimely filed and that the Plaintiff had failed to seek the leave of court or the Defendant's agreement prior to the filing of the Amended Complaint.

In response, the Plaintiff filed a Second Amended Complaint, again without the permission of the trial court or the agreement of the Defendant. The Defendant responded with Preliminary Objections again.

Thereafter, the Plaintiff filed a Third Amended Complaint, again without the permission of the trial court or the agreement of the Defendant. The Defendant raised the same arguments in his Preliminary Objections, again asserting that the Plaintiff had failed to seek leave of court or the Defendant's agreement to file the additional Amended Complaint.

The trial court sustained the Defendant's Preliminary Objections in this regard, finding that the Plaintiff had failed to seek leave of court or the agreement of the Defendant to file the Amended Complaint. The court also held that the Amended Complaints were void and should be stricken. As such, the case was dismissed by the trial court with prejudice. The Plaintiff then filed this appeal.

On appeal, the Pennsylvania Superior Court affirmed the dismissal of the case by the trial court.

Amendment To Add New Claim Not Allowed After Statute of Limitations Expires [Non-Precedential]

In the case of *Kersey v. Pisano*, No. 798 EDA 2022 (Pa. Super. March 7, 2023 Sullivan, J., Panella, P.J., Bender, P.J.E.) (Op. by Sullivan, J.)[Non-Precedential], the court affirmed in part and reversed in part relative to post-trial motions filed in a medical malpractice case after a verdict was entered in favor of a Plaintiff.

In this case, the Pennsylvania Superior Court found that, where the Plaintiff's Complaint made allegations solely about prostate cancer, it was an error by the trial court to allow an amendment of the Complaint so as to permit evidence to be presented at trial on a claim for liver cancer, where that claim was only asserted after the two (2) year statute of limitations had run.

The court reaffirmed the general rule that amendments to a Complaint to add new causes of action after the statute of limitations is not permitted.

The court additionally noted that, where an expert report includes a new cause of action on behalf of a Plaintiff, the trial court may not permit the Plaintiff to introduce that opinion after the applicable statute of limitations has run.

The court found that there was no possible reading of the Complaint that could support a claim that the allegations of liver cancer were contained therein so as to allow the desired amendment or claims to proceed.

In this matter, because the trial court utilized a special verdict questionnaire that allowed the jury to reach separate verdicts for the two (2) types of cancer, only the jury verdict relative to the claim of medical malpractice related to the liver cancer would be reversed.

Leave to Amend Complaint Denied

In the case of *Myrick v. Hall*, April Term 2020, No. 00794 (C.P. Phila. Co. Aug. 15, 2022 Shreeves-Johns, J.), the court affirmed the trial court's Order granting a Motion to Dismiss and denying a Plaintiff's Motion for Leave to file an Amended Complaint to correct the name of the Defendant driver. in the Complaint.

In its decision, the court focused upon the fact that, although the Plaintiff knew that they had sued the wrong party in the Complaint's caption, the Plaintiff did not seek to cure this defect until after the applicable statute of limitations had expired.

The court pointed to Supreme Court precedent holding that, where the statute of limitations has run, amendments will not be allowed to introduce a new cause of action or to bring in a new party.

The court emphasized that, based upon the Plaintiff's own admission, the Plaintiff was aware that an adult male was driving the vehicle involved in the subject accident, but nevertheless chose to name a female as the Defendant driver in the Complaint. It turned out that the husband of the named Defendant driver was the actual driver during the course of the accident.

The court noted that the Plaintiff did not act with haste and took over six (6) months to attempt to cure the defects in their pleading after having become aware of the actual driver's identity.

As such, in the Rule 1925 Opinion, the trial court asserted that it did not abuse its discretion by granting the named Defendant driver's motion to dismiss and denying the Plaintiff's request for leave to amend the Complaint to identify the correct driver.

Forum Selection Clause for UIM Case

In the case of *Warren v. Donegal Mut. Ins. Co.*, No. 1:22-CV-01309 (M.D. Pa. May 4, 2023 Wilson, J.), the court denied the UIM carrier's Motion to Dismiss a UIM claim and granted the Plaintiff leave to effectuate proper service.

In this UIM matter, the Defendants asserted that the Complaint should be dismissed for insufficient service of process, improper venue, and failure to state a claim.

As noted, the court granted the Plaintiff leave to effectuate proper service.

In part, the UIM carrier asserted that the insurance contract's forum selection clause rendered the United States District Court for the Middle District of Pennsylvania an improper venue.

In addressing this motion, the court applied the venue rules found under F.R.C.P. 12.

In reviewing this Motion to Dismiss, the court noted that the forum selection clause in the policies at issue required that the Plaintiff to file the action in a "court of competent jurisdiction in the county and state" where the Plaintiff resided at the time of the accident.

The carriers asserted that, because the Plaintiffs resided in Cumberland County, Pennsylvania at the time of the accident, the forum selection clause only allowed the Plaintiff to bring his claim into Cumberland County Court of Common Pleas.

The court disagreed and accepted the Plaintiff's claim that the forum selection clause should be interpreted broadly to also cover the Federal Middle District Court as a court of competent jurisdiction that covered the area of Cumberland County.

The court found that the plain language of the forum selection clause allowed the Plaintiff to file the action in the Federal District Court if so desired. As such, the Motion to Dismiss was denied in this regard.

Proper Venue

In the case of *Twigg v. Varsity Brands Holding Co., Inc.*, No. 21-CV-00768 (E.D. Pa. Jan. 12, 2023 Goldberg, J.), the court granted a Defendant's Motion to Transfer Plaintiff's products liability action from the Eastern Federal District Court of Pennsylvania and out of the Middle Federal District Court of Pennsylvania.

According to the Opinion, the Plaintiff was a teacher and coach who was throwing indoor batting practice from behind an L-screen that was covered with safety netting. A hit ball ripped through the safety netting, hitting the Plaintiff in the eye and causing permanent damages.

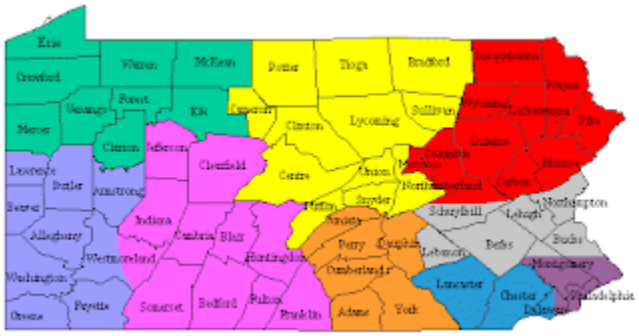
The Plaintiff brought strict liability claims against the Defendant and filed a suit in the Eastern District Court of Pennsylvania. The Plaintiff's main argument for filing in that county was that a majority of the Plaintiff's treating doctors and nurses were allegedly located within that district.

After reviewing the record before it, the Eastern District Judge Goldberg ruled that the Defendants had demonstrated that the case could have been brought in the Middle District of Pennsylvania and that the balancing of the factors required under 28 U.S.C. §1404(a) and the *Jumara* case weighed in favor of the transfer of the case from the Eastern District to the Middle District.

The court found that venue was proper in the Middle District because the injury occurred in a county located within that district. The court otherwise found that the convenience of the party's factor was neutral and that more witnesses were actually located in the Middle District.

The court also noted that the allegedly defective product was sold to a public school in the Middle District for use by its students and employees and that the case was, therefore, fairly characterized as a localized controversy within the Middle District Federal Court jurisdiction of Pennsylvania. As such, the Defendant's Motion to Transfer was granted.

Proper Venue



In the case of *Morehart v. Germania Country Store & Lodge, LLC*, No. CV-22-01040 (C.P. Lyc. Jan. 25, 2023 Carlucci, J.), the court granted a Defendant's request to transfer a lawsuit to the county where the Plaintiff sustained injuries and where the Defendant corporation was headquartered.

In this matter, the Plaintiff filed a premises liability lawsuit against the Defendant for injuries allegedly sustained when the Plaintiff allegedly fell while in one of the Defendant's stores.

The Plaintiff filed a lawsuit in Lycoming County. The Defendant filed Preliminary Objections asserting that venue should be Potter County, where the injury was sustained and where the Defendant's corporation was headquartered.

The court reviewed the issue under Pa. R.C.P. 2179 and 1006(b) and noted that a personal injury action against the corporation or a similar entity may be brought in a county where the corporation regularly conducts business.

The court further noted that, in determining where a corporation regularly conducts business, the court should consider the nature of the corporation's actions in the county in terms of both the quantity and quality of those actions.

Although the Plaintiff in this matter sought to bring a lawsuit in the county where the Defendant routinely traveled to purchase inventory, the court found this contact to be incidental rather than necessary to the Defendant's purpose of operating a retail store.

As such, the court granted the Defendant's Preliminary Objections and ordered the matter to be transferred to the Court of Common Pleas of Potter County.

Proper Venue

In the case of *Watson v. Baby Trend, Inc.*, Aug. Term 2021, Case No. 210802189 (C.P. Phila. Co. Dec. 16, 2022 Cohen, J.), the court filed a Rule 1925 Opinion requesting the Superior Court to affirm the trial court's granting of a Defendant corporation's Preliminary Objections asserting improper venue in Philadelphia County.

According to the Opinion, the Plaintiff filed this products liability lawsuit alleging that their 11 month old child died while in a car seat manufactured by the Defendant.

The Plaintiffs filed their lawsuit in Philadelphia County. The Defendant filed Preliminary Objections to the Complaint and sought to transfer venue from Philadelphia County to Bucks County.

After allowing for discovery on the issue, the court sustained the Preliminary Objections and issued an Order transferring the case to Bucks County.

The Plaintiffs filed an appeal, which prompted the trial court to issue this Rule 1925 Opinion. In this Opinion, the court in *Watson* stated that, while a Plaintiff's choice of forum is to be given great weight, that choice is not absolute. The court noted that, under Pennsylvania Rules of Civil Procedure 2179, personal injury action against the corporation or a similar entity may be brought in a county where that Defendant regularly conducts business.

Under the applicable law, when determining whether venue is proper in this type of case against a corporation, the courts are required to apply a quality/quantity analysis.

After reviewing the record, the court noted that the Defendant's direct to consumer sales in Philadelphia represented just .0018% of the company's total 2021 sales and that the company otherwise sold their product through big box retailers such as Target, Wal-Mart, and Amazon.

The court found that the Defendant corporation did not otherwise have any direct connection with Philadelphia County and did not maintain any places of business in the city or even in the state of Pennsylvania. It was additionally noted that the company did not buy any products or material from any Pennsylvania vendors.

According to the trial court, the company's activities within Philadelphia failed to meet both the quality and quantity prongs of the venue analysis. Consequently, the court found that venue was not proper in its jurisdiction.

Proper Venue

In the case of *Troseth v. Carson Helicopters Holding Co. Inc.*, March Term, No. 1222 (C.P. Phila. Co. Aug. 24, 2022 Kennedy, J.), the court ruled that venue was proper over all of the Defendants in this matter because one of the Defendants had sufficient quantity and quality of contacts so as to qualify Philadelphia County as a proper venue. The court additionally held that venue was proper for the remaining Defendant under Pa. R.C.P. 1006(c)(1), which states that, where venue is proper for one (1) Defendant, it is proper for all Defendants.

In this matter, the Plaintiff was injured in a helicopter crash.

The Defendants asserted that Philadelphia County was an improper venue for the suit under Pa. R.C.P. 2179, which governs proper venue for corporate Defendants. The Defendant filed Preliminary Objections. The trial court overruled the Preliminary Objections and the Defendants then moved for an appellate certification of the Orders so that they could immediately appeal the ruling to the extent that it involved a substantial venue issue.

As to the quality of contacts, the court noted that the corporate Defendant's acts within the county must be those acts directly furthering or essential to their corporate objective. In this regard, the court held that the helicopter manufacturer was in the business of manufacturing, refurbishing, and selling helicopters, and had contracts with manufacturers in northern Philadelphia. The court found that these contacts were of sufficient quality relative to the venue question.

With regard to the quantity test, the court noted that a Defendant's acts must be sufficiently continuous so as to be considered habitual for venue purposes. The court additionally referenced precedent finding that venue was properly established where just 1-2% of a company's gross sales were located within the venue jurisdiction.

After reviewing the record before it, the court noted that the helicopter manufacturer had specifically contracted with a Philadelphia manufacturer to produce the interior materials and items for helicopters. The court found that this evidence satisfied the quantity prong of the test.

The court also noted that the Defendant helicopter manufacturer also had other contacts in Philadelphia County and used Philadelphia airports to transport their helicopters.

Given that the court found that venue was proper as to the helicopter corporate Defendant, the court noted that, under Pa. R.C.P. 1006, venue was also proper for the other Defendants.

Proper Venue

In the case of *Estate of Rita Quigley v. Pottstown Hospital*, No. 2022 Pa.Super. 205 (Pa. Super. Dec. 1, 2022 Lazarus, J., Murray, J., McCaffery, J.) (Op. by Lazarus, J.), the Pennsylvania Superior Court ruled that a Montgomery County hospital may be sued in Philadelphia County because its parent company regularly conducted business in the City of Philadelphia.

According to commentators, little case law exists on this issue of proper venue in the context of parent-subsidiary relationships. Those commentators note that the limited guidance that did exist up to the time of this decision tended to favor the medical Defendants.

In this case, the Pennsylvania Superior Court reasoned that the parent company, Tower Health, which owned the Defendant, Pottstown hospital, actively controlled subsidiaries located in the City of Philadelphia. The court found that that relationship was more than a sufficient reason for the lawsuit to be allowed to remain in Philadelphia.

According to the *Pennsylvania Law Weekly* article by Alezza Furman cited below, some commentators view this decision as creating a framework for interpreting the relationship between parent and subsidiary companies and the impact of the same on proper venue for civil litigation matters involving such Defendants. Some commentators believe that this ruling now hinders the ability of parent companies to distance themselves from the action taken by their subsidiaries and that this decision will assist Plaintiffs in forum disputes.

Note that, on January 1, 2023 a new Pennsylvania Rules of Civil Procedure went into effect that serves to expand the scope of where medical malpractice claims may be filed. Under that Pennsylvania-friendly rule change issued by the Pennsylvania Supreme Court, Plaintiffs will now be allowed to sue medical providers in any county where the medical provider regularly conducts business or has significant contacts.

This new rule reverses a 20 year old rule that limited medical malpractice suits to counties where the Plaintiff received the treatment at issue.

Doctrine of Forum Non Conveniens

In the case of *Ehmer v. Maxim Crane Works, L.P.*, No. 2431 EDA 2022 (Pa. Super. June 7, 2023 DuBow, J., McLaughlin, J., and McCaffery, J.) (Op. by DuBow, J.), the Pennsylvania Superior reversed a trial court's granting of a Petition to Transfer Venue in a motor vehicle accident case that had been transferred from Philadelphia County to Columbia County.

According to the Opinion, this motor vehicle accident case involved a Columbia County Plaintiff injured in Columbia County. The Plaintiff filed suit in Philadelphia.

The Superior Court initially noted that a trial court Order transferring venue is an interlocutory Order that is appealable as of right.

In its decision, the Pennsylvania Superior Court ruled that a Plaintiff's choice of forum is entitled to great weight. Here, the Plaintiff chose to file suit in Philadelphia County over Columbia County.

The court also noted that the party asserting forum non conveniens must create a record before the court demonstrating hardship.

In this matter, the court found that the Affidavit from the witnesses claiming inconvenience failed to indicate what the witnesses' potential testimony would be.

As such, the Superior Court found that, without evidence of relevance of the potential witness testimony, the trial court abused its discretion in finding that a trial in Philadelphia would pose a hardship to the moving party.

The court additionally noted that, with the state of modern technology, site visits are rarely the sole means of providing a fact-finder with necessary information about the site of an event. The court also noted that the technology now allows for the quick and easy transfer of medical records such that the initial location of the records is no longer an important factor.

The court additionally stated a Plaintiff's residence is peripheral to the issues presented and are insufficient, in and of itself to warrant a granting of a Petition for Forum Non Conveniens.

In the end, the Superior Court reversed the trial court's Order transferring the case to Columbia County.

Doctrine of Forum Non Conveniens

In the case of *Smith v. Beckman Coulter, Inc.*, No. 2313 EDA of 2021 (Pa. Super. June 6, 2023 King, J., Bowes, J. and Pellegrini, J) (Op. by King, J.)[Non-Precedential], the Pennsylvania Superior Court affirmed the trial court's granting of a Petition to Transfer a Case under the doctrine of forum non conveniens.

This case involved an asbestos suit that was filed over an alleged exposure to asbestos at an educational institution located in Cumberland County. The case was filed in Philadelphia County.

The Superior Court ruled that the trial court properly transferred the case from Philadelphia County to Cumberland County.

The court noted that the evidence before the court confirmed that the Plaintiff's choice of venue was either vexatious or so oppressive as to require a transfer. In this case, the site of the claimed exposure to asbestos was over 100 miles from Philadelphia.

Additionally, multiple Affidavits from witnesses were provided to the court in which those witnesses confirmed that a trial in Philadelphia would be oppressive and create a great hardship because of personal, family, and job-related responsibilities.

The court ruled that, given the distance involved, the decision to transfer venue was proper even without consideration of those Affidavits.

Doctrine of Forum Non Conveniens

In the case of *Mitchell v. Gentry*, No. 22-CV-2951 (C.P. Lacka. Co. March 3, 2023 Nealon, J.), the court granted a Petition to Transfer Venue filed by the Defendants in a motor vehicle accident.

According to the Opinion, the Plaintiff was a Lycoming County resident who was injured in a Lycoming County accident. The records also revealed to the court that all of the Plaintiff's medical treatment occurred in Lycoming County.

The Defendant driver was a New York motorist and his employer was a company incorporated in the State of New York and which maintained its principal place of business in New York.

The New York Defendants filed a Preliminary Objection asserting improper venue in Lackawanna County since the Defendant motorist could not be served in Lackawanna County, given that the Defendant driver's employer did not regularly conduct business in Lackawanna County, and given that the cause of the action arose in Lycoming County.

In the alternative, the Defendants filed a Petition to Transfer Venue to Lycoming County under Pa. R.C.P. 1006(d)(1) on the grounds that the litigation and trial of this matter in Lackawanna County would be oppressive to the parties and witnesses.

Based upon the totality of the circumstances, the court found that Lackawanna County was an oppressive forum and, as such, the court granted the Defendant's Petition to Transfer the case to Lycoming County.

Doctrine of Forum Non Conveniens

In the case of *Russo v. Allstate Indem. Corp.*, Feb. Term 2022, No. 02004 (C.P. Phila. Co. Feb. 15, 2023 Fletman, J.), the trial court issued a Rule 1925 Opinion requesting the Superior Court to affirm the trial court's decision to deny the insurance company's Petition to Transfer Venue under the Doctrine of Forum Non Conveniens.

The trial court initially ruled that the appeal should be quashed because the Order denying the Petition to Transfer Venue for Forum Non Conveniens is not an appealable Order under the Pennsylvania Rules of Appellate Procedure.

In this regard, the trial court noted that the Order did not dispose of all parties and all claims and did not change venue or transfer the matter to another court.

The trial court stated that, while Orders granting changes in venue are interlocutory Orders that are appealable as of right, Orders denying such petitions were not appealable.

The trial court went on to review the substantive issues presented as well. The trial court stated that it denied the Motion to Transfer Venue where the Defendant had failed to carry its burden of providing detailed information to establish that the Plaintiff's chosen forum was oppressive or vexatious. In particular, the court noted that the Defendant did not provide any Affidavits from any witnesses who would be inconvenienced.

Doctrine of Forum Non Conveniens

In the case of *Smith v. CMS West, Inc.*, July Term 2020, No. 02048 (C.P. Phila. Co. Sept. 2, 2022) (Shreeves-Johns, J), the court affirmed a decision granting a Motion to Transfer Venue under Pa. R.C.P. 1006(d)(1) on the grounds that the former venue was oppressive to several of the witnesses who did not reside within the county where the case was filed and which witnesses would have to travel several hours for depositions and the trial.

This matter arose out of a strict products liability incident that occurred in Butler County, which is near Pittsburgh. The Plaintiff filed suit in Philadelphia.

After the trial court denied Preliminary Objections asserting improper venue, certain Defendants filed a joint Petition to Transfer Venue for *Forum Non Conveniens* seeking to have the matter transferred to Butler County under Pa.R.C.P. 1006(d)(1).

As noted above, the trial court granted this Petition to Transfer. In doing so, the court rejected the Plaintiff's arguments that the court did not allow the parties to engage in enough discovery related to the issue of venue. The court noted that the Plaintiffs were allowed to submit several Affidavits to the court regarding the venue selection.

Doctrine of Forum Non Conveniens

All in all, they'd rather be in Philadelphia

In the case of *Ritchey v. Rutter's Inc.*, No. 2219 EDA 2020 (Pa. Super. Oct. 20, 2022 Dubow, J., Pellegrini, J., Lazarus, J.) (Op. by Lazarus, J.), the Pennsylvania Superior Court ruled that a trial court properly denied Defendants' Motion to Transfer Venue on the basis of the doctrine of forum non conveniens because, although the Defendant showed inconvenience with the venue selected by the Plaintiff, there was no showing of oppressiveness.

The Pennsylvania Superior Court also found that there was no evidence that the trial court's decision rose to the level of overriding or misapplying the law. The Superior Court also found that the trial court's decision was not manifestly unreasonable.

According to the Opinion, the Plaintiff resided in Cumberland County and the Defendant Pennsylvania Corporation had its principal place of business in York and regularly conducted business in Philadelphia.

This case arose out of a motor vehicle accident. The Plaintiff was treated in Dauphin County, Philadelphia County, and Cumberland County. The Plaintiff filed suit in Philadelphia.

Under Pa. R.C.P. 2179, a corporate Defendant may be sued in any county in which it regularly conducts business.

The Defendant in this matter filed a Motion to Transfer Venue from Philadelphia County to either Cumberland or York County under Pa. R.C.P. 1006(d)(1). The Defendant attached twenty (20) witness affidavits to its motion confirming that venue in Philadelphia would be a "great hardship."

When the trial court denied the Motion to Transfer, the Defendant appealed. As noted, the per Superior Court upheld the trial court's decision.

In upholding the denial of the motion, the appellate court found that the trial court did not abuse its discretion in denying the Motion to Transfer where there is evidence that two (2) eyewitnesses to the accident noted their willingness to travel to Philadelphia to testify where the Plaintiff received three (3) months of medical care in Philadelphia County, and where the Defendants' affidavits asserting inconvenience amounted to nothing more than a superficial showing of inconvenience.

Also, with respect to any hardship, the Pennsylvania Superior Court noted that, in this day and age, technology to conduct remote depositions and/or to gather witness statements had become a vital and regular component of pre-trial discovery in civil litigation matters.

No Claim For Negligent Spoliation of Evidence Recognized in PA

In the case of *Erie Ins. Exch. v. United Services Auto. Assoc.*, 2022 Pa. Super. 207 (Pa. Super. Dec. 6, 2022 Olson, J., Colins, J., Dubow, J.) (Op. by Colins, J.), the Pennsylvania Superior Court ruled that there is no recognized cause of action in Pennsylvania for negligent spoliation of evidence.

In this matter, in which involved fire damage claims and the right to conduct an investigation as to the cause of a fire, the court granted summary judgment for the Defendant on a promissory estoppel claim which claim was brought in an effort to recover damages for the negligent spoliation based upon an agreement to indefinitely preserve evidence.

The Superior Court affirmed the trial court's finding that the promissory estoppel claim was essentially disguised as a negligent spoliation of evidence cause of action. Since such claims are not recognized in Pennsylvania, the Court affirmed the entry of judgment against this promissory estoppel claim.

Arbitration Clause Upheld

In the case of *Waters v. Express Container Services*, 2022 Pa. Super. 182 (Pa. Super. Oct. 18, 2022 Collins, J., Olson, J., Dubow, J.) (Op. by Collins, J.), the Pennsylvania Superior Court found that a Plaintiff was bound by the arbitration provisions of an equipment lease for the truck he was inspecting at the time of the accident such that the Plaintiff was required to arbitrate his claims for personal injury instead of pursuing them by way of a lawsuit.

According to the Opinion, the Plaintiff was allegedly injured when he fell from a catwalk on the top of a tanker-trailer that he was inspecting at a trucking terminal.

In its decision, the Pennsylvania Superior Court re-affirmed the notation that Pennsylvania law favors the enforcement of the arbitration agreements. This was particularly so where the validity of the arbitration agreement in this case was undisputed.

The court stated that a contract clause in this matter, which required the arbitration of any claims arising out of or relating to the contract, also served to cover tort or other non-contract causes of action.

Defendant Found To Have Waived Arbitration Clause

In the case of *Watson v. The Terrace at Chestnut Hill*, Sept. Term 2020, No. 00101 (C.P. Phila. Co. Sept. 21, 2022 Shreeves-Johns, J.), the court addressed a Motion to Compel Arbitration in a nursing home case.

The court denied the nursing home's Motion to Compel Arbitration given that the injured party was found to have waived their right to the arbitration agreement by engaging in the judicial process.

In this regard, the Plaintiffs filed a negligence lawsuit. Approximately nine (9) months after receiving the Complaint, the Defendants filed a Motion to Compel Arbitration, arguing that the arbitration clause in the contract between the parties mandated arbitration.

The court denied the motion on the grounds that the Defendant had waived its right to arbitration by engaging in a judicial process.

In so ruling, the court applied five (5) factors including whether the parties (1) failed to raise the issue of arbitration promptly, (2) engaged in discovery in the litigation, (3) filed pre-trial motions that do not raise the issue of arbitration, (4) waited for adverse rulings on pre-trial motions before asserting arbitration, or (5) waited until the case is ready for trial before a certain arbitration.

In this case, the court faulted the Defendant for not raising the issue of arbitration immediately but waiting until nine (9) months into the litigation, during which time the parties engaged in discovery. The court additionally found that the Defendant's assertion that the reason for the delay, that is, that the Defendant was simply unaware of the arbitration agreement, was unavailing.

Statutory Employer

In the case of *Yoder v. McCarthy Construction, Inc.*, No. 1605 EDA 2021 (Pa. Super. Jan. 31, 2023 Bender, P.J.E., Panella, P.J., Sullivan, J.) (Op. by Bender, P.J.E.), the court addressed issues of whether or not a Defendant was a worker's compensation statutory employer and, therefore, immune from any tort liability asserted by the Plaintiff, who was an employee of a subcontractor.

According to the Opinion, the jury in the underlying matter had entered a verdict for over $5.5 million dollars against the Defendant on the personal injury claims presented.

In reviewing the Worker's Compensation Law, 77 Pa.C.S.A. Section 462, the Superior Court noted that general contractors take on secondary liability for the payment of worker's compensation for the employees of any subcontractors. In the event a subcontractor defaults on securing worker's compensation coverage, then the coverage purchased by the general contractor would apply. In this regard, the general contractor is considered under the law to be a statutory employer of the subcontractor's employee.

In exchange for this secondary liability taken on by a general contractor under the law, the general contractor is granted immunity from any tort liability arising out of the same incident.

The court found that, given that the Plaintiff had received worker's compensation benefits, the Plaintiff was judicially estopped from denying his employee status. The court noted that the record confirmed that the Plaintiff was an employee of the subcontractor at issue, and not an independent contractor.

As such, the Pennsylvania Superior Court ruled that a statutory employer status is not limited to general contractors at a job site.

The court additionally noted that worker's compensation immunity, including with respect to the issue of whether or not a Defendant is a statutory employer, is a jurisdictional issue that cannot be waived.

The court additionally noted that whether a Defendant is a statutory employer is a question of law for the court, not a question of fact for the jury.

In the end, the Superior Court found that the Defendant was a statutory employer and was therefore immune from any liability.

Petition To Open Default Judgment

In the case of *Locklear v. Pocono Luxury Inc.*, No. 3142-CV-2020 (C.P. Monroe Co. May 8, 2023 Zulick, J.), the court denied a Defendant's Petition to Open a Default Judgment because the Defendant's Petition was untimely.

This case arose out of a lawsuit filed by a Plaintiff against a Defendant home improvement company.

The court noted that, in order to open the default judgment, the Defendant was required to show a prompt filing of its Petition, a reasonable explanation for the default, and a meritorious defense.

In this case, the Defendant waited over a year after the default judgment was entered before filing a Petition to Open the Default Judgment.

The court noted that various court documents and Orders were previously served on the Defendant prior to the filing of the Petition. No explanation was provided to the court why the Defendant did not seek legal representation or otherwise act during the time even before the Complaint was filed.

Judge Zulick noted that the prompt filing of a Petition to Open a Default Judgment typically refers to a period of less than one (1) month. The court noted that delays exceeding that time frame have been deemed to be untimely in other cases.

Million Dollar Default Judgment Opened Due to Defects in Record

In the case of *Grady v. Nelson*, No. 2115 EDA 2021 (Pa. Super. Oct. 21, 2022 Stabile, J., Dubow, J., and Pellegrini, J.) (Op. by Stabile, J.), the Pennsylvania Superior Court reversed a trial court Order in which the trial court denied a Defendant's Petition to Strike or Open a Default Judgment.

On appeal, the Pennsylvania Superior Court ruled that a Sheriff's Return of Service indicating the non-existence of an address was conclusive on its face to render a Petition to Strike or Open Default Judgment meritorious as it was apparent from the record that the Defendant had not been afforded notice of the proceedings.

According to the Opinion, this matter arose out of a shooting incident on premises owned by the Defendant. The court noted that a default judgment was entered against the Defendant in the amount of $1 million dollars.

The Superior Court opened the judgment after finding two (2) fatal defects that existed on the face of the record. One, the court found that there was conclusive evidence that the Plaintiff had served the Complaint and the judgment notices on a non-existent address, thereby depriving the Defendant of notice that this action was pending against him.

Also, the court found that the Plaintiff's 10-Day Notice of Intent to Enter a Default Judgment did not substantially comply with the language required under Pa. R.C.P. 237.5 and 237.1.

Personal Jurisdiction (Federal Court)

In the case of *Grady v. Rothwell*, No. 4:22-CV0-00428 (M.D. Pa. Nov. 8, 2022 Brann, J.), the court addressed issues of personal jurisdiction in a trucking accident case.

According to the Opinion, the Plaintiff's decedent was killed in a motor vehicle accident that occurred in Virginia.

The Defendant tractor trailer driver was not a resident of Pennsylvania, nor was La-Z-Boy Logistics, which was the company for which the driver was driving.

Judge Brann found that the court lacked personal jurisdiction as there was no evidence or allegation that the corporate Defendant was "at home" in Pennsylvania. Personal jurisdiction was also not found due to the fact that the subject motor vehicle accident occurred outside of Pennsylvania.

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Judge Brann ruled that the fact that La-Z-Boy did business nationwide, including Pennsylvania, was insufficient, in and of itself, to confer general personal jurisdiction over that party, as there was no allegation that the company had any locations or employees in Pennsylvania.

The court additionally found that there was no basis to assert specific personal jurisdiction as the underlying motor vehicle accident occurred in the State of Virginia.

Personal Jurisdiction (Federal Court)

In the products liability case of *Merino v. Repak, B.V.*, No. 135 MDA 2022 (Pa. Super. Dec. 6, 2022 Bowes, J., McCaffery, J., and Stevens, P.J.E.) (Op. by McCaffery, J.), a Defendant company operating out of the Netherlands filed an appeal from a trial court Order overruling its Preliminary Objection to personal jurisdiction. The Superior Court affirmed the trial court's Order.

In so ruling, the Superior Court rejected the Defendant's arguments that the trial court had erred and abused its discretion when the trial court exercised personal jurisdiction over the foreign company based upon either the Defendant's independent contacts with the Commonwealth of Pennsylvania or its relationship with a Co-Defendant company.

The Superior Court noted that the trial court properly exercised specific personal jurisdiction over the foreign manufacturer with no minimum contacts of its own within the forum. The court found that, based upon the actions and contacts of the foreign manufacturer's exclusive distributor, with whom the manufacturer had a close agency relationship, jurisdiction over the foreign manufacturer was warranted.

The Superior Court found that the Co-Defendant distributor had acted as an agent for the foreign manufacturer by selling the manufacturer's products to customers in the Commonwealth of Pennsylvania.

Relation Back Doctrine Addressed

In the case of *Edwards v. Norfolk Southern Railway Co.*, No. 826 EDA 2021 (Pa. Super. March 21, 2023 Stabile, J., McCaffery, J., and Pellegrini, J.) (Op. by Pellegrini, J.)(Stabile, J., Dissenting), the court addressed the relation back doctrine which, in certain situations, has served to validate the acts of a personal representative of an estate predates their official appointment as the representative of the estate.

In this case, the court considered whether the relation back doctrine applies when a Plaintiff timely files an action on behalf of an estate but does not apply to be appointed to be the personal representative of the estate until after the statute of limitations has run.

The trial court found that the doctrine did apply in this situation and, as such, denied the Motion for Summary Judgment filed by the Defendant.

The Pennsylvania Superior Court affirmed and held that the Plaintiff's appointment as a personal representative of her late husband's estate related back to her filing of the Complaint even though the Plaintiff did not apply to be the personal representative of the estate until two (2) months after the expiration of the statute of limitations.

Relation Back Doctrine Does Not Serve to Defeat Statute of Limitations Defense

In the case of *Coleman v. W. Oilfields Supply Co.*, No. 4:21-CV-00090 (M.D. Pa. Dec. 6, 2022 Brann, J.), the court addressed statute of limitations issues in a trip and fall matter.

In this case, the Plaintiff attempted to secure leave to amend the Complaint to add another Defendant who was allegedly responsible for the condition that allegedly caused the Plaintiff's trip and fall. That Defendant moved to dismiss the matter filed against it as being barred by the statute of limitations.

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In response, the Plaintiffs argued that their claims against that new Defendant related back to the claims noted in the original timely filed Complaint.

Judge Brann granted the Motion to Dismiss and agreed with the new Defendant that the Plaintiffs could not rely upon the relation-back doctrine where there was no evidence that the Defendant in question had notice of the action within a 120 days of the date that the action was filed. Nor was there any evidence that the new Defendants should have known that the action would have been filed against it but for a mistake in identity.

The court otherwise found that the new Defendant was not so closely related to the original parties that had been given notice of the action such that notice of the lawsuit could be imputed to the new Defendant through the filing of the original Complaint against the original Defendants.

Affirmative Defenses (Federal Court)

In the case of *Armbruster v. Eskola*, No. 4:21-CV-02070 (M.D. Pa. Oct. 5, 2022 Brann, J.), the court granted in part and denied in part a Motion to Dismiss. Of note, the court addressed the propriety of pleadings in a Defendant's stated affirmative defenses in this Federal Court matter.

This case arose out of a motor vehicle accident.

After the Defendant filed an Answer with Affirmative Defenses, the Plaintiff filed a Motion to Strike the Answer under F.R.C.P. 11.

Initially, the court ruled that a Rule 12(f) Motion to Strike, not a challenge under Rule 11, is the proper process for evaluating the sufficiency of pleading defenses.

Under F.R.C.P. 12(f), a court "may strike from a pleading an insufficient defense or any redundant material, immaterial, impertinent, or scandalous matter."

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Judge Matthew W. Brann went on to rule that affirmative defenses asserted by a Defendant must provide the Plaintiff with fair notice as to the types of defenses raised, but need not rise to the level of plausibility.

The court noted that pleading facts in affirmative defenses is not necessary as long as the defense stated is logically within the ambit of the litigation. However, defenses that have no factual or logical relationship to the allegations in the Complaint will be stricken.

Motion To Amend To Allow Punitive Damages (State Court)

In the case of *Jennings v. Lycoming County SPCA*, No. CV23-00512 (C.P. Lyc. Co. July 20, 2023 Carlucci, J.), the court struck a Plaintiff's claim for punitive damages in a dog bite but allowed the Plaintiff the right to amend.

According to the Opinion, the Plaintiff was in the lobby of a local SPCA when she was allegedly attacked by a Terrier named "Peanut."

The Plaintiff alleged that the dog had been previously adopted by a family, but returned to the SPCA, after biting a child in that family. The Plaintiff also alleged that the dog previously bit a SPCA employee and that, therefore, the SPCA had actual knowledge that the dog was dangerous.

In his Opinion, Judge Carlucci noted that he was not satisfied that the facts alleged in the Plaintiff's Amended Complaint were sufficient to show that the Defendant's conduct demonstrated a reckless indifference to the interests of others. However, as noted, the Court granted the Plaintiff leave to try again in another Amended Complaint.

Motion to Amend To Allow Punitive Damages Granted (Federal Court)

In the case of *Stelzer v. Stewart Logistics, Inc.*, No. 1:21-CV-02097 (M.D. Pa. March 10, 2023 Kane, J.), the court granted a Plaintiff's Motion to Amend under F.R.C.P. 15(a) in a trucking accident case to allow the Plaintiff to add a claim for punitive damages after discovery was found to have supported such a claim.

The court held that the punitive damages claim was neither late nor unduly prejudicial. In this regard, the court stated that the fact that punitive damages are not covered by insurance is not considered to be prejudicial as that term is defined in this context.

The court otherwise found that the Plaintiff's requested amended allegations of both a subjective appreciation of the risk and an alleged conscious disregard of the risk of danger to others were plausible under the amended facts. More specifically, the Plaintiff was alleging that the Defendant driver allegedly concealed a medical condition, falsified federally required time logs, and ignored lane markings on the road. As such, allowing the amendment was deemed not to be a futile effort on the part of the Plaintiff.

The court additionally noted that the Defendant driver's employer could be vicariously liable for punitive damages under the case presented.

The court also ruled that the claim for direct punitive damages against the employer were also plausible on the negligent hiring claim.

As such, the Plaintiff was granted leave to amend his Complaint.

Defendant's Motion to Amend To Add Crossclaim on Eve of Trial Denied

In the case of *Reynolds Iron Works, Inc. v. Lundy Constr., Co. Inc.*, No. 20-00, 730 (C.P. Lyc. Co. Jan. 25, 2023 Carlucci, J.), the court denied a Defendant's Motion for Leave to file new

crossclaims after finding that the Defendant had waited too long to do so in this case, which was already scheduled for trial.

The court noted that, granting the Defendant's motion would likely lead to prejudice to the other parties under circumstances in which a continuance also might not serve to remedy that prejudice.

This matter arose out of a civil litigation involving a contractor dispute regarding the money allegedly owed on a subcontract.

NJ Transit Found Not To Be Immune From Suit in Pennsylvania

In the case of *Galette v. N.J. Transit*, No. 2210 EDA 2021 (Pa. Super. March 21, 2023 Bowes, J., Lazarus, J., and Olson, J.) (Op. by Bowes, J.), the court addressed whether the New Jersey Transit Corporation was entitled to sovereign immunity from a personal injury motor vehicle accident lawsuit arising out of an accident that occurred in Philadelphia.

The trial court had denied the Motion to Dismiss filed by N.J. Transit based upon an argument that that Defendant was an arm of the State of New Jersey and was protected by the state afforded governmental and sovereign immunities such that the Plaintiff's Complaint was barred and should be dismissed.

On appeal, the Pennsylvania Superior Court affirmed the trial court's denial of the motion to dismiss.

N.J. Transit had asserted that the case against it should have been dismissed for lack of jurisdiction where N.J. Transit, as a foreign state entity, did not provide consent to be sued in another state and where that Defendant had rightfully asserted its state sovereign immunity protections under the United States Constitution.

After reviewing the history of the legal doctrine of sovereign immunity, which dates back to English common law, and after examining the relevant case law, including United States

Supreme Court precedent, the Pennsylvania Superior Court rejected N.J. Transit's arguments that it should be dismissed from the case.

The Superior Court noted that the issue of sovereign immunity often rises in the context of interstate lawsuits. The court noted that, under the law, it was not automatically incumbent upon one State to recognize the sovereign immunity of another State.

The court also noted that, although the State of New Jersey was not directly named as a Defendant in this suit, well-settled law holds that sovereign immunity does also extend to entities which are agents or instrumentalities of a state such that a lawsuit brought against the entity would, for all practical purposes, be considered to be a suit against the state itself.

As such, the court addressed the issue of whether N.J. Transit was an instrumentality of the State of New Jersey as it alleged.

The Superior Court noted that N.J. Transit relied upon a previous decision out of the Third Circuit Court of Appeals which had previously held that N.J. Transit does indeed qualify as an instrumentality of the State of New Jersey for purposes of sovereign immunity.

However, the Superior Court noted that the holdings of the Third Circuit are not binding upon the Pennsylvania Superior Court.

Turning to Pennsylvania's own 6-part test on whether sovereign immunity should be applied, the court in this *Galette* case ultimately found that that test was not dispositive on the question.

As such, the court noted that it was required to address whether allowing N.J. Transit to be sued would thwart the two principal purposes of the Eleventh Amendment, that is, the protection of New Jersey's dignity as a sovereign State and the protection of New Jersey's Treasury against involuntary depletion of funds by virtue of lawsuits brought by private persons.

In coming to its ruling, the Pennsylvania Superior Court analogized cases that are brought against SEPTA, or the Southeastern Pennsylvania Transit Authority, in Pennsylvania.

The court noted that, in such lawsuits, those suits proceed against SEPTA alone, as a wholly independent entity and without the involvement of the Commonwealth of Pennsylvania. As such, the Commonwealth cannot be subject to any Order of Court as a result of such a personal injury suit. Therefore, no right or interests of the Commonwealth would be affected by the outcome of any lawsuit against SEPTA in Pennsylvania courts. Consequently, personal injury lawsuits against SEPTA do not pose any danger that the Commonwealth itself would be involuntarily subject to and controlled by the mandates of the courts, without its consent, at the instance of private parties.

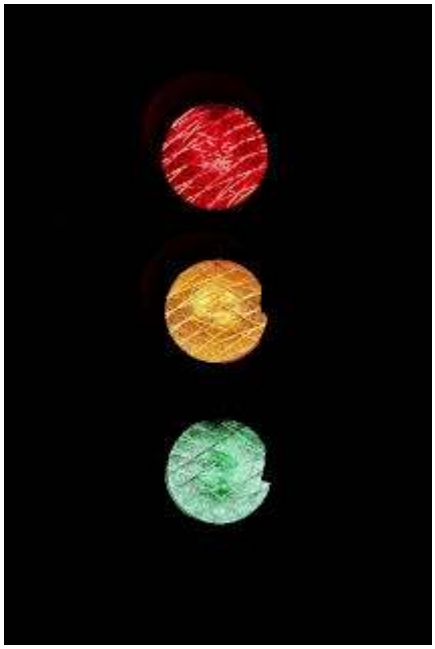
Based upon this analysis, the court in this *Galette* case found that the particulars of N.J. Transit's status with respect to the State of New Jersey was similar. N.J. Transit was noted to be a distinct legal entity that is empowered to sue and to be sued in a capacity that is independent from the State of New Jersey.

The court found that there was no risk to the sovereign dignity of the State of New Jersey in permitting a suit against N.J. Transit to proceed. The court also noted that any potential judgment against N.J. Transit would not have any discernible impact on the New Jersey Treasury.

Based upon this analysis, the court found that the Plaintiff's personal injury lawsuit posed no threat either to the sovereign dignity or the State Treasury of New Jersey. As such, the court concluded that N.J. Transit was not an arm of the State of New Jersey in this context.

Consequently, the court ruled that N.J. Transit was not entitled to protections of sovereign immunity which it had asserted. Accordingly, the trial court's denial of N.J. Transit's Motion to Dismiss was affirmed by the Pennsylvania Superior Court in this *Galette* case.

Motion To Dismiss Punitive Damages Claims in Federal Trucking Case Granted



In the case of *Koch v. Lawson*, No. 4:22-CV-01647 (M.D. Pa. April 12, 2023 Brann, C.J.), the court granted a partial Motion to Dismiss in which a Defendant attacked punitive damages claims asserted by a Plaintiff in a trucking accident case.

Chief Judge Matthew W. Brann of the Middle District Court of Pennsylvania ruled that punitive damages are proper only when the Defendant's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. In order to proceed on a claim for punitive damages, the Plaintiff must pled facts in support of the same.

In support of a punitive damages claim, the Plaintiff rattled off a long list of traffic violations against the Defendant in the Complaint, including allegations that the Defendant-driver was driving while distracted or fatigued and that the driver allegedly fell asleep while driving.

The Court noted that, while the Plaintiff had alleged a slew of traffic violations alleged committed by the Defendant-driver, the Plaintiff had only factually alleged that the Defendant-driver operated a tractor trailer and, at the time of the accident, allegedly ran a red light.

Judge Brann noted that a Plaintiff who only alleges that a Defendant failed to obey traffic laws has not met the pleadings requirements for punitive damages claims, particularly where underlying facts are not also pled in support of such allegations of outrageous conduct.

It was also emphasized that, in this case, the Plaintiff did not allege any facts to support an allegation that the driver made a conscious decision to drive while fatigued.

Chief Judge Brann ruled that, at most, the Plaintiff alleged that the Defendant-driver failed to follow the Rules of the Road. The Court found that such allegations, alone, are insufficient to support a claim for punitive damages. As such, the punitive damages claims asserted against the Defendant-driver were dismissed.

Chief Judge Brann otherwise ruled that, with respect to the allegations of punitive damages asserted against the Defendant trucking company, those claims would also be dismissed given that the Plaintiff had only pled conclusory allegations that the company Defendant knew or should have known certain things without the Plaintiff also providing any factual specificity in the Complaint. Accordingly, the punitive damages claims asserted against the Defendant-company were also dismissed.

Petition To Open Default Judgment of Non Pros Must Be Filed Before Any Appeal

Oops!

In the case of *Reilly v. Bristol Twp*., No. 2019-08757 (C.P. Bucks Co. June 30, 2023 Corr, J.), the trial court judge issued a Rule 1925 Opinion in which he requested the Superior Court to dismiss a Plaintiff's appeal of a civil litigation which a non pros default judgment was entered against the Plaintiff and the Plaintiff failed to preserve any issues for appeal when he filed an appeal from the entry of the judgment of non pros rather than filing a Petition to Open and/or Strike the Default Judgment under Pa. R.C.P. 3051.

According to the Opinion, a Plaintiff police officer sued the Defendant township regarding various employment issues.

During the course of the litigation, the trial court granted a Defendant's request for the entry of judgment of non pros due to the Plaintiff's failure to proceed with the case with reasonable promptitude.

The Plaintiff then filed an appeal.

The trial court held that the Plaintiff's appeal had to be dismissed given that the Plaintiff failed to file a Petition for Relief from the judgment of non pros under Pa. R.C.P. 3051.

According to the trial court, that Rule, and case law construing that Rule, directly addresses the means of obtaining relief from an entry of a judgment of non pros. The Court noted that, according to the Explanatory Note of the Rule, a Plaintiff must file a Petition for relief from the judgment of non pros to the trial court rather than filing an appeal to the appellate court.

The trial court ruled that, where the Plaintiff erroneously filed an appeal, the Plaintiff failed to preserve any of the issues regarding the entry of the judgment. As such, the trial court requested the Superior Court to dismiss the Plaintiff's appeal.

Plaintiff Cannot Properly Sue Tortfeasor's Carrier In Third Party Claim

In the case of *Nails v. Amguard Ins. Co.*, No. 3-23-CV-00557 (M.D. Pa. July 10, 2023 Carlson, M.J.), the court granted a Defendant's Motion to Dismiss in a case involving a pro se Plaintiff who was involved in a motor vehicle accident after which she sued not only the alleged tortfeasor but also the tortfeasor's liability insurance carrier.

The court ruled that Pennsylvania law does not permit a tort Plaintiff to maintain a direct cause of action against the alleged tortfeasor's insurance carrier. Magistrate Judge Carlson, quoting *Holovich v. Progressive Specialty Ins. Co.*, 600 F. Supp. 3d 572, 579 (E.D. Pa. 2022), wrote:

"It is well-settled that under Pennsylvania law, an injured party has no right to directly sue the insurer of an alleged tortfeasor unless a provision of the policy or a statute creates such a right." *Apalucci v. Agora Syndicate, Inc.*, 145 F.3d 630, 632 (3d Cir. 1998) (citations omitted); *see also Vella v. State Farm Mut. Auto. Ins. Co.*, Civ. No. 1:17-CV-1900, 2018 WL 1907335, at *2 (M.D. Pa. Apr. 23, 2018) ("In Pennsylvania, it is well-settled law that a third-party claimant cannot bring a cause of action for bad faith against an alleged tortfeasor's liability insurer. (*citing Strutz v. State Farm Mut. Ins. Co.*, 415 Pa.Super. 371, 609 A.2d 569, 570–71 (1992) and *Brown v. Candelora*, 708 A.2d 104, 108 (Pa. Cmwlth. 1998).

* * * * * *

Simply put, “absent a permissive statute or policy provision, a tort claimant cannot maintain a direct action against the insurance company.” *Mallalieu-Golder Ins. Agency, Inc. v. Exec. Risk Indem., Inc.*, 254 F. Supp. 2d 521, 525 (M.D. Pa. 2003)."

Judge Carlson went on to note in the *Nails* case that "[g]iven this settled tenet of Pennsylvania law, Nails may not maintain a direct action against Amguard based upon the alleged negligence of one of its policyholders."

Rather, the Plaintiff may only legally sue the tortfeasor. In this regard, the Plaintiff can rely upon the tortfeasor’s insurance company to satisfy its contractual obligation to pay the claim against the insured tortfeasor.

DISCOVERY

Information Not Subject Discovery Simply Because It Is Up In Computer Cloud

In the case of *Edenfield v. ECM Energy Services, Inc.*, No. 999 MDA 2022 (Pa. Super. Aug. 1, 2023 Bowes, J., Lazarus, J., and Stevens, P.J.E.) (Op. by Bowes, J.), the Pennsylvania Superior Court reviewed a notable discovery issue and concluded that, despite the accessibility of electronic records stored by a party on the so-called Cloud, state courts cannot compel companies to documents stored on the Cloud unless those companies have a sufficient link to Pennsylvania.

In this Opinion, the Pennsylvania Superior Court was presented with the question of whether electronic records stored in the Cloud by a company without any established physical location in Pennsylvania, were located within Pennsylvania for purposes of Title 15 solely by virtue of being theoretically accessible from Pennsylvania.

In ruling that the documents did not have to be produced, the Pennsylvania Superior Court upheld a decision out of the Lycoming County Court of Common Pleas in which that court had denied a Petition to Compel Inspection of Corporate Books and Records of an entity.

The Superior Court noted that to rule otherwise would, for example, permit the courts to compel any business utilizing Quickbooks or similar services to have to produce records in Pennsylvania simply because those records were stored in the Cloud and despite the fact that there was no other connection between that company and the Commonwealth of Pennsylvania. The court stated that such a result was not contemplated by the law at issue.

Fifth Amendment Right Against Self-Incrimination

In the case of *Whitcher v. Zimmerman*, No. 2022-C-0339 (C.P. Leh. Co. Oct. 25, 2022 Varricchio, J.), the court issued a detailed Order denying a Plaintiff's Motion to Compel and upholding a Defendant's right to assert his Fifth Amendment privilege against self-incrimination.

According to the Order, this case involved a motor vehicle accident with possible allegations of driving under the influence. The Defendant driver had previously pled guilty to the charge of careless driving in connection with the accident.

The Plaintiff asserted that, as such, the Defendant driver could not face any further criminal charges.

In response, the Defendant driver asserted that it was certainly possible for him to face additional criminal charges related to the accident based upon any newly discovered or disclosed evidence that could come out during the course of discovery during this civil litigation matter.

In ruling on the Motion, the court noted that the statute governing when a subsequent prosecution is barred by a former prosecution for a different offense, contains certain exceptions. One exception was when the offense of which the Defendant was formerly convicted or acquitted was a summary offense or a summary traffic offense.

Given this set of facts, the court applied the applicable standard of review and noted that it was not "perfectly clear" that the Defendant driver would not possibly face additional criminal charges related to the accident based upon his provision of information in discovery.

As such, the court found that the Defendant driver's assertion of the Fifth Amendment right against self-incrimination was reasonable. Therefore, the court denied the Plaintiff's Motion to Compel the Defendant driver to respond to certain discovery requests.

Stay of Discovery Due to Pending Criminal Case

In the case of *Piazza v. Young*, No. 4:19-CV-00180 (M.D. Pa. Feb. 14, 2023 Brann, C.J.), the court denied a Plaintiff's Motion to Lift an Existing Discovery Stay Order in a case in which certain Defendants had secured a stay of any discovery due to a pending parallel criminal action.

In reviewing the Motion, the court addressed the following factors:

1. The extent to which the issues in the civil and criminal cases overlapped;

2. The status of the criminal proceedings, including whether any Defendants have been indicted;

3. The Plaintiff's interests in expeditious civil proceedings weighed alongside the prejudice to the Plaintiff caused by the delay;

4. The burden on the Defendants;

5. The interest of the court; and,

6. The public interests

In reviewing these factors, the court noted that the civil and criminal cases were identical in this matter arising out of an alleged fraternity hazing claim. The court also noted that the civil court would not penalize the Plaintiffs for any delays that may be caused by the criminal proceedings. For example, the court indicated that discovery deadlines could be extended if the criminal proceedings were not resolved by the time the deadlines expired.

The court additionally noted that the Defendants indicated that, should discovery be allowed to proceed, the Defendants would likely assert their Fifth Amendment rights against self-incrimination, which could lead to further discovery disputes.

The court also noted that, given the overlap between the civil case and the ongoing criminal actions, requiring the Defendants to proceed with discovery in the civil case and sit for depositions would create a real risk of undue prejudice for the Defendants.

Based upon an application of the factors to the case presented, the court denied the Motion to Lift the Stay.

No Fishing Allowed

In the case of *Rotella v. Community Medical Center*, No. 22-CV-3943 (C.P. Lacka. Co. June 9, 2023 Nealon, J.), the court addressed the proper breadth and scope of subpoenas for a Plaintiff's prior medical records in a medical malpractice action.

In this case, the Plaintiffs confirmed to the court that they had no objection to the Defendants seeking records regarding the injured Plaintiff's condition at issue. It was also noted that the Defendants had already secured records on the Plaintiff dating back over twenty (20) years before the treatment which was the subject of this lawsuit.

The Plaintiff challenged additional subpoenas issued by the Defendants that sought any and all records from the time the Plaintiff's birth for any and all conditions and illnesses.

It was the Plaintiff's contention that the Defendants did not have a good faith basis to request records of this magnitude. The Plaintiffs otherwise indicated that they did not object to any request of discovery for some reasonable prior time period, such as 3-5 years.

After reviewing the Rules of Civil Procedure and related case law on the responsibility of the trial court to oversee discovery between the parties, Judge Nealon noted that it is within the court's broad discretion to determine the appropriate measures to ensure adequate and prompt discovery of information in a lawsuit.

The court noted that, generally, discovery is to be liberally allowed with respect to any matter, not privileged, which is relevant to the case being tried. The court also noted that the relevancy standard applicable to discovery is broader than the standard used at trial for the admission of evidence.

However, the court also noted that discovery requests must be reasonable, which is to be judged based upon the facts and circumstances of the case. The court is granted with authority to prohibit any discovery of matters which has been stated too broadly. Judge Nealon noted that, although discovery is to be liberally allowed as a general rule, "fishing expeditions" are not authorized under the Pennsylvania Rules of Civil Procedure.

Judge Terrence R. Nealon
Lackawanna County

In colorful language, Judge Nealon noted that, as the court has observed with increasing frequency, "[w]hile a limited degree of 'fishing' is to be expected with certain discovery requests, parties are not permitted 'to fish with a net rather than a hook or a harpoon.'" [citations omitted]. Applying the above law to this case, the court ruled that the subpoena served by the Defendants, as presented, were too broad.

The court did allow the Defendants to request records and materials for the period of ten (10) years prior to a relevant date up to the present.

Scope of Permissible Discovery of Prior Similar Incidents

In the case of Birl *v. Ski Shawnee, Inc.*, No. 3:22-CV-1598 (M.D. Pa. May 31, 2023 Carlson, Mag. J.), the court granted in part and denied in part a Motion to Compel discovery in a skiing accident case.

More specifically, the court found that a demand for the production of all documents and communications about all prior collision accidents on the Defendant's property for over twenty (20) years was excessive.

However, the court also noted that a restriction of discovery to only the particular object that the Plaintiff collided with was also too narrow.

The court stated that judicial discretion on discovery issues is limited by valid claims of relevance and privilege. Relevance issues are to be tempered by principles of proportionality. Proportionality, in turn, is determined based upon temporal and topical aspects of the discovery dispute.

Magistrate Judge Carlson otherwise indicated that prior accidents are relevant if they occur under similar circumstances as presented in the pending case, and where such prior accidents are also relevant to the issue of notice on the part of the Defendant.

The court otherwise indicated that five (5) years is a common temporal limit on discovery.

In the end, the court granted the Plaintiff the right to discovery five (5) year records on all collision incidents.

Discoverability of Peer Review Documents

In the case of *Sanders v. Children's Hosp. of Phila*., No. 646 EDA 2021 (Pa. Super. Nov. 22, 2022 Bowes, J., McLaughlin, J., and Stabile, J.) (Op. by Bowes, J.) (McLaughlin, J., concurring/dissenting), the Pennsylvania Superior Court affirmed in part and reversed in part a trial court's decision relative to a Defendant hospital's challenges on alleged privileged documents in a Plaintiff's medical malpractice wrongful death and survival action. The appellate court found that most of the documents and reports at issue were protected from discovery by the Peer Review Protection Act or the Medical Care Availability and Reduction of Error Act (MCARE Act).

According to the Opinion, the court involved twenty three (23) infants at the hospital who had allegedly contracted an adeno-virus in the hospital's NICU. Testing allegedly revealed the presence of the virus on equipment used for an eye exam and the virus was allegedly transmitted to patients by doctors touching the equipment and then touching the patients.

A doctor who led the investigation into the matter reported to the Patient Safety Committee and held "safety huddles" using powerpoint presentations with members of the Infection Prevention and Control Department and the NICU doctors and nurses. Several conferences were also held by the Defendant medical providers as a result of which a root cause analysis report was created. The investigating doctor also published an abstract and an article about the method of transmission.

The Plaintiff sought documents at issue in discovery.

On appeal, the court ruled that certain documents were admissible and certain documents were privileged. In the opinion, the court provided a nice overview of the application of the Peer Review Protection Act and the Medical Care Availability and Reduction of Error Act.

Peer Review Documents Discoverable

In the case of *Lahr v. Young*, No. 2021-C-0010 (C.P. Leh. Co. Oct. 3, 2022 Caffrey, J.), the court ruled that patient safety reports that the Plaintiff sought in discover from the Defendants in this medical malpractice action were solely prepared for compliance with the Medical Care Availability and Reduction of Error Act reporting requirements.

The court noted that the Peer Review Protection Act grants qualified immunity for healthcare providers participating in a peer review process and establishes an evidentiary privilege applicable to peer review proceedings to protect the process which is designed to improve the practice of medicine.

However, the court noted that these documents were not immune from discovery because they did not arise out of matters reviewed by a patient safety committee. It was emphasized that the documents at issue consisted of information that was otherwise available from original sources. As such, the court vacated a prior Order and issued a new Order granting discovery.

The court granted this Motion after an in-camera review of the documents at issue.

Motion for Sanctions Not Designed to Test Veracity of Discovery Responses

In the case of *Morel v. Patt*, No. 2021-C-0506 (C.P. Leh. Co. July 17, 2022 Caffrey, J.), the court found that the court granted in part and denied in part a Defendant's Motion for Sanctions raising various alleged discovery violations by a Plaintiff.

In its decisions, the court found in at least one instance the Plaintiff failed to make a good faith effort to identify her treatment providers and to produce related treatment records during the course of discovery.

As such, the court found that the Defendants were entitled to recover attorney's fees and expenses incurred in the effort to secure such information.

Otherwise, the Court found that sanctions were not warranted on other claims of discovery violations asserted by the defense. In this regard, the court noted that the rules of discovery are not designed to allow a motion for sanctions to be utilized to test the veracity of a party's claims of a lack of information or documentation to produce in discovery. Rather, the rules are designed to compel that parties make good faith efforts to comply with the requirements of discovery.

Punitive Damages Discovery

In the case of *Williams v. Glenmaura Senior Living at Montage, LLC*, No. 21-CV-1494 (C.P. Lacka. Co. Oct. 14, 2022 Nealon, J.), the court addressed discovery motions relative to the scope of permissible discovery of financial assets of a Defendant relative to a punitive damages claim in a personal injury case.

According to the Opinion, this case involved a professional liability action alleging reckless and negligence relative to alleged acts and/or omissions by the Defendants at a senior living facility which allegedly caused the death of the Plaintiff's decedent.

After the Defendant's separate Motion for Summary Judgment on the punitive damages claims was denied, the Plaintiff sought additional discovery on the Defendant's financial assets over and above the tax returns that the Defendant had previously produced. In part, the Plaintiff was seeking to gather bank records in an effort to discover more detailed information on the financial worth of the Defendant.

Judge Nealon overruled the defense objections to the discovery requests and found that the Plaintiff was entitled to discover the most accurate and detailed financial documentation and information that reflects the exact amount by which the Defendant's assets exceeded its liabilities.

The court noted that the tax records and balance sheets previously produced by the Defendant may not fully demonstrate the Defendant's net worth with sufficient precision and completeness.

The court therefore allowed the Plaintiff to gather the relevant bank records since a borrower seeking financing from a bank is likely to portray its financial position in a positive light in an

effort to secure the requested funding. The court found that the Defendant's representations of its assets to the bank would likely assist in this regard.

As such, the court ruled that the Defendant had not satisfied its burden of demonstrating that the requested materials were not discoverable under the liberal discovery allowed in Pennsylvania Rules of Civil Procedure.

Accordingly, the court granted the Plaintiff's Motion to Strike the Defendant's Objections to the subpoenas that were addressed to the Defendant's bank. However, the court limited the subpoenas to only require the production of records within the past three (3) years. The court additionally required the execution of a confidentiality agreement between the parties restricting the dissemination of the materials obtained.

Summary Judgment as an Appropriate Sanction for Spoliation of Evidence

In the case of *McClafferty v. Scranton Electric Heating*, No. 2019-CIVIL-2216 (C.P. Lacka. Co. Aug. 5, 2023 Nealon, J.), the court addressed issues with regards to the alleged spoliation of evidence.

A carpenter instituted this personal injury action against a subcontractor after he was burned in a fire caused by a gas tank provided by the subcontractor at the work site, and the subcontractor joined the gas tank supplier as an Additional Defendant.

The gas tank supplier filed a Motion for Summary Judgment seeking to dismiss the joinder action based upon the subcontractor's alleged spoliation of evidence in failing to preserve the subject gas tank.

Judge Terrence R. Nealon
Lackawanna County

Judge Nealon confirmed 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 defer future similar conduct.

The court noted that the first prong, which addresses the fault of the spoliating party, requires consideration of the offending party's duty or responsibility to preserve the relevant evidence or lack of any such duty.

Judge Nealon also noted that the destruction of potentially relevant evidence determines whether and what type of sanction should be imposed, not whether spoliation occurred.

Since the subcontractor's vice-president testified that it was "more than likely" that the gas tank "was returned" to the supplier after the fire, genuine issues of material fact existed as to whether the subcontractor could be characterized as the spoliator of the gas tank.

The court noted that the entry of summary judgment is the most extreme sanction for spoliation, and, at a minimum, requires proof that the party actually altered or destroyed the evidence, or authorized or directed its destruction or alteration.

Judge Nealon ultimately ruled that, although the presiding trial judge would later determine whether an adverse inference instruction under Pa. SSJI (Civ) §5.60 (5th Ed.) is warranted under the circumstances presented, at this stage of the matter, the entry of summary judgment as a spoliation sanction was found to be inappropriate by the court.

Spoliation Allegations Addressed in Federal Court Case

In the case of *Heagy v. Burlington Stores, Inc.*, No. 2:20-CV-02447-CMR (E.D. Pa. Sept. 6, 2023 Rufe, J.), the court denied a motion against a Defendant store that was based, in part, on the Defendant store's alleged spoliation of video surveillance evidence regarding the subject slip and fall incident.

According to the Opinion, on the day of the incident, a cleaning crew was cleaning the floors earlier that morning, as a result of which there was a wet mat near the entrance area.

About ten (10) minutes before the Plaintiff entered the store, the store employee nearly slipped and fell in the area. The Plaintiff then entered the store and slipped and fell on the tile floor after stepping from the mat, which the parties agreed was soaking wet.

Thereafter, the Plaintiff contacted a lawyer and, two (2) weeks after the fall, that attorney sent Burlington a letter confirming his representation of the Plaintiff and requesting the preservation of security/surveillance video of the incident. The Plaintiff's attorney requested that the entire unedited video be preserved as recorded for a period of twenty-four (24) hours before and twenty-four (24) hours after the subject incident.

A few days thereafter, the adjuster for Burlington's third party administrator contacted Plaintiffs' counsel and stated that the store cannot produce forty-eight (48) hours of footage, but that the footage would be preserved.

According to the Opinion, two (2) days before that communication, the adjuster had submitted a request to Burlington to save video from thirty (30) minutes before the incident to thirty (30) minutes after the incident.

Ultimately, Burlington's loss prevention associate preserved the footage only of the customer, which amounted to three (3) minutes prior to the fall and seventeen (17) minutes after the fall.

In this regard, the court was addressing a Motion for Summary Judgment by Burlington relative to the Plaintiff's punitive damages claims along with Motion for Summary Judgment by the

subcontractor Defendants who argued that Burlington's negligence was an intervening and superseding cause of the Plaintiff's fall and that Burlington's spoliation of evidence warranty summary judgment in favor of the subcontractor Defendants.

The court denied all motions so that the issues could be addressed later in terms of what spoliation sanctions were warranted.

The court found that Burlington's action of only preserving only a very limited amount of the video evidence constituted spoliation as there was no basis to conclude that Burlington's failure to preserve the pertinent video evidence was the result of any inadvertence, routine practice, or accident. The court noted that the evidence in the record demonstrated that Burlington spoliated the pertinent video evidence for the purpose of undermining the integrity of the litigation and that Burlington could not now benefit from its own misconduct.

The court found that the Burlington spoliation did not require a dismissal of the claims against the subcontractor. The court also noted that the finding of the entitlement to a spoliation adverse inference or an award of litigation expenses was premature at the present juncture of the case. Accordingly, all arguments regarding spoliation sanctions were denied without prejudice. The court granted the party's leave to file appropriate Motions for Sanctions.

Discovery Sanctions - Federal Court

In the case of *Garcia v. S&F Logistics*, No. 5:21-CV-04062-JMG (E.D. Pa. Oct. 24, 2022 Gallagher, J.), the court granted discovery sanctions against a Defendant in the form of a default judgment of liability against those Defendants where the Defendants had repeatedly failed to respond to discovery requests or appear for depositions despite Court Orders to do so.

According to the Opinion, this case arose out of a trucking accident.

In entering its Order, the court additionally noted that defense counsel had trouble establishing contact with the Defendants.

In the Opinion, the Court reviewed the Federal Court standard of review for the imposition of discovery sanctions, which includes an analysis of five factors set forth in the decision, and also noted that the trial court judge had wide discretion in this regard.

The court found that the Plaintiff had been materially prejudiced by the Defendants' discovery violations. Because the court anticipated that there would be no change in the Defendants' behavior, the court concluded that the most effective sanction would be to bar the Defendants from contesting liability at trial.

TRIAL ISSUES/EVIDENTIARY ISSUES

Liability Damages Cap Challenge Rejected

In the case of *Freilich v. SEPTA*, No. 327 C.D. 2022 (Pa. Cmwlth. July 6, 2023 Wojcik, J., Wallace, J., Leadbetter, S.J.) (Mem. Op. by Wojcik, J.) [Opinion not reported], The Pennsylvania Commonwealth Court rejected a Plaintiff's challenge to Pennsylvania's liability caps for state agencies.

In so ruling, the appellate court upheld a trial court Order reducing a $7 million stipulated jury verdict entered by a jury against SEPTA to the $250,000.00 liability cap required by Pennsylvania law.

In its Opinion, the Commonwealth Court held that it was bound by Pennsylvania Supreme Court precedent and thereby compelled to affirm the trial court's Order molding the verdict to conform with the statutory caps under 42 Pa.C.S.A. §8528(b).

In an article on the issue, it was indicated that plaintiffs' attorney plans to appeal the case up to the Pennsylvania Supreme Court.

Authentication

In an example of a criminal court case providing law that could become pertinent in a civil litigation matter, in the case of *Commonwealth v. Jackson*, 2022 Pa. Super 156 (Pa. Super. Sept. 13, 2022 Bowes, J., Lazarus, and Stabile, J.)(Op. by Lazarus, J.), the court found that the prosecution had sufficiently authenticated social media accounts by providing substantial circumstantial evidence linking the accounts to the Defendant in a first degree murder case.

On appeal, the Defendant challenged the admission of the social media evidence under the authentication rules found at Pa.R.E. 901.

According to the Opinion, the prosecution introduced names of accounts that reflected nicknames used by the Defendant. Also provided were biographical sections of the accounts, which were all similar to each other and contained a pin drop location reflecting the place where the Defendant was photographed at times.

The supporting evidence also showed that the information in the accounts was consistent with information in another account that the Defendant admitted that he owned and controlled.

Sudden Emergency Doctrine

In the case of *Cox v. Cemex, Inc.*, No. 10132 of 2020, C.A. (C.P. Lawr. Co. March 20, 2023 Motto, P.J.), the court denied a Defendant's Motion for Summary Judgment in a Plaintiff's personal injury litigation arising out of a motor vehicle accident.

According to the Opinion, the Plaintiff was a passenger in a vehicle being operated by the Defendant when the vehicle was struck by a tree located on a property next to the road. The Plaintiff sued the Defendant driver, the Defendant's business, and the owner of the property where the tree was located, among other parties.

There was conflicting evidence about how the accident occurred.

The Defendant driver maintained that the accident happened as he was driving around a curve in the road and oncoming traffic crossed the centerline, forcing the Defendant driver to move his right in his own lane. The Defendant driver denied that his vehicle left the roadway.

However, in his 911 call and alleged statement to ambulance crew members, the Defendant driver allegedly stated that he had run off the road and that a tree had come through the door injuring the Plaintiff. There was also conflicting testimony as to whether there were any tire tracks off the roadway.

The Defendant property owner had testified that the trees on his property had been trimmed to ensure that they did not protrude over the road. Also, a local police officer who routinely patrolled the area confirmed that he did not observe any parts of a tree protruding over the road. Additionally, the Plaintiff testified that the oncoming vehicle had moved back into its own lane of travel before encountering the Defendant's vehicle and that the Defendant driver had approximately ten (10) seconds to respond after first seeing the other vehicle.

The court found that issues of fact, including on the issue of sudden emergency doctrine, required the court to deny the Defendant driver's Motion for Summary Judgment.

Admission of Pedestrian Plaintiff's Consumption of Alcohol Upheld

In the case of *Moffitt v. Miller*, No. 8 EDA 2023 (Pa. Super. Sept. 18, 2023, Pelligrini, J., Bowes, J., and Stabile, J.) (Op. by Pelligrini, J.), the Pennsylvania Superior Court affirmed a lower court's denial of Plaintiff's post-trial motions in a case involving a pedestrian Plaintiff who was struck by a motor vehicle.

The court found that the low verdict and the 50/50 negligence apportionment by the jury were not against the weight of the evidence.

One of the issues that the Plaintiff challenged was the admission of testimony regarding the Plaintiff's consumption of alcohol before the accident. The appellate court found that evidence of the Plaintiff pedestrian's high blood alcohol level at the time of the accident was properly admitted by the court below.

The Superior Court noted that the evidence was supported by competent expert testimony that the Plaintiff's judgment would be impaired. Additionally, there was witness testimony that the Plaintiff smelled of alcohol at or around the time of the incident. The court noted that the exclusion of this evidence would have deprived the jury of relevant evidence to consider in its decision.

The court also found that the Defendant's alcohol expert was competent to testify based upon the expert's several decades of experience of treating alcoholics.

In another notable ruling, the Superior court ruled that evidence established that the Plaintiff had attempted to cross the street in a mid-block area and outside of any crosswalk. As such, the court found that the Plaintiff's requested "unmarked crosswalk" instruction was properly denied.

Admissibility of Photographs of Injuries

In the case of *Saahir v. Albert Einstein Med. Center*, December Term 2017, No. 03298, (C.P. Phila. Co. Aug. 25, 2022 Foglietta J.), the court found that photographs documenting a decedent's painful injuries while the decedent was in the hospital were relevant to the Plaintiff's wrongful death and survival claims. The court, in this Rule 1925 Opinion, recommended affirmance of its ruling in favor of the admission of the photographs at trial.

In its Opinion, the court noted that the Defendant's argument regarding a discrepancy in the date of the photos went to the weight of such evidence and not the admissibility of the evidence.

The court in its Opinion provides a nice summary of the law of admissibility at trial in this regard, including with respect to whether the prejudicial effect of the evidence outweighs any probative value of the evidence.

Court Precludes Admissibility of Exemplar Pictures of a Surgery That Plaintiff Did Not Undergo

In the case of *Crump v. Goldsleger*, Aug. Term, No. 01434 (C.P. Phila. Co. Jan. 4, 2023 Powell, J.), the trial court issued a Rule 1925 Opinion addressing various issues following a motor vehicle accident trial in which a defense verdict was entered.

Of note was the trial court's conclusion that it properly denied Plaintiff's request to admit evidence of photographs that did not pertain to any of the Plaintiff's injuries. The court found that such evidence was not relevant or probative on the issues presented.

More specifically, in this case, the court noted that the Plaintiff's credibility had been called into question as the Plaintiff attempted to introduce into evidence pictures of a knee surgery that were not pictures of the Plaintiff's knee. It was also noted that the pictures did not depict a type of surgery that was completed on the Plaintiff.

The court noted that, since the photographs of the knee that the Plaintiff sought to introduce were not actually pictures of the Plaintiff's knee, the court found that the evidence was irrelevant in that any minimal probative value of the picture was severely outweighed by the danger of unfair prejudice. The court noted that the only purpose of the photos appeared to be to shock the jury and to attempt to garner sympathy for the Plaintiff.

The court also asserted in its Rule 1925 Opinion that it had properly excluded the expert testimony of the Plaintiff's expert, Dr. Lance Yarus, where the expert had noted a "suspected" knee injury based upon a tele-medicine meeting with the Plaintiff. The court found that such testimony did not meet the reasonable degree of medical certainty standard.

Use of a Deposition In Lieu of Live Testimony

In the case of *Whitlock v. Allstate Fire & Cas. Ins. Co.*, No. 2:20-CV-00373-KSM (E.D. Pa. Oct. 13, 2022 Marston, J.), the court addressed various Motions In Limine.

In this federal court decision in which a party wished to use a pre-trial deposition of a medical expert, the court stated that, before a witness' recorded deposition testimony is admissible in lieu of live testimony, there must be an exceptional showing of reasons for the witness' unavailability.

The court stated that the fact that medical witnesses are busy seeing other patients is not an exceptional circumstance. The Court stated that it is well known that doctors are almost always busy. The court stated that, to recognize a "busy witness" exception would expand the exception to swallow the rule favoring live testimony.

As such, the court compelled both parties to present their medical expert's testimonies live at trial instead of by way of video deposition.

Failure to Properly Edit Videotaped Trial Deposition Prior to Presentation to Jury Deemed to Be a Harmless Error

In the case of *Bell v. O'Neill*, Oct. Term 2019 No. 03845 (C.P. Phila. Co. Nov. 16, 2022 Foglietta, J.), the trial court issued a Rule 1925 Opinion following the entry of a verdict in favor of the Plaintiff in an automobile accident litigation matter.

The court denied the Defendant's post-trial motion seeking a new trial and related relief.

In part, the court found that the failure of the Plaintiff to redact videotape deposition testimony of the Plaintiff's medical expert as agreed to by the parties did not warrant a mistrial.

In the testimony at issue, the Plaintiff's medical expert stated during his testimony that jurors "can see" with their own eyes the Plaintiff's injury in the medical imaging. The court noted that the erroneous playback of this testimony, which was rephrased during the course of the videotaping after an objection was asserted by defense counsel, did not warrant a declaration of a mistrial where other admissible testimony made similar points.

The trial court noted that it had also issued a prompt curative instruction admonishing the jury to disregard the testimony at issue.

The court also found that, if there was an error, it was a harmless error.

Expert Precluded Due To Lack of Sufficient Qualifications

In the case of *McConn v. Dollar General Corporation*, No. 2:-21-CV-01177-MJH (W.D. Pa. Dec. 19, 2022 Horan, J.), the court addressed a Defendant's Motion under *Daubert* to preclude the opinion testimony of the Plaintiff's purported retail safety expert in a case in which the Plaintiff was allegedly injured when a number of books allegedly fell upon her after she removed a jammed book from the bookshelf.

The court granted the F.R.E. 702 Motion in this case after finding that the Plaintiff's expert lacked any relevant qualifications to testify as to issues of retail safety.

The court noted that the proposed expert of the Plaintiff had no academic background, no formal training, and no retail work experience in the last fifty (50) years.

The court noted that the fact that the expert had reviewed the store's manuals could not create expertise.

The court also noted that the expert failed to identify any industry standards with the shelving of books at a retail store. The "standards" referenced in the expert report were neither industry standards nor the Defendant store's standards.

In the end, the court found that claimed experience by an expert does not make testimony admissible where the testimony lacks any independent indicia of reliability.

The court also noted that the bases that the expert cited for his opinion were contradicted by the facts of the case.

Cumulative Expert Testimony Precluded

In the case of *Evans v. Lavallee*, No. CV 20-00879 (C.P. Lyc. Co. 2022 Carlucci, J.), the court granted in part and denied in part a Plaintiff's Motion In Limine relative to the testimony of defense medical experts in a medical malpractice case.

According to the Opinion, this matter arose out of an accident during which the Plaintiff sustained burns when oxygen was allegedly caused to ignite, resulting in burns to the Plaintiff during the course of a surgery.

The Plaintiffs argued that the expert testimony of the expert in question should be precluded because the expert report was provided after the deadline for experts had expired, because the

expert was not of an appropriate specialty, and because the expert testimony would be cumulative or duplicative with the testimony of other defense experts.

The court ruled that, in the event the expert is found to be competent at trial, the expert would be allowed to testify in his field of plastic surgery.

However, the court noted that, unless the Defendants established a need at trial for testimony from this plastic surgeon expert on the separate subject of the operating room standard of care for an anesthesiologist, the plastic surgeon expert testimony would be precluded as cumulative given that the Defendants had other experts to testify in that regard.

Request To Have Settled Defendants on the Verdict Slip Rejected

In the case of *Williams v. Glenmaura Senior Living at Montage, LLC*, No. 21-CV-1494 (C.P. Lacka. Co. Nov. 7, 2022 Nealon, J.), the court addressed a motion by certain Defendants in a medical malpractice case for reconsideration of the court's previous Order granting certain settling Defendants' Motion for Discontinuance from the case by virtue of the settling Defendants' Joint Tortfeasor Agreements.

One of the non-settling Defendants wished to keep the settling Defendants in the case for purposes of the trial.

Judge Terrence R. Nealon
Lackawanna County

In his Opinion, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas confirmed that, in Pennsylvania, there is no absolute right to have settling Co-Defendants placed on a verdict slip.

Rather, under the applicable standard of review, the trial court is required to determine whether any evidence of a settling Co-Defendant's liability exists before deciding whether to put that Co-Defendant on the verdict slip.

In terms of a medical malpractice action, Judge Nealon noted that expert testimony is required to establish the elements of a duty, breach, and causation and that, if expert testimony will not be presented at trial to establish a settling Defendant's potential liability, then that settling Defendant should not be included on the verdict slip.

Judge Nealon noted that he had previously granted the voluntary Discontinuance of the settling Defendants in this matter in the absence of admissible expert testimony against those Defendants. The court also noted that any efforts by the Plaintiff to introduce expert testimony on the standard of care and causation would amount to hearsay in this case.

As such, the court found that it had previously properly granted the settling Defendants' Motions for Discontinuance. The Motion for Reconsideration at issue here was, therefore, also denied.

Measures of Damages With Older Plaintiff

In the case of *Williams v. Glenmaura Senior Living at Montage*, LLC, No. 21-CV-1494 (C.P. Lacka. Co. Nov. 4, 2022 Nealon, J.), Judge Terrence R. Nealon addressed the proper damages recoverable and the supporting evidence required in a medical professional liability action involving the death of a retired older adult.

In particular the court addressed this issue in terms of a Plaintiff's effort to seek to recover damages under the Wrongful Death Act, 42 Pa. C.S.A. §8301, and the Survival Act, 42 Pa. C.S.A. §8302.

After outlining what types of damages are available to be recovered under each of these elements of avenues of damagers,

After reviewing the record before him, the court found that, since the Plaintiff had not produced an expert report to provide the jury with evidence of the effect of productivity and inflation over time, the applicable discount rate required by the law, and the decedent's personal maintenance cost, for food, clothing, shelter, medical attention, and some recreation, the Plaintiff could not satisfy her burden of proof under the law in order to advance and sustain a claim in the Survival action for the decedent's loss of earnings or income.

The court further found that the Plaintiff's intended use of the decedent's adjusted gross income as the measure of his estate's recoverable economic damages would erroneously include forms of income that did not arise from the decedent's intellectual or body laborer and, as such, are not proper items of damages under the Survival Act.

Accordingly, the court ruled that the Defendant's Motion In Limine to preclude the Plaintiff from pursuing any type of claim for loss of earnings/income at the trial of the case was granted.

Fair Share Act Found Not to Apply in Case of Innocent Plaintiff

In the case of *Tucchi v. Carroll*, No. CV-2018-1794 (C.P. Northumb. Co. Jan. 24, 2023 Saylor, S.J.), a trial court judge addressed a Defendant's post-trial motions following the entry of a jury verdict in favor of the Plaintiff against three (3) Defendants in a personal injury civil litigation matter.

In this case, the moving Defendant argued that the verdict against all three (3) Defendants for the total amount awarded should be stricken under the Fair Share Act. This position was opposed by the Plaintiff.

In an Order only, Senior Judge Charles H. Saylor, sitting in the Northumberland County Court of Common Pleas, ruled that, pursuant to *Spencer v. Johnson*, 249 A.3d 529, 559 (Pa. Super. 2021), that the Fair Share Act was inapplicable given that the minor Plaintiff in this matter was not found to be contributorily negligent by the Plaintiff or, in other words, was an innocent Plaintiff.

In a footnote in his Order, the judge noted that the *Spencer* decision "was a precedential holding of the Superior Court after an analysis of the Fair Share Act, and not "dicta" as contended by Defendant Carroll."

Fair Share Act Found Not to Apply in Case of Innocent Plaintiff

In the case of *Ace v. Ace*, No. 6242-CIVIL-2020 (C.P. Monroe Co. Jan. 12, 2023 Williamson, J.), the court issued an Opinion in a non-jury trial arising out of a shooting incident and following the entry of default judgments against Defendants who did not appear for the trial.

Of note, the Court addressed the import of the *dicta* in the *Spencer v. Johnson* decision relative to the applicability of the Fair Share Act in a case in which no liability is assessed to a Plaintiff. Although Judge Williamson noted that the "dicta" in the *Spencer v. Johnson* contained reasoning that seemed "absurd," he apparently felt compelled to apply it to this case.

By way of background, the court noted that default judgments had been previously entered against the Defendants and that neither Defendant appeared at the time of the non-jury trial at which the only issue was the issue of damages.

The court found that the evidence presented confirmed that the Plaintiff had met his burden of proof with regards to causation and damages. As such, the Court in this non-jury trial found it necessary to apportion liability between the two Defendants for the Plaintiff's injuries.

Liability was apportioned by the Court to both Defendants. No percentage of liability was assessed to the Plaintiff.

Judge David J. Williamson
Monroe County CCP

Judge Williamson then noted that "[t]here has been a lot of confusion recently as to whether or not defendants are subject to joint and several liability for a judgment, regardless of their proportionate share of liability. **<u>See</u> Op. at p. 8.**

In making this decision, the Court addressed the history of the Comparative Negligence Act and the Fair Share Act.

Judge Williamson noted that, when passed in 2011, the Fair Share Act was thereafter interpreted by many courts as abolishing joint and several liability in most negligence cases such that defendants would only be responsible for their percentage of negligence assessed by the jury except in those instances where the exceptions under the Act were applicable.

The court noted that, with respect to this case, the exceptions which are found at 42 Pa.C.S.A. Section 7102(a.1)(3) applied to one of the defendants in this case relative to that one defendant being found to have engaged in an intentional act and by the fact that that same defendant had been found to be more than 60% liable.

The Court noted, however, that the other Defendant did not fall under any of the exceptions.

Judge Williamson noted that whether subsection (a.1) of the Fair Share Act applied to this case "is now very much in doubt." **See Op. at p. 11.**

The Court noted, "The statute heading at 42 Pa.C.S.A. Section 7102 is "Comparative negligence." This is the legal principal (sic) covering when a plaintiff is at fault in some percentage for their own injuries, together with a defendant or defendants. The Fair Share Act as enacted addresses the situation of a plaintiff who is contributorily negligent at subsection (a), titled as "General rule." Subsection (a.1) addresses recovery against multiple defendants and is titled "Recovery against joint defendants; contribution." Subsection (a.1) makes no mention of a plaintiff's contributory negligence." **See Op. at p. 11.**

In this regard, Judge Williamson wrote "The legislative intent, in light of an enactment of the Fair Share Act, appears to re-affirm the general rule regarding the contributory negligence of a Plaintiff, and to add provisions regarding the responsibility for an award as to multiple Defendants. It would seem that subsection (a.1) would apply in all cases, including those where a Plaintiff has some level of fault, or no level of fault at all. Otherwise, it would seem likely that the language of subsection (a.1) would have referenced a contributorily negligent Plaintiff if that subsection only applied in instances of comparative negligence attributed to a Plaintiff. To say the legislature enacted a statute to address what was perceived as an unfair result to a big-pocket Defendant following finding of minimal fault against them for injuries caused by multiple Defendants only in cases where Plaintiff is also contributorily negligent, seems like an absurd result. It makes more sense that the legislature would have enacted this measure in all cases of multiple Defendants, even where the Plaintiff has no contributory negligence."

That being said, Judge Williamson went on to review the contrary result noted in the *dicta* put forth by the Pennsylvania Superior Court in its *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021) decision. Judge Williamson noted that the Superior Court in Johnson analyzed the Fair Share Act and concluded that the legislature only intended for the joint and several provisions of subsection (a.1) to apply in cases where a Plaintiff is also found to have been contributorily negligent. Judge Williamson stated that the Superior Court in *Spencer* reasoned that, in all other cases, joint and several liability applied regardless of the percentage of fault of each Defendant.

In his decision, Judge Williamson noted that the rationale of the *Spencer* court regarding Fair Share Act "appears as *dicta* in the Superior Court's decision, as it was not the direct holding" of the Superior Court.

Judge Williamson also noted that the *Spencer* decision "was also a panel decision, and not one made by the entire court sitting *en banc*." **See Op. at 13.**

Judge Williamson also noted that the ruling in *Spencer* was not appealed to the Pennsylvania Supreme Court.

Based upon Judge Williamson's review of the *Spencer* decision, he noted his belief that the Superior Court "would rule that joint and several liability applies to all Defendants without limitations of the Fair Share Act, unless the Plaintiff has some amount of contributory negligence assessed against him or her." **Id.**

Despite noting earlier in his decision that the reasoning as contained in the *Spencer* decision was "absurd," Judge Williamson, apparently feeling compelled to do so, stated that he would "adhere to the *dicta* stated in *Spencer* in this particular case, and find joint and several liability without the application of the Fair Share Act as between both Defendants" given that there was no finding of contributory negligence against the Plaintiff in this case.

In other words, given that there was no contributory negligence assessed against the Plaintiff in this matter, the Fair Share Act was found not to apply, and the Plaintiff was free to collect the entire verdict from either Defendant even though one Defendant had been assessed with 70% liability and the other Defendant was hit with 30% of the liability.

Zero Verdict Upheld

In the case of *Derry v. Blackman*, No. 3:21-CV-01744 (M.D. Pa. June 30, 2023 Mehalchick, J.), the court ruled that a jury's zero verdict in a conceded liability case was not against the weight of the evidence.

In this matter, the Plaintiff filed a motion for a new trial. The Federal Court addressed the motion under the standards set forth in F.R.C.P. 59. Federal Magistrate Judge Karoline Mehalchick, who has been nominated to assume a position as a Federal Judge in the Middle District of Pennsylvania, wrote a thoroughly researched Opinion on the current status of Pennsylvania law regarding the validity of zero verdicts handed down by juries in Pennsylvania.

The court emphasized that the record in the case confirm that the existence, severity and alleged cause of the Plaintiff's alleged injuries were all disputed.

Judge Mehalchick reiterated the rule of law that a jury is free to decide which side's witnesses are credible.

The court also noted the general rule of law that, even if a jury found that a Plaintiff did actually suffer some pain or discomfort as a result of an accident, the jury could conclude that the injuries were not significant enough to warrant compensation.

In the end, the court found that the jury's verdict did not result in a miscarriage of justice and that the verdict did not cry out to be overturned as shocking the judicial conscience.

New Trial Allowed After Zero Damages Award

In the case of *Giko v. Calgiano*, No. 1262 EDA 2022 (Pa. Super. March 29, 2023 Lazarus, J., Nichols, J., and McCaffery, J.) (Op. by Lazarus, J.) [non-precedential], the Pennsylvania Superior Court concluded that a jury's award of $0 damages was against the weight of the evidence and, as such, the appellate court remanded the case for a new trial limited to damages.

According to the Opinion, this case arose out of a rear-end motor vehicle accident.

At trial, the jury found that the Plaintiff had sustained injuries in the accident and that the Defendant was 75% liable. However, the jury awarded $0 in damages.

According to the Opinion, the Plaintiff declined treatment at the scene and proceeded to work. Later that day, however, the Plaintiff's supervisor suggested that the Plaintiff leave work early and get treatment for complaints of neck and back pain.

The Plaintiff reported to an Urgent Care Center and was prescribed medication and advised to use ice and heat. Shortly thereafter, the Plaintiff began a course of physical therapy.

The Plaintiff also eventually underwent bilateral sacroiliac joint injections. She additionally had EMG and MRI testing for complaints of neck and back pain. The Plaintiff's overall medical bills were noted to be in excess of $26,000.00.

Based upon the evidence in the record, the Superior Court found that the jury's finding that the Plaintiff's harm was not compensable was against the weight of the evidence. The court held that the award of $0 damages bore no reasonable relationship to the alleged losses suffered.

While the court recognized that not every injury results in compensable pain and that a jury may decline an award of compensation for pain and suffering if the jury determines that the discomfort suffered by the Plaintiff was the sort of "transient rub of life" for which compensation is not warranted, here, the court found that the record confirmed that the Plaintiff had indeed sustained pain and suffering and that the general proposition that victims of accidents must be compensated for all that they suffer from the tort of another warranted the granting of a new trial.

Accordingly, the Superior Court found that the jury's award of $0 damages was against the weight of the evidence. As such, the court reversed the trial court's decision and remanded the case for a new trial limited to damages only.

Zero Verdict for Pain and Suffering Damages Upheld

In the case of *Wilson v. Hannigan*, Aug. Term, 2022, No. 00196 (C.P. Phila. Co. Nov. 22, 2022 Alan, J.), the trial court issued a Rule 1925 Opinion following a slip and fall case in which a jury found the parties to be equally liable and in which the jury granted the Plaintiff an economic damages award but no pain and suffering award.

The Court noted that the Plaintiff was not able to advise the jury as to what caused her to fall on a sidewalk.

Also, the medical evidence appeared to confirm that the Plaintiff may have sustained an ankle sprain for which she had minimal and conservative treatment. The trial court judge also noted in his Opinion that, although the Plaintiff testified to the jury that she had walked with a limp at times, the jury was able to watch the Plaintiff walk to and from the witness stand.

In requesting the Pennsylvania Superior Court to affirm its decision denying the Plaintiff's Motion for a New Trial, the trial court found that the evidence was sufficient for the jury to decline to award the Plaintiff non-economic damages where the Plaintiff's subjective complaints were inconsistent with the objective medical evidence presented.

The court also found that the Plaintiff's treatment was excessive in relationship to the alleged severity of the injury. The Plaintiff was also noted to have been non-compliant with her doctor's treatment recommendations.

The trial court also faulted the Plaintiff with respect to the number of issues raised on appeal in the Plaintiff's Concise Statement of Matters Complained of on Appeal. Given that the Plaintiff's Concise Statement was not concise, the trial court requested that the Superior Court find that the Plaintiff's alleged errors be deemed waived under Pa.R.A.P. 1925(b)(4)(vii).

Employer Immunity Due To Workers Compensation Claim Upheld

In the case of *Franczyk v. Home Depot, Inc.*, No. 11 WAP 2022 (Pa. April 19, 2023) (Op. by Wecht, J.) (Todd, C.J, concurring), the court addressed immunity provided to employers in personal injury civil litigation matters given the employer's exposure to worker's compensation recoveries.

The Pennsylvania Supreme Court confirmed that the worker's compensation system is a compromise that, in exchange for a no-fault insurance system, employers are granted immunity from tort liability for workplace injuries.

The court reiterated that, where worker's compensation is available, such compensation is the exclusive remedy for an injured party against their employer.

The worker's compensation statute precludes virtually any sort of negligence claim against the employer "on account" of a physical injury that occurs in a workplace.

In this matter, the court found that a Plaintiff could not sue his employer for allegedly failing to investigate a dog bite that occurred at the place of employment and thereby obstructing the Plaintiff's ability to bring a claim against the customer who owned the dog.

The court found that the plain language of the exclusivity clause under the Worker's Compensation Act barred this action. None of the exceptions were found to apply.

The court otherwise noted that employers have no general duty to protect and preserve the interests of their employees relative to a possible personal injury action.

Given that the Plaintiff in this matter was seeking a recovery of the same damages from the same injury that occurred in a workplace, the claim was found to be precluded from the Worker's Compensation Act.

Delay Damages Claim Denied Where Plaintiff Caused Delays

In the case of *Tyler v. Hoover*, June Term, 2019, No. 06965 (C.P. Phila. Co. Aug. 19, 2022 Hill, J.), the court denied a Plaintiff's Motion for Delay Damages following a trial in a rear-end accident case and wrote this Rule 1925 Opinion for appellate purposes.

The court, reviewing Rule 238, found that the Plaintiff's request for delay damages was unwarranted because the Plaintiff's noncompliance with the discovery rules and Orders of Court had led to certain delays in the matter. According to the Opinion, the Defendant had to file numerous motions to compel and motions for sanctions relative to written discovery and depositions in order to push the case forward.

The court also emphasized that, even if the delay of the trial had been solely attributable to Defendants, the Plaintiffs in this matter had not provided any other basis to support their formulation of the alleged delay damages.

As such, because the Plaintiff's estimation of delay damages was not properly calculated to reflect the lengthy pre-trial history of the case, the court found that it would be "patently unjust" and an abuse of discretion to award delay damages in this matter.

Constitutionality of Punitive Damages Award

In its recent Pro-Plaintiff decision in the case of *Bert Company v. Turk*, No. 13 WAP 2022 (Pa. July 19, 2023) (Op. by Donohue, J.) [Numerous Concurring Opinions written by numerous Justices], the Pennsylvania Supreme Court considered United States Supreme Court precedent in addressing the constitutionality of an award of punitive damages by a civil jury in Pennsylvania.

More specifically, the court addressed the ratio calculation, that is, the appropriate ratio calculation measuring the relationship between the amount of punitive damages awarded against multiple Defendants who are found to be joint tortfeasors, and the compensatory damages awarded.

The court noted that the ratio is one of the considerations utilized in assessing whether an award of punitive damages is unconstitutionally excessive.

This matter arose out of a business dispute in which the Plaintiffs claimed that the Defendants had poached employees from the Plaintiff's business as an attempt to harm the Plaintiff's business.

The jury awarded 11.2 times as many dollars for punitive damages as it did for compensatory damages. More specifically, the jury's verdict awarded $250,000.00 in compensatory damages as well as a total of $2.8 million dollars in punitive damages. The jury split the damages between the four (4) Defendants.

The Defendants based their 11.2 ratio on the cumulative punitive damages against all four (4) Defendants. The Pennsylvania Supreme Court determined that this was an incorrect calculation.

In its decision, the Pennsylvania Supreme Court noted that the Pennsylvania Superior Court calculated a punitive to compensatory damages ratio using a per-Defendant approach, as calculated by the trial court, rather than a per-judgment approach.

In its own decision, the Pennsylvania Supreme Court generally endorsed the per-Defendant approach as being consistent with federal constitutional principles that require consideration of a Defendant's due process rights.

The Pennsylvania Supreme Court additionally concluded that, under the facts and circumstances of this case, it was appropriate to consider the potential harm that was likely to occur from the concerted conduct of the Defendants when determining whether the measure of punishment was both reasonable and proportionate.

As such, the Pennsylvania Supreme Court affirmed the Order of the Superior Court.

Petition To Enforce a Settlement

In the case of *Vangjelli v. Banks*, No. 19-CV-1635 (E.D. Pa. April 6, 2023 Bratter, J.), the court denied a Defendant's Motion to Enforce a Settlement after finding that the Plaintiff asserted that she never agreed to the settlement and that the Plaintiff's attorney had no express authority from the client to accept the proposed settlement.

The case arose out of issues related to the Plaintiff's attempts to enter a Social Security Card Center and allegedly encountering trouble with a security guard. This led to the Plaintiff, at one point, being tackled by the security guard. The Plaintiff asserted various claims for personal injury as a result.

After the state court case was removed to federal court, the parties were referred to a magistrate judge for a Settlement Conference.

The magistrate judge was informed that the parties had settled the case. As such, the court dismissed the case with prejudice.

The Plaintiff then sent a letter to the court two (2) days later stating that she did not agree to settle and that her attorneys knew that. The Defendants filed the Motion to Enforce the Settlement at issue.

The court found a conflict of interests between the Plaintiff and her attorneys and granted the attorneys' Motion to Withdraw. The Plaintiff did not secure new counsel.

The court construed the Plaintiff's attorney's letter to the court as a pro se Motion to Set Aside the Order of Dismissal.

Applying Pennsylvania law, the federal courts noted that counsel needed the express authority of the client to settle the case. The court stated that express authority would not be found where, as here, the client had repudiated the attorney's authority in a timely manner after the settlement.

Given that the evidence in this case showed a lack of clarity regarding the attorney's express authority to settle the claims, the court denied the Defendant's Motion to Enforce the Settlement.

More specifically, the court saw and heard notable material gaps and inconsistencies in the testimony of the Plaintiff and her attorneys on the issues presented. The court also noted that none of the witnesses presented any documentary evidence.

It was indicated that there were two Settlement Conferences that were conducted via telephone. The record indicated that the Plaintiff was in the attorney's office listening to the first conference but was not present for the second conference. While she was not present at the second conference, she had agreed to be available by telephone to discuss any settlement offers and to possibly authorize her attorneys to accept any offers.

The Plaintiff's attorney testified that he conveyed the settlement offer to the Plaintiff, asked her if she wanted to settle, and that the Plaintiff had responded in the affirmative.

The attorney also testified that, when he called the Plaintiff back to tell her that the case had settled, the Plaintiff stated that she had changed her mind and no longer wanted to accept the offer.

During her testimony, the Plaintiff stated that she did not remember ever saying she wanted to accept the offer and that she had, instead, told her attorney to "go higher."

Based upon the record before it, the court found that it could not conclude that the attorney for the Plaintiff ever had any expressed authority to accept the settlement agreement. Given that the contradictory testimonial evidence showed that there was not a meeting of the minds between the Plaintiff and her attorney as to what was said, let alone what was meant, the court denied the Petition to Enforce the Settlement.

AUTO LAW UPDATE

Uber's Arbitration Clause Not Enforceable

In the case of *Chilutti v. Uber Technologies, Inc.*, No. 1023 EDA 2021 (Pa. Super. July 19, 2023 *en banc*) (Op. by McCaffery, J.)(Stabile, J., Dissenting), a split Pennsylvania Superior Court ruled that the Plaintiffs were not bound by an arbitration agreement that was contained within a set of hyper linked "terms and conditions" on a website or a smartphone application that they never clicked upon, viewed, or read.

Such "terms and conditions" contained an arbitration clause relative to any personal injury claims.

In ruling that a plaintiff is not bound by the arbitration clause under the facts and circumstances at issue in this case, a majority of the Pennsylvania Superior Court *en banc* panel upheld a Plaintiff's constitutional right to a jury trial in a personal injury matter.

This case is the first before a Pennsylvania appellate court to examine the waiver of a right to a jury trial in an online agreement.

Sudden Emergency Doctrine

In the case of *Cox v. Cemex, Inc.*, No. 10132 of 2020, C.A. (C.P. Lawr. Co. March 20, 2023 Motto, P.J.), the court denied a Defendant's Motion for Summary Judgment in a Plaintiff's personal injury litigation arising out of a motor vehicle accident.

According to the Opinion, the Plaintiff was a passenger in a vehicle being operated by the Defendant when the vehicle was struck by a tree located on a property next to the road. The Plaintiff sued the Defendant driver, the Defendant's business, and the owner of the property where the tree was located, among other parties.

There was conflicting evidence about how the accident occurred.

The Defendant driver maintained that the accident happened as he was driving around a curve in the road and oncoming traffic crossed the centerline, forcing the Defendant driver to move his right in his own lane. The Defendant driver denied that his vehicle left the roadway.

However, in his 911 call and alleged statement to ambulance crew members, the Defendant driver allegedly stated that he had run off the road and that a tree had come through the door injuring the Plaintiff. There was also conflicting testimony as to whether there were any tire tracks off the roadway.

The Defendant property owner had testified that the trees on his property had been trimmed to ensure that they did not protrude over the road. Also, a local police officer who routinely patrolled the area confirmed that he did not observe any parts of a tree protruding over the road.

Additionally, the Plaintiff testified that the oncoming vehicle had moved back into its own lane of travel before encountering the Defendant's vehicle and that the Defendant driver had approximately ten (10) seconds to respond after first seeing the other vehicle.

The court found that issues of fact, including on the issue of sudden emergency doctrine, required the court to deny the Defendant driver's Motion for Summary Judgment.

Punitive Damages Claim Allowed to Proceed in Trucking Accident Case

In the case of *Capie v. Lobao*, No. 3:21-CV-00829-KM (M.D. Pa. Aug. 4, 2023 Mehalchick, M.J.), Federal Magistrate Judge Karoline Mehalchick of the Federal Middle District Court of Pennsylvania denied the Defendant trucking company's Motion for Summary Judgment on the issue of punitive damages.

According to the Opinion, this case involves a truck driver who allegedly failed to get out and look prior to reversing his tractor trailer on a public roadway and, as a result, allegedly struck the Plaintiff. The Plaintiff had amended the Complaint to add a claim for punitive damages after completing the deposition of the driver.

At the deposition, the driver admitted that his decision to reverse his vehicle while knowing that there could possibly have been a vehicle behind him could be viewed as reckless conduct.

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Wife Bound By New Husband's Previous Execution of Stacking Waiver on UIM Policy

In the case of *Golik v. Erie Insurance Exchange*, No. 1110 WDA 2022 (Pa. Super. Aug. 7, 2023 Murray, J., McLaughlin, J. and Pellegrini, J.) (Op. by Murray, J.), the Pennsylvania Superior Court vacated a judgment entered by the trial court in favor of the Plaintiff on an issue involving the stacking of UIM benefits relative to a motor vehicle accident case.

According to the Opinion, the Plaintiff-wife joined her husband's existing automobile insurance policy a year after the couple's marriage in 2004. The husband had signed stacking waivers once previously in 1998 and again, subsequently, in 2004.

The Plaintiff-wife testified that she did not recall ever seeing or discussing any stacking waivers.

The Plaintiff-wife claimed that she was entitled to stacked benefits because she never signed or even heard about any stacking waivers relative to the insurance policy in question.

The trial court sided with the Plaintiff's argument, holding that the signature of the policy's first named insured alone was not enough to allow for a full execution of a waiver of stacked coverage. The trial court ruled that the carrier was required to provide each named insured with a chance to waive stacked coverage. In so ruling, the trial court did concede that there was no binding precedent addressing the issue presented.

On appeal, the Pennsylvania Superior Court determined that, although there was no case law on point, past rulings had suggested that a named insured, even when subsequently added to a policy, is presumed to have known about available options and is bound by the first named

insured's election of a lesser coverage, unless the insured takes affirmative steps to try to change the coverage.

Based upon the evidence in this case, the Superior Court ruled that the Plaintiff-wife had constructive knowledge of the waiver and was bound by her husband's signature.

The Pennsylvania Superior Court further held that the plain language of §1738 of the Motor Vehicle Financial Responsibility Law only required notice to be provided to the named insured who purchased the policy.

No New UIM Waiver Forms Required When a Change is Made to an Existing Policy

In the case of *Franks v. State Farm Mut. Auto. Ins. Co.*, No. 42 MAP 2022 (Pa. April 19, 2023) (Op. by Mundy, J.), the court ruled that the removal of a vehicle from a multiple motor vehicle insurance policy, in which stacked coverage had been previously waived through a waiver form executed by the insured, did not require the insurance carrier to secure a renewed expressed waiver of stacked coverage under §1738(c).

At the lower level, the Pennsylvania Superior Court had described the issue in this case as one of first impression.

By way of background, according to the Pennsylvania Supreme Court's Opinion, the injured parties purchased automobile insurance from State Farm in 2013 for their two (2) vehicles.

The Plaintiffs included underinsured motorist coverage in their policy but completed a form rejecting stacked UIM coverage in compliance with §1738(d)(2) of the Motor Vehicle Financial Responsibility Law ("MVFRL").

The court noted that, absent any such waiver, stacked coverage would have been the default.

Thereafter, under the history of the insurance policy in question, the Plaintiffs removed one of the original vehicles and added a third vehicle to the policy in 2014. The Plaintiffs again rejected stacked UIM coverage at that point.

The Plaintiffs made another change to the automobile insurance policy in 2015 under which they removed the other of the original insured vehicles and replaced it with a different vehicle. No additional form rejecting stacked UIM coverage was offered or sought to be completed on the occasion of the removal of the last vehicle.

The court emphasized that the ongoing premiums paid by the Plaintiffs reflected the lower rate for non-stacked UIM coverage on the vehicles under the policy.

Thereafter, one of the Plaintiffs was injured in the motor vehicle accident. After pursuing a claim against the tortfeasor, the Plaintiffs pursued a UIM claim against State Farm. The parties disagreed on what the available limits would be.

The Plaintiffs argued that, with the last change to the policy, there was no valid waiver of stacked UIM coverage secured by the carrier and that, as such, the Plaintiffs were entitled to default stacked coverage under Pennsylvania law.

The Superior Court had ruled in favor of the insurance company.

On this appeal, the Supreme Court ruled that the Superior Court did not err when this Superior Court held that the removal of a vehicle from a multiple motor vehicle insurance policy, in which stacked coverage had been previously waived, did not require a renewed express waiver of stacked coverage pursuant to §1738(c).

The basic rationale of the Court was that Section 1738 requires insurance companies to secure a new written waiver of UIM coverage whenever an insurance policy is purchased. Here, there was a change made to an existing policy. No new policy was purchased. As such, there was no requirement under the law for the carrier to secure a new waiver form.

Post-Koken Trial - Reference to Insurance Company

In the case of *Whitlock v. Allstate Fire & Cas. Ins. Co.*, No. 2:20-CV-00373-KSM (E.D. Pa. Oct. 13, 2022 Marston, J.), the court addressed various Motions In Limine.

At a pre-trial conference, Allstate requested to be referred to at the trial in the name of the non-party tortfeasor as opposed to as "Allstate." This the court refused.

Of note, the court ruled that Federal Rule of Civil Procedure 411, regarding the admissibility of insurance evidence, applies only where negligence or other wrongful conduct is at issue. The court noted that this rule did not apply in a contract action involving an insurance company.

The court also found that evidence that the Defendant is an insurance company being sued under a policy of insurance was not unduly prejudicial under F.R.C.P. 403. The court noted that Pennsylvania law does not exclude insurance evidence under these circumstances.

As such, the court found that Allstate had not established a reason to use another name for the carrier at trial or that the carrier would be prejudiced by the use of its name at trial in front of the jury.

In another notable ruling in this decision, the court stated that, before a witness' recorded deposition testimony is admissible in lieu of live testimony, there must be an exceptional showing of reasons for the witness' unavailability.

The court stated that the fact that medical witnesses are busy seeing other patients is not an exceptional circumstance. The Court stated that it is well known that doctors are almost always busy. The court stated that, to recognize a "busy witness" exception would expand the exception to swallow the rule favoring live testimony.

As such, the court compelled both parties to present their medical expert's testimonies live at trial instead of by way of video deposition.

Motion to Bifurcate Post-Koken Trial Denied

In the case of *Ives v. McLain*, No. 20-CV-2658 (C.P. Lacka. Co. Jan. 10, 2023 Gibbons, J.), Judge James A. Gibbons of the Lackawanna County Court of Common Pleas denied a Motion to Bifurcate filed by a third party Defendant in a post-Koken automobile accident litigation.

The tortfeasor Defendant asserted that it would be unfair for him to proceed to trial with a UIM carrier insurance company sitting at the same table as a Co-Defendant.

The tortfeasor also asserted that the interest of judicial economy would be furthered by bifurcation, particularly if the Plaintiff were to secure a verdict less than the liability limits, which would thereby preclude the need for any trial on the Plaintiff's UIM claim.

The court reviewed the law under Pa. R.C.P. 213(b) and denied the motion. The court found that all counsel are equipped to outline their respective positions to the jury in such a way to avoid any confusion or prejudice regarding the issues presented in this combined trial.

The court additionally indicated that the lay persons on the jury would be properly instructed by the court on the law applicable to negligence claims as well as breach of contract claims at trial.

As such, the court denied the tortfeasor's Motion to Bifurcate.

PennDOT Has Sovereign Immunity Relative to Placement of Bus Stop

In the case of *Essington v. Monroe County Transit Auth.*, No. 5117-CV-2020 (C.P. Monroe Co. Aug. 15, 2022 Williamson, J.), the court granted the Motion for Summary Judgment filed by the Defendant, PennDOT, in a case involving a pedestrian Plaintiff who had exited a bus and was struck while crossing the roadway under nighttime conditions.

The Plaintiff alleged that PennDOT was negligent by allowing a dangerous condition to occur on its property, i.e., the roadway. More specifically, the Plaintiff alleged that PennDOT was negligent in the planning, designing, controlling, locating, and designation of a bus stop on a state road in a manner that created dangerous conditions.

The Plaintiff also faulted PennDOT for failing to erect signs, lights, guardrails, bus shelters, crosswalks, or other features to protect disembarking bus passengers.

In granting the Motion for Summary Judgment, the court relied upon the Sovereign Immunity Act under 42 Pa. C.S.A. §8522(b).

The court found that none of the exceptions under that Act were applicable to the case presented. The court emphasized that, in order for liability to attach to PennDOT, a dangerous condition must derive, originate, or have its source that the Commonwealth realty. This is also known as the real estate exception to Sovereign Immunity.

Judge David J. Williamson noted that the Plaintiff's allegations did not implicate any alleged defects on the land itself. The court noted that, had PennDOT installed the items noted by the Plaintiff, and those items were defective in some manner, then PennDOT could be held liable. However, under Pennsylvania law, the failure to install the items noted by the Plaintiff did not implicate an exception to the immunity afforded the governmental agency under Pennsylvania law.

The court additionally noted that where the Co-Defendant, Monroe County Transit Authority, chose to have a bus stop was not a material defect of the real estate itself and was not a condition created by PennDOT.

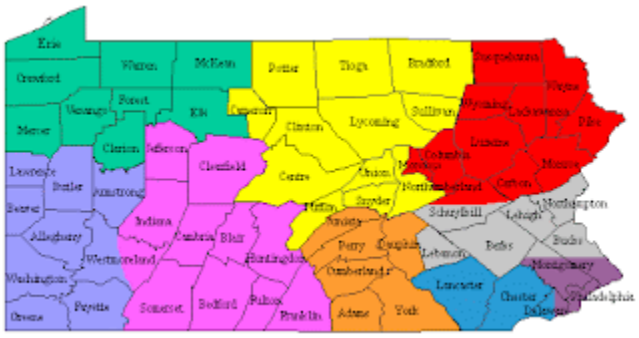
Rather, the Co-Defendant, Monroe County Transit Authority, was the entity that chose where to have their bus stops. The court noted that the Plaintiff did not produce any evidence that PennDOT played any part in the decision to allow the bus stop in the area or any evidence that the business was a dangerous condition of the real estate itself.

The court also rejected the Plaintiff's argument that PennDOT was negligent for allowing the bus stop to exist and in failing to take steps to inspect, discover, or correct any defects, or to ensure that the real estate was safe for its regular and intended use as a bus stop. The court ruled that the real property exception to the Sovereign Immunity Act only applies to a dangerous condition of Commonwealth real estate and not to negligent policies or activities regarding real estate. The court noted that a failure to inspect has been previously ruled in Pennsylvania to be a policy or an activity which is not within the real estate exception to the immunity statute.

The court also noted that the intended use of the road was as a roadway for vehicular traffic and not for the placement of bus stops. As such, any allegations by the Plaintiff regarding a lack of lighting, narrow shoulders, or safe pedestrian accommodations such as crosswalks, sidewalks, or pedestrian crossing signs, were found not to relate to the design of the roadway itself or to its use as a roadway. As such, those allegations did not serve to defeat PennDOT's Motion for Summary Judgment. In sum, the court found that the Plaintiff's expert had not offered any opinion that the roadway itself as designed, caused the accident.

For all of these reasons, and others, the court granted summary judgment in favor of PennDOT.

Forum Selection Clause for UIM Case



In the case of *Warren v. Donegal Mut. Ins. Co.*, No. 1:22-CV-01309 (M.D. Pa. May 4, 2023 Wilson, J.), the court denied the UIM carrier's Motion to Dismiss a UIM claim and granted the Plaintiff leave to effectuate proper service.

In this UIM matter, the Defendants asserted that the Complaint should be dismissed for insufficient service of process, improper venue, and failure to state a claim.

As noted, the court granted the Plaintiff leave to effectuate proper service.

In part, the UIM carrier asserted that the insurance contract's forum selection clause rendered the United States District Court for the Middle District of Pennsylvania an improper venue.

In addressing this motion, the court applied the venue rules found under F.R.C.P. 12.

In reviewing this Motion to Dismiss, the court noted that the forum selection clause in the policies at issue required that the Plaintiff file the action in a "court of competent jurisdiction in the county and state" where the Plaintiff resided at the time of the accident.

The carriers asserted that, because the Plaintiffs resided in Cumberland County, Pennsylvania at the time of the accident, the forum selection clause only allowed the Plaintiff to bring his claim into Cumberland County Court of Common Pleas.

The court disagreed and accepted the Plaintiff's claim that the forum selection clause should be interpreted broadly to also cover the Federal Middle District Court as a court of competent jurisdiction that covered the area of Cumberland County.

The court found that the plain language of the forum selection clause allowed the Plaintiff to file the action in the Federal District Court if so desired. As such, the Motion to Dismiss was denied in this regard.

Requirement to Report Accident To Police in UM Case

In the case of *Smart v. Allstate Ins. Co.*, No. 2:21-CV-03910-WB (E.D. Pa. Jan. 12, 2023 Beetlestone, J.), the court denied the carrier's Motion for Partial Summary Judgment relative to the Plaintiff's breach of contract claims in this uninsured motorist hit and run accident case.

According to the Opinion, Allstate was seeking summary judgment on the grounds that the Plaintiff had not confirmed that he had notified both Allstate and the police about this hit and run accident immediately following the same.

According to the Opinion, while the Plaintiff and his attorney initially indicated that the accident was not reported to the police, thereafter, the Plaintiff clarified his response to indicate that the police were called immediately after the incident but did not respond.

The court denied the Motion for Partial Summary Judgment filed by the insurance company after finding that credibility issues relative to the Plaintiff rendered the questions presented to represent disputed issues to be decided by a jury.

Regular Use Exclusion Upheld

In the case of *Burton v. Progressive Adv. Ins. Co.*, No. 3:21-CV-01522-MEM (M.D. Pa. March 20, 2023 Mannion, J.), the court addressed cross-Motions for Summary Judgment based upon a regular use exclusion.

This matter arose out of a motor vehicle accident. At the time of the accident, the Defendant driver was insured by an automobile insurance policy issued by the Defendant, Progressive Advanced Insurance Company. Under that policy, there was a regular use exclusion that precluded coverage to any insured who was operating a vehicle that was furnished or available for an insured's regular use but which was not covered under the Progressive policy.

In other words, under that provision, Progressive was precluding coverage for accidents involving a vehicle that was regularly available for the insured's use but for which the insured was not paying Progressive any premiums for any insurance coverage.

More specifically, on the date of the subject accident, the Defendant driver was driving a vehicle that was owned by her brother and which was not covered under the Progressive policy.

According to the record before court, the Defendant driver had her brother's permission to be driving his vehicle at the time of the accident because she was having mechanical issues with her own vehicle. The Defendant driver noted that she had been driving her brother's car for about a month or two before the incident. Other evidence in the case indicated that the Defendant driver was using the vehicle at issue on a daily basis and at her discretion.

Progressive denied coverage on the claims presented under an argument that the vehicle that the Defendant driver was operating was not covered under the Progressive policy and given that the vehicle that the Defendant driver was driving was allegedly furnished and available for her regular use and, therefore, fell under the regular use exclusion.

The Plaintiff cited the case of *Rush v. Erie Insurance Exchange* and asserted that the regular use exclusion should be deemed to be unenforceable under the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL).

The Defendant attempted to distinguish the *Rush* case and other cases as being distinguishable as UIM cases which reviewed the regular use exclusion under §1731 of the MVFRL, which statute governs the scope of UIM claims.

Judge Mannion noted that this case did not involve a UIM claim and that, therefore, §1731 did not apply. Rather, this case involved a request for liability coverage by the Defendant driver.

The court noted that the Plaintiff was requesting the court to extend the holdings of the *Rush* case, and another case cited in this Opinion, to cover liability claims as well. Judge Mannion noted that there was no support under Pennsylvania law for the requested extension of the law of those decisions to this fact pattern. As such, the Plaintiff's Motion for Summary Judgment was denied.

The court also rejected the Plaintiff's more specific factual arguments that the type of use of the vehicle by the Defendant driver was not regular, but rather, was incidental or temporary while the Defendant driver's car was being repaired. The court rejected this claim after reiterating that the record before the court established that the Defendant driver had free access to use the car at her discretion over an extended period of time.

Household Exclusion Upheld and Applied

In the case of *Erie Insurance Exchange v. Burnsworth*, No. 325-CV-2021 (C.P. Somerset Co. March 29, 2023 Geary, P.J.), the court upheld a household exclusion under an Erie Insurance policy and confirmed that the carrier did not have any obligation to provide underinsured motorist benefits to the Plaintiffs.

The court additionally found that the Plaintiff had no obligation to provide UIM benefits to the Plaintiff based upon the Plaintiff's rejection of UIM coverage for the motorcycle involved in the subject accident.

At the time of the accident, the Plaintiffs were on a motorcycle when they were rear-ended.

That motorcycle was insured by Progressive Insurance Company. Under that policy, the Plaintiff had rejected UM and UIM coverage for the motorcycle.

The Plaintiff also had a separate automobile insurance policy with Erie Insurance that covered their automobiles. That policy had a household vehicle exclusion. The motorcycle was not insured under the Erie Insurance policy.

After settling the personal injury claim against the tortfeasor arising out of the accident during which the Plaintiffs were on their motorcycle, the Plaintiffs filed a claim for UIM benefits under their Erie Insurance policy that covered the other vehicles in their household.

Erie rejected the claim and filed this declaratory judgment action requesting that the court find that the Plaintiffs were not entitled to UIM benefits for the motorcycle accident given that the motorcycle was not covered under the Erie Insurance policy and given that the Plaintiff had rejected UIM coverage under the separate policy that covered the motorcycle.

The decision in this case was the result of a Motion for Judgment on the Pleadings filed by the carrier.

Judge Geary of the Somerset County Court of Common Pleas noted that, although the Plaintiffs were relying upon the case of *Gallagher v. Geico*, the Pennsylvania Supreme Court had recently resolved the same types of issues as presented in this matter in its decision in the case of *Erie Insurance v. Mione*, No. 89 MAP 2021 (Pa. Feb. 15, 2023).

Essentially, this trial court judge agreed with the Pennsylvania Supreme Court in *Mione* that the Plaintiffs are not entitled to UIM coverage in cases where UIM coverage cannot be stacked given that UIM coverage was rejected with respect to the vehicle involved in the accident. The court found that, in this regard, the requirements under 75 Pa. C.S.A. §1738 regarding securing a waiver of stacking are "simply not implicated." See Op. at 2. quoting Mione.

Judge Geary emphasized in this *Erie v. Burnsworth* Opinion that, as "made clear" by Pennsylvania Supreme Court in the case of *Mione*, "when an insured seeks UM/UIM benefits under a household policy but does not have UM/UIM coverage on the vehicle that he or she was occupying at the time of the collision…the household vehicle exclusion serves as an unambiguous preclusion of all UM/UIM coverage (even unstacked coverage) for damages sustained while operating an unlisted household vehicle."

In short, the court ruled that UIM coverage under the Erie policy could not be stacked onto the motorcycle because the motorcycle was not a covered vehicle under the Erie Insurance policy and given that the Plaintiffs had waived UM/UIM coverage for the motorcycle under the Progressive policy.

Eastern District Federal Court Declines to Apply Household Exclusion in UIM Case

In the case of *Mid-Century Ins. Co. v. Werley*, No. 21-CV-5592 (E.D. Pa. March 30, 2023 Smith, J.), the Eastern District Federal Court addressed the issue of whether or not a household vehicle exclusion in an automobile insurance policy excluded UIM coverage for a Plaintiff in a motor vehicle accident matter.

In this case, Judge Edward G. Smith of the Eastern District Federal Court took into account, and distinguished the recent Pennsylvania Supreme Court decision in the case of *Erie Ins. Exch. v. Mione*, in which the Pennsylvania Supreme Court confirmed that the Household exclusion remains valid in certain scenarios.

In this matter, the injured party had UIM coverages available under other household policies. However, he was on the family's dirt bike at the time of the accident. The accident was allegedly caused by an allegedly underinsured motorist while the dirt bike was being operated in an off-road fashion.

The issue was whether, where the host vehicle (the dirt bike) was uninsured, was there any policy upon which the injured party could stack UM/UIM benefits?

The Court noted that it could find no case on point.

Here, the Court found that since insureds did not knowingly waive inter-policy stacking on the policy at issue, they were entitled to inter-policy stacking.

Judge Smith went on to state that he was also constrained to hold that enforcing the household vehicle exclusion in this case would have amounted to an impermissible *de facto* waiver of stacking in violation of the Pennsylvania Motor Vehicle Financial Responsibility Law.

As such, the court granted the injured party's Motion for Summary Judgment, denied the carrier's Cross-Motion for Summary Judgment, and entered a declaratory judgment in favor of the Plaintiffs and against the carrier.

The court held that the carrier had a duty to provide UIM coverage under the applicable policy for injuries allegedly sustained in the underlying accident.

In the end, Judge Smith urged the General Assembly to reexamine the MVFRL stacking provisions in order to bring clarity to the recurring issues faced by the Courts in this context.

PA Supreme Court Upholds Household Exclusion As Valid and Enforceable

In the case of *Erie Ins. Exchange v. Mione*, No. 89 MAP 2021 (Pa. Feb. 15, 2023) (Op. by Wech, J.), the court addressed the enforceability of two (2) household vehicle exclusions in a pair of automobile insurance policies. In the end, whereas the Pennsylvania Supreme Court previously ruled that household exclusions are unenforceable, that Court has now held that household exclusions do remain enforceable under Pennsylvania law in certain circumstances.

In its previous decision in the case of *Gallagher*, the Pennsylvania Supreme Court wrote "we hold that the household vehicle exclusion violates the MVFRL; therefore, these exclusions are unenforceable as a matter of law." Gallagher v. GEICO Indem. Co., 650 Pa. 600, 613, 201 A.3d 131, 138 (2019).

According to the Pennsylvania Supreme Court in this Mione decision, the courts below had held that the household exclusions were valid and enforceable and had cited to the Supreme Court's previous decision in the case of *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006 (Pa. 1998).

In this *Mione* case, the insureds contended that the lower courts had erred in applying *Eichelman* and argued that the Pennsylvania Supreme Court *sub silentio* overruled that decision in the Pennsylvania Supreme Court's decision in *Gallagher v. Geico*, 201 A.3d 131 (Pa. 2019).

Although the Pennsylvania Supreme Court in the previous case of *Gallagher v. Geico*, and again in the case of *Donovan v. State Farm*, attempted to eradicate the household exclusion across the board, in this decision of *Erie Ins. Exchange v. Mione*, the Pennsylvania Supreme Court rejected the insured's arguments, distinguished its previous decision in *Gallagher v. Geico* and affirmed the lower court decisions that the household exclusions were valid and enforceable.

In this *Erie Ins. Exchange v. Mione* case, Erie had asserted that the *Gallagher* decision was factually distinguishable because the insureds had waived UM/UIM coverage on the insured's motorcycle policy, whereas the insured in *Gallagher* did not waive coverage.

The Pennsylvania Supreme Court in this *Mione* case accepted that argument and noted that the insureds in this case were not attempting to stack anything between the various automobile insurance policies available.

The Pennsylvania Supreme Court in *Mione* noted that the insureds had not yet received any UIM benefits but that the insured's theory was that one or both of the household policies that possessed could provide them with UIM coverage in the first instance as opposed to in conjunction with another policy. The Pennsylvania Supreme Court found that the "problem" with that argument is that the policies at issue had valid household exclusions which, under the facts of this case, the Pennsylvania Supreme Court found, in a 6-0 decision, did not conflict with the MVFRL.

In other words, unlike as was found in the *Gallagher* decision, the household exclusions in this Mione case did not act as *de facto* waiver of stacking. In other words, because the insureds in this case were not attempting to stack UIM benefits from the other household policies on top of the UIM benefits from their motorcycle policy, the rules for waiving stacking in writing found under 75 Pa. C.S.A. §1738, which were the basis for the court's decision in *Gallagher*, were not implicated. *See Op. at 9-10*.

Although, as confirmed above, the Pennsylvania Supreme Court decision in *Gallagher* attempted to phrase that decision as eradicating the household exclusion across the board and never limited the decision to the facts before the Court in that matter, in this *Mione* decision, Justice Wecht noted that the Court "reiterate[s] today that the holding in *Gallagher* was based upon the unique facts before [the court] in that case, and that the decision there should be construed narrowly." *See Op. at 10*. [Bracket inserted here].

Although the Pennsylvania Supreme Court stated otherwise in the *Gallagher* decision, Justice Wecht also stated in the Mione decision that the Pennsylvania Supreme Court "continue[s] to reject the view that household vehicle exclusions are *ipso facto* unenforceable." *See Op. at 12*.

In the end, the Pennsylvania Supreme Court in *Mione* ultimately concluded that the lower courts correctly distinguished the *Gallagher* decision from the facts in this case and correctly enforced the household exclusions contained in the insured's automobile insurance policies.

UIM Limit of Protection Clause Upheld as Valid and Enforceable

In the case of *Erie Ins. Exchange v. Backmeier*, No. 323 WDA 2022 (Pa. Super. Dec. 28, 2022 Olson, J., Dubow, J., and Colins, J.) (Op. by Olson, J.), the Pennsylvania Superior Court affirmed a trial court's granting of Erie Insurance's Motion for Judgment on the Pleadings and denial of the injured party's cross-Motion for Judgment on the Pleadings in a case addressing the issue of whether a "limit of protection" clause capping second priority UIM coverage to the highest limit of liability of any signal second priority UIM coverage policy violates the excess coverage requirement of Pennsylvania's Motor Vehicle Financial Responsibility Law.

In a matter of first impression, the Superior Court panel ruled that a particular limit on the amount of underinsured motorist coverage and insured may recover from multiple policies does not violate Pennsylvania's MVFRL.

In this case, the insurance policy clause at issue capped the Plaintiff's total available UIM coverage at the highest limit of a single one of her policies, rather than capping her coverage at the combined limit of the two (2) policies she held.

The court otherwise noted that the stacking waivers that the Plaintiff had signed for each of her automobile insurance policies precluded her from combing the coverage limits of the two (2) separate policies. The court found that, where a Plaintiff knowingly and effectively waived stacking, the type of "limit of protection" clause found in an automobile insurance policy does not violate the excess coverage requirement of the MVFRL.

No UM/UIM Sign-Down Forms Required Unless New Policy is Issued

In the case of *Geist v. State Farm Mut. Auto. Ins. Co.*, 49 F.4th 861 (3rd Cir. Sept. 29, 2022 Randel, C.J.), the Third Circuit Court of Appeals addressed the issue of when an automobile insurance carrier may be required to secure updated UM/UIM sign down forms.

In this matter, when the insured had purchased the State Farm policy initially, two (2) vehicles were insured under the policy and the necessary forms were executed. Thereafter, the insured added a third vehicle. At that point in time, the insured did not execute a request for UIM coverage limits below the bodily injury coverage limits.

Thereafter, an insured under the policy was involved in a motor vehicle accident. After settling the tort claim against the Defendant driver, that Plaintiff turned to State Farm for UIM coverage. A dispute arose over the amount of UIM limits available.

The Plaintiff asserted that she should be provided with higher limits because State Farm did not secure a sign down form when another vehicle had been added to the policy. When State Farm disagreed, litigation ensued and eventually resulted in this decision.

The Plaintiff asserted that she was owed higher coverage because State Farm had not followed the requirements of 75 Pa. C.S.A. §1731 and 1734 relative to the forms at issue.

The Third Circuit Court of Appeals, after reviewing the existing case law, ruled that no events in the years prior to the subject motor vehicle accident triggered the obligations under §1731 and 1734 because State Farm had never issued a new policy to the insured. As such, the court found that State Farm was not obligated to seek a new written election for lower UIM coverage limits under the policy.

Rather, the court ruled that the Pennsylvania Motor Vehicle Financial Responsibility Law only required carriers to seek elections of lower UIM coverage limits only when the carriers issue policies. State Farm was found to have satisfied their duties under the law when they secured the forms when the insured had executed the requisite forms when the policy was initially issued.

The court more specifically noted that both §1731 and 1734 expressly state that the requirements contained in those statutes apply, under §1731 when an insurance company is involved in the "delivery or issuance" of a "policy," and §1734 applied when a carrier "issues a policy."

The court in Geist went on to note that, once the carrier meets its obligations to secure the UIM sign down forms on a particular policy, the insurance company need not do anymore to fulfill its obligations under §1731 and 1734 during the life of that particular insurance policy.

UIM Rejection Form Upheld (Non-Precedential)

In the case of *Keeler v. Esurance Insurance Services, Inc.*, No. 21-2449 (3d Cir. Oct. 18, 2022 Jordan, J., Porter, J., and Phipps, J.) (Op. by Phipps, J.) (marked "Not Precedential), the Third Circuit Court of Common Pleas affirmed a district court's ruling in favor of the UIM carrier and found that the carrier was correct in its denial of coverage and that the Plaintiff's bad faith claim was without merit.

According to the Opinion, this case involved a claim for UIM benefits related to a collision between a motorcycle and a motor vehicle.

The Plaintiff's injuries allegedly exceeded the Defendant driver's liability insurance coverage limit and, as such, the motorcyclist and his wife sought UIM benefits under their own motorcycle insurance policy issued by Esurance.

However, the record before the court confirmed that, when the Plaintiffs originally purchased that policy, they expressly waived UIM coverage in writing. As such, the carrier refused to pay.

The Plaintiffs sued and asserted that the waiver could not be enforced and that, as a result, they should be entitled to a bad faith recovery due to an alleged improper denial of coverage.

As noted, the court disagreed and found that the waiver of UIM coverage signed by the Plaintiff was proper and met the requirements of 75 Pa. C.S.A. §1731. The Third Circuit agreed with the district court's finding that the UIM rejection form satisfied the prominent-type-and-location requirements in terms of the language of the waiver form.

The Third Circuit also agreed with the district court's decision that any alleged violations of the renewal notice provision were not remediable through a civil action.

Note that the household exclusion was not at issue in this case because the Plaintiffs were trying to seek UIM benefits under their own motorcycle policy that covered the motorcycle that the Plaintiff was operating at the time of the accident. In other words, the Plaintiffs were not attempting to recover UIM benefits under some other policy covering some other vehicle in the household.

Stacking

In the case of *Shanfelt v. Progressive Adv. Ins. Co.*, No. 21-CV-1614 (C.P. Carbon Co. June 22, 2022 Matika J.), the court found that a Plaintiff could not recover stacked underinsured motorist coverage benefits where her father, who was the original insured, had executed a valid stacking waiver when he first purchased the insurance policy and the subsequent substitution of a replacement vehicle did not require the carrier to secure a new waiver for that policy.

Based upon this ruling, the court dismissed the Plaintiff's declaratory judgment Complaint.

Collateral Estoppel Against a UIM Claim

In the case of *Holland v. Progressive Spec. Ins. Co.*, No. 23-0910-KSM (E.D. Pa. April 10, 2023 Marston, J.), the court granted in part and denied in part a Defendant carrier's Motion to Dismiss portions of a Plaintiff's bad faith claim in a UIM case.

The court denied the Motion to Dismiss the Plaintiff's breach of contract action.

According to the Opinion, the carrier moved to dismiss the Complaint which was based upon the carrier's denial of the Plaintiff's UIM claim.

In this matter, the Plaintiff had previously arbitrated his claims against the tortfeasor and secured an Arbitration Award.

The Plaintiff then signed a Release in which the Plaintiff released all of his claims against the tortfeasor, the tortfeasor's insurance company and "any other person, firm, or corporation" chargeable with responsibility for the accident.

The Plaintiff had included a handwritten clause on the Release reserving his right to bring a UM/UIM claim against his own insurance carrier.

The Plaintiff had additionally sent a request to his own insurance carrier for consent to settle before he signs the Release.

The UIM carrier also noted the arbitrator had found that the Plaintiff's damages did not exceed the tortfeasor credit and, as such, the UIM carrier denied the claim presented. More specifically, in the third party arbitration the Plaintiff had been awarded $58,029.85 in a case where the tortfeasor had $100,000 in liability coverage.

The Plaintiff sued the UIM carrier in state court for breach of contract and bad faith. The carrier removed the action to the federal court.

In its Motion to Dismiss the carrier primarily argued that the Plaintiff's breach of contract claim was barred by collateral estoppel. The carrier also noted that the Plaintiff failed to allege sufficient facts to support a bad faith claim.

Relative to the bad faith claim, the court found that the Plaintiff's Complaint consisted of conclusory statements unsupported by facts. There were no details provided describing what was allegedly unfair about the UIM carrier's settlement negotiations and the Complaint also failed to explain what alleged misrepresentation the UIM carrier may have made.

In its decision, the court noted that, relative to the bad faith claim, the UIM carrier's argument that the other driver was not driving an underinsured motor vehicle was reasonable and was supported by the case law and the facts and circumstances of this case.

The court also found that the Plaintiff did not allege any fact to suggest that the UIM carrier denied the Plaintiff's claim with "ill will" or under a "dishonest purpose." It was also noted that the Plaintiff did not assert that the UIM carrier's decision to deny coverage was made with undue delay.

Relative to the breach of contract action and the argument that the same was barred by the collateral estoppel doctrine, the federal court found that it needed additional information as to the

scope of the Arbitration in order to determine if the carrier had satisfied its burden of establishing that the doctrine of collateral estoppel applied. In this regard, it was indicated that neither party to the action had submitted to the court a copy of the Arbitration Agreement, the Arbitration record, or the Arbitrator's findings. As such, the Motion to Dismiss the breach of contract action was denied.

Alleged Negligence Relative to Pedestrian Crossing Sign Found to Fall Within Real Estate Exception to Immunity

In the case of *Estate of Patterson v. Rockefeller Group Int. Inc.*, No. 2022-CV-0060 (C.P. Leh. Co. Aug. 22, 2022 Johnson, P.J.), the court found that a Plaintiff's wrongful death claim against PennDOT was not barred by the sovereign immunity doctrine where the Plaintiff alleged that an artificial condition in the form of an allegedly non-functioning pedestrian crossing sign along a highway that was allegedly under the control of PennDOT was the cause of the Plaintiff's injuries.

The Preliminary Objections filed by PennDOT in his case were denied in part and sustained in part.

The Plaintiff alleged that the decedent was struck and killed by a motor vehicle while crossing an intersection on a street undergoing a road-widening project. The Plaintiff alleged that the decedent was crossing the road in an area that PennDOT was responsible for and in which the pedestrian crossing sign had inoperable flashing yellow lights that were covered.

In response to PennDOT's efforts to have the case dismissed under the Sovereign Immunity Act, the court found that the Plaintiff's allegations of a breach of the Defendant's duty to properly

maintain a pedestrian crossing sign was an action in negligence that satisfied the first prong for defeating the Defendant's assertion of sovereign immunity, i.e., the statement of a valid cause of action for negligence.

The court found that the second prong under the Sovereign Immunity Act required the Plaintiff to establish that the negligent act complained of fell within any of ten (10) exceptions to sovereign immunity.

Among its claims, the Plaintiff alleged that the Defendant PennDOT installed an item as part of its real estate, namely a pedestrian crossing sign adjacent to a public highway, in a manner that created a hazardous condition.

The court found that this allegation was sufficient to invoke the real estate exception to sovereign immunity. As such, the court found that the Plaintiff had stated a valid cause of action which was not subject to dismissal.

PennDOT also asserted that the Plaintiff's claims of recklessness and willful indifference should be stricken because the Sovereign Immunity Act only allowed claims for negligence in certain circumstances.

The court found that the Defendant was correct in arguing that the Plaintiff's claims of recklessness and willful indifference were legally invalid. Under the express terms of the Sovereign Immunity Act, sovereign immunity is only waived in actions against the Commonwealth for damages arising out of negligent acts.

The court also reviewed the remainder of the Plaintiff's allegations which allege various failures to act on the part of PennDOT. The court found that those claims were barred as it was well-established that claims against the Commonwealth based upon a failure to act are barred by the sovereign immunity doctrine.

Attorney's Fees in Peer Review Cases

In the case of *Turnpaugh Chiropractic Health & Wellness Cr., P.C. v. Erie Ins. Exch.*, No. 1448 MDA 2021 (Pa. Super. June 8, 2023 Stevens, P.J.E., Bowes, J., McCaffery, J.) (Op. by Stevens, P.J.E.)(Bowes, J, Concurring), the Pennsylvania Superior Court affirmed in part and denied in part a trial court's entry of judgment in favor of a chiropractor in a first party peer review case.

In this case, the insurance company appealed a judgment in favor of the chiropractor and an award of attorney's fees.

According to the Opinion, the insurance company had repriced the chiropractor's invoices and referred the chiropractor's bills to a peer review.

The Superior Court found that the trial court had erred in allowing the chiropractor's expert to testify on matters outside the scope of an expert report.

In what may be a case of first impression, the Superior Court additionally found that the trial court had erred in awarding the chiropractor attorney's fees under §1716 and §1798 because there was no statutory authorization for an award of attorney's fees when an insurance company invokes the peer review process.

PREMISES LIABILITY UPDATE

Company That Charged For Work Event At Which Alcohol Was Served Cannot Be Held Liable Under Social Host Theory

In the case of *Klar v. Dairy Farmers of America, Inc.*, No. 29 WAP 2022 (Pa. Aug. 22, 2023 Wecht, J.), the Pennsylvania Supreme Court revisited precedents from over a half of a century that have imposed civil liability arising from the provision of alcohol to visibly intoxicated persons with respect to persons and entities licensed to engage in the commercial sale of alcohol while those precedents have also limited the liability of non-licensees and "social hosts."
In this matter, Pennsylvania Supreme Court affirmed the decisions of the lower courts that held that an organization which hosted an event at which alcohol was provided, but which organization was not a liquor licensee, could not be held liable for injuries caused by a guest who had become intoxicated at the event and was later involved in a motor vehicle accident.

Parent Cannot Waive a Child's Right to a Jury Trial (Case of First Impression)

In the case of *Santiago v. Philly Trampoline Park, LLC*, No. 2615 EDA 2021 (Pa. Super. March 21, 2023 Bowes, J., King, J., and Pellegrini, J.) (Op. by Bowes, J.), the Superior Court addressed an issue of first impression in Pennsylvania in these consolidated appeals, that being whether a parent's role as natural guardian entitles the parent to bind a minor child to an arbitration agreement and waive that child's right to seek redress for injuries in a court of law.
In the consolidated appeal, the Superior Court also addressed whether one spouse's signature on a waiver form could bind the other spouse to be limited to only pursuing a recovery at arbitration.

The appellate court affirmed the lower court rulings that answered this question in the negative and concluded that the claims presented were indeed permitted to head to a jury trial as opposed to arbitration.

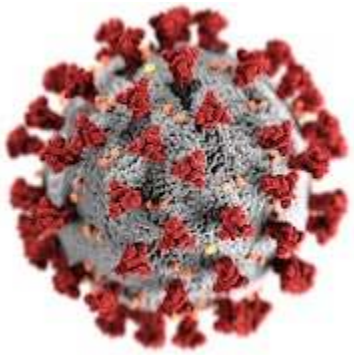
Overall, the Pennsylvania Superior Court, after reviewing the law of agency and contract law, concluded that the trial courts had properly ruled that no agreements at issue served to bind the children or the non-signing spouses to resolve their negligence claims in arbitration rather than by way of a personal injury lawsuit in the courts.

More specifically, the Pennsylvania Superior Court agreed with the trial court findings that the trampoline facility had failed to meet its burden to show that the signatory spouses were the agents of the non-signing spouses.

The court additionally held that the parent-child relationship did not empower the signatory parents to waive their minor children's rights to have their claims resolved in a personal injury lawsuit in a court of law as opposed to arbitration.

As such, the lower court's Orders were affirmed.

Plaintiff Allowed To Proceed With Claim In Premises Liability Case That Decedent Passed Away From Contracting COVID-19 During Treatment



In the case of *Corter v. Wal-Mart*, No. CV-22-00100 (C.P. Lyc. Co. April 11, 2023 Linhardt, J.), the court sustained in part and denied in part various Preliminary Objections filed by Defendant Wal-Mart in a case involving allegations relative to a slip and fall matter that allegedly resulted in injuries that allegedly led to the Plaintiff's death.

More specifically, the Plaintiff alleged that the decedent sustained multiple fractures during the course of his slip and fall injuries, as well as traumatic brain injuries, all of which required hospitalization. It was further alleged that the decedent was exposed to the COVID-19 virus during his hospitalization and in-patient treatment which allegedly caused and/or contributed to his death.

In one of its Preliminary Objections, Wal-Mart sought to strike, as scandalous and impertinent, allegations in the Complaint related to the Plaintiff's alleged exposure to the COVID-19 virus during his post-incident treatment.

The court noted that the validity of these types of allegations turned on the issue of whether or not the Plaintiff had stated a legally cognizable claim of negligence against Wal-Mart. The court noted that, if the decedent's death could not be attributed to Wal-Mart's negligence as a matter of law, then the allegations that the decedent died, in part, due to exposure of the COVID-19 virus would be inappropriate and immaterial to the claims presented.

Judge Linhardt noted that, in this early stage of the litigation, the court could not conclude, as a matter of law, that Wal-Mart's alleged negligence was not the legal cause of the decedent's eventual death from COVID. As such, the court found that, at least at this stage of the litigation,

allegations regarding the circumstances of the decedent's death were neither scandalous nor impertinent.

Checkout Line Incident

In the case of *Kovalev v. Wal-Mart, Inc.*, No. 2:2022-CV-1217 (E.D. Pa. Oct. 11, 2022 Quinones Alejandro, J.), the court granted a F.R.C.P. 12(b)(6)Motion to Dismiss in part and denied it in part in a premises liability case.

According to the Opinion, the Plaintiff was allegedly injured when he was standing in a checkout line and a customer behind him started hitting the Plaintiff with her shopping cart while shouting "move the line." The Plaintiff alleged, in part, that, even though security personnel had the ability to observe the incident via real-time surveillance in a security room several feet away, no one came to the aid of the Plaintiff at the time of the incident.

After suit was initiated, the Defendant store filed a Rule 12(b)(6) Motion to Dismiss on various grounds.

The Plaintiff's claims against Wal-Mart for assault and battery were dismissed given the lack of any facts to support any allegations that the store intentionally harmed the Plaintiff. Nor were there any facts to support an allegation that Wal-Mart was liable for the intentional acts of another patron in the store.

The court found that the Plaintiff's claim that the store was negligent in failing to have sufficient security to prevent its customers from assaulting other customers did state a valid cause of action. Here, the Plaintiff alleged that he was a business invitee of the store and that the store

was negligent in protecting him from the intentional or criminal acts of a third person within the store.

However, the court also found that a negligence duty to provide security within a commercial establishment does not create a special relationship that would support a separate claim for negligent infliction of emotional distress. The court noted that such relationships exist only in extremely limited circumstances.

The court dismissed the Plaintiff's separate claim for "gross negligence" after finding that there is no separate cause of action for gross negligence recognized under Pennsylvania law.

The court additionally found that negligence per se is not an independent cause of action.

In contrast, the court in this matter additionally ruled that there is civil cause of action recognized in Pennsylvania for reckless endangerment.

The court also ruled that, absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act. The court also found that a negligence claim is not an intentional or criminal act that could support a separate civil conspiracy claim.

Lastly, the court also found that physical and emotional injuries do not support a cause of action under the Unfair Trade Practices & Consumer Protection Law, as that cause of action is limited to losses of money or property.

Altercation Between Two Customers

In the case of *Cimbat v. Old Navy LLC*, No. 21-2657 (E.D. Pa. Oct. 31, 2022 Beetlestone, J.), the court ruled that a Defendant's Motion for Summary Judgment would be denied as to the negligence claims in a premises liability case where the Plaintiff presented issues of fact regarding whether the store had sufficient protection in place for the Plaintiff after she accused another customer of shoplifting. The summary judgment motion was granted with respect to the claims asserted of Intentional Infliction of Emotional Distress.

According to the Opinion, the Plaintiff was assaulted by another customer at an Old Navy store after the Plaintiff approached that customer when she observed the customer attempting to shoplift.

Thereafter, the Plaintiff went to a store employee to report the attempting shoplifting. That employee informed the store manager, after which the accused shoplifting customer went into the fitting room area. The Plaintiff, believing that the issue was being handled, continued to shop.

However, shortly thereafter, the manager later heard the Plaintiff exclaim, "How are you just going to let her take that stuff where I have to pay for it?"

The record also indicated that the Plaintiff was informed by another employee that the accused shoplifting customer was tampering with a price tag gun in the fitting room and also appeared to be under the influence of drugs or alcohol.

Shortly thereafter, the alleged shoplifting customer approached the Plaintiff in the checkout line and spat in her face. The Plaintiff reacted by throwing a punch to get the customer out of her personal space. The alleged shoplifting customer then connected with a punch to the Plaintiff and then began kicking the Plaintiff after she fell to the ground.

In reviewing the Motion for Summary Judgment filed by the Old Navy store, the court granted the Defendant's Motion relative to the Plaintiff's claims of intentional infliction of emotional distress. The court stated that the record was insufficient to demonstrate that the employees of the store were deliberately indifferent by failing to take further precautions after discovering that the other customer was attempting to shoplift and appear to be under the influence.

However, the court declined to dismiss the Plaintiff's premises liability negligence claims. The court found that there were no sufficient facts in the records to support a jury finding that the store had failed to exercise reasonable care in protecting the Plaintiff from harm from the accused shoplifter. The court noted that there was evidence that the store employees suspected that the shoplifter was under the influence and thereby posed a risk of starting an altercation. There was also conflicting evidence as to whether or not the employees of the store were trained to handle intoxicated customers or customer-on-customer altercations.

The court rejected the defense contention that the Plaintiff's own actions, including falsely representing that she was a store employee and swinging a fist at the shoplifter contributed to the assault that the Plaintiff suffered. The court found that these actions by the Plaintiff were too remote in time to conclusively establish that they were a contributing factor to the assault.

As such, overall, the court concluded that the record contained facts that could allow it to conclude that the store was negligent in failing to protect the Plaintiff from an assault on the premises of the store.

Open and Obvious Danger

In the case of *Irwin v. Neshannock Woods, Inc.*, No. 10457 of 2022 (C.P. Lawr. Co. May 15, 2023 Motto, P.J.), the court denied a Defendant's Motion for Summary Judgment in a slip and fall case that occurred at an apartment complex.

In this case, the Plaintiff sued her landlord and the landlord property maintenance company after the Plaintiff allegedly sustained injuries from a slip and fall caused by a snow mound near a dumpster on the property.

In their Motion for Summary Judgment, the Defendants asserted that Plaintiff's claim of negligence was legally insufficient because the snow mound was an open and obvious condition.

The Defendants also asserted that the Plaintiff voluntarily assumed a risk by choosing to walk over the mound to dispose of her trash. The landlord additionally asserted that the Plaintiff failed to inform the landlord about an issue with the snow mound before the Plaintiff's fall.

The court denied the Motion for Summary Judgment after finding that genuine issues of material fact remain to be decided by a jury.

The court otherwise noted that the Defendants had a duty to protect the Plaintiffs from the known and obvious hazard created by the snow mound and that the Defendants could have taken steps to prevent the alleged injuries.

The court additionally considered the fact that the landlord had a policy requiring residents to use the dumpster and the fact that the landlord had made a prior request to have the snow mound removed, which was not accomplished.

Open and Obvious Danger

In the case of *Pusateri v. Wal-Mart East, LP*, No. 21-1137 (W.D. Pa. Dec. 20, 2022 Kelly, M.J.), the court denied a Defendant store's Motion for Summary Judgment in a trip and fall case.

According to the Opinion, the Plaintiff was shopping in a Wal-Mart store during which the Plaintiff walked four (4) times past a partially empty black pallet that held large screen televisions. The Plaintiff alleged that she did not remember the presence of the pallet during each pass, but conceded that nothing blocked her view of the pallet.

After her fourth pass, a store employee entered the aisle with a top stock shopping cart that was loaded.

In order to avoid the stock cart and permit it to pass, the Plaintiff backed up and tripped on the base of the protruding pallet that was behind her. The Plaintiff alleged injuries as a result.

The Federal Magistrate Judge that decided this case noted that, while a store owner owes no duty to invitees for an obvious danger that is avoidable by the exercise of ordinary care, the court found that the issue of whether the hazard in question was open and obvious is a question for the

jury. In this case, the court also noted that the Plaintiff may have been distracted by the Defendant employee's actions. Based on the issues of fact presented, the court denied the Motion for Summary Judgment.

Open and Obvious Danger – Walking on Snowy, Grassy Area

In the case of *Hinerman v. Westmoreland County Airport Auth.*, No. 732 C.D. 2022 (Pa. Cmwlth. June 15, 2023 Ceisler, J., Covey, J., and Leavitt, J.) (Op. by Ceisler, J.), the Pennsylvania Commonwealth Court affirmed the entry of summary judgment in a slip and fall case.

In this matter, the Plaintiff, instead of using a paved walkway or the driveway, both of which were cleared, chose to instead walk across a snow covered grassy area where the Plaintiff then fell. The Plaintiff thereafter brought suit against the Defendant.

The court ruled that the snowy area that the Plaintiff chose to walk over was an open and obvious danger. The court noted that the uncertainties inherent in walking on snow covered ground are obvious as a matter of law. The Court found that, by taking a short cut across the snow covered ground, the Plaintiff accepted the risk that the underlying ground would be less suitable for walking.

The court reiterated the general rule that landowners do not have a duty to remove any and all dangers from any and all parts of their premises involving winter conditions.

As stated, the trial court's entry of summary judgment was affirmed.

Plaintiff Unable to State or Show Cause of Fall

In the case of *McClure v. Love's Travel Stops*, No. 1:21-CV-00334-YK (M.D. Pa. May 23, 2023 Kane, J.), the court granted the Defendant's Motion for Summary Judgment in a slip and fall case.

According to the Opinion, a tractor trailer driver pulled his vehicle into the parking lot of a Love's store to purchase fuel and food. It was not raining at the time.

The Plaintiff entered and exited the store without any problem before the incident. He confirmed that he did not see any type of liquid on the ground where he fell while entering and exiting the store.

After fueling his tractor trailer, the Plaintiff retrieved an empty cup from his truck and returned to the store. Using the same entrance that he had previously used to enter and exit the store, the Plaintiff entered the store and fell.

In this Motion for Summary Judgment, the Defendant asserted that the Plaintiff admitted during his testimony that he did not know what caused him to fall.

The Plaintiff argued that he only did not know the identity of the particular substance that caused him to fall. The Plaintiff maintained that the store manager wiped up a black, foreign substance from the store near the store's diesel entrance, which was an area away from the area where he fell.

According to his deposition testimony, after he fell, the Plaintiff felt around on the floor with his hands but did not recall seeing anything in the area where he fell. The Plaintiff also testified that he went to the bathroom after he fell and that, when he returned to the location of his fall, he did not recall seeing anything there on the floor.

The store manager also testified that he examined the area where the Plaintiff allegedly fell and found that the floor was not slippery in this location. The store manager also denied cleaning up any black substance off any part of the floor.

The court also noted that the Plaintiff did not have any information or facts to offer in terms of how long any alleged slippery substance was on the floor in the area where he fell prior to the accident or how long the area was allegedly slippery.

Judge Kane reviewed the law of Pennsylvania regarding actual and constructive notice of an allegedly dangerous condition existing on a Defendant's premises. After reviewing that law in detailed fashion, the court concluded that the Plaintiff failed to produce sufficient evidence of any actual or constructive notice on the part of the Defendant of any allegedly dangerous condition that caused the Plaintiff to fall.

In the end, the court granted summary judgment.

Slip and Fall in a Store

In the case of *Taylor v. Wal-Mart Stores East, LP*, No. 2:22-CV-00495-CCW (W.D. Pa. March 2, 2023 Wiegand, J.), the court denied summary judgment in a slip and fall case.

In this matter, the court found that genuine issues of material fact existed as to whether or not the Plaintiff had an opportunity to see and avoid what would have otherwise been an obvious spill on the floor given that the Plaintiff's view was blocked by other people in the aisle and where the Plaintiff's attention may have been distracted by one of the Defendant's employees, who was giving the Plaintiff directions

The court also noted that a reasonable person is not required to be aware of the dangers that may exist at the far end of a relatively lengthy department store aisle.

Slip and Fall on Ice Skating Rink

In the case of *Murphy v. Pines*, No. 3:20-CV-00320 (M.D. Pa. Nov. 21, 2022 Saporito, M.J.), the court denied summary judgment after finding genuine issues of material fact existed on whether the Plaintiff, an experienced skater, was entitled to a recovery when she slipped and fell while skating on ice. The court noted that the Plaintiff had never before skated on synthetic ice.

In his Opinion, Judge Joseph F. Saporito, Jr., noted that, while falling while ice skating is an inherent risk of that activity, the risks of alleged damaged surfaces are not. The court found that the issue of assumption of the risk was for the jury to decide under the conflicting facts presented in this case.

The court also addressed the "no duty" rule. While the court noted that the "no duty" rule precludes liability for injuries from risk that are common, frequent, expected, and inherent in a sporting activity, and while that rule can apply when the assumption of the risk doctrine does not, the court found that issues of fact in this case prevented the entry of summary judgment in favor of the Defendant.

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Judge Saporito additionally addressed separate arguments raised relative to the scope and impact of the release that was signed by the Plaintiff prior to engaging in the ice skating activity at the facility.

The court noted that the release language was boilerplate and was only located on a rental receipt. The language was not conspicuous and was never explained to the Plaintiff or even brought to the Plaintiff's attention. As such, given these issues, the court ruled that the issue of whether the Release was effective to preclude a recovery would be left for the jury's consideration.

Summary Judgment Granted Relative to Hills and Ridges Doctrine

In the case of *Irvin v. Wegmans Food Market, Inc.*, No. CV-21-00360 (C.P. Lyc. Co. April 11, 2023 Lindhardt, J.), the court granted a Defendant store's Motion for Summary Judgment in a slip and fall case.

The court's decision in this matter was based, in part, on the hills and ridges doctrine.

After reviewing the elements of the hills and ridges doctrine, the court found that certified weather records and video footage established the general wintry conditions that existed at the Plaintiff's location at the time of the incident.

The court rejected the Plaintiff's argument that the precise location of the Plaintiff's heel at the time of the incident was a material issue in determining liability in this case. The court noted

that the evidence showed the Plaintiff's lead foot as he was walking was in the area of the alleged wintry conditions at the time he fell.

Overall, the court found that the Plaintiff failed to produce evidence to get beyond the hills and ridges doctrine.

As such, summary judgment was entered in favor of the store.

Summary Judgment Denied Relative to Hills and Ridges Doctrine

In the case of *Spruill v. Dreher Ave. Holdings*, No. 6444-CV-2021 (C.P. Monroe Co. April 17, 2023 Zulick, J.), the court denied a property owner's Motion for Summary Judgment in a slip and fall case after finding that issues of material fact existed as to the cause and location of the ice and whether that condition allegedly caused the Plaintiff to fall.

According to the Opinion, the Plaintiff slipped and fell in her employer's parking lot after leaving a Christmas party.

After discovery, the Defendant moved for summary judgment, claiming that the hills and ridges doctrine barred the Plaintiff's claim.

The court noted that the Plaintiff had produced photographs and testimony that ice had accumulated around a drainpipe and then spread across the sidewalk, went over the curb, and ran across the surface of the parking lot.

The court ruled that the hills and ridges doctrine did not preclude liability where an icy condition was allegedly caused by a drainpipe or some other cause like a defective hydrant or water pipe.

Judge Zulick noted that, where a specific, localized patch of ice existed in the area that was otherwise free of ice and snow, the presence of the hills and ridges necessary to support the hills and ridges defense is not established.

The court found that material questions of fact and testimonial differences as to the cause and location of the ice, as well as whether that condition caused the Plaintiff to fall, required the court to deny the Motion for Summary Judgment.

Hills and Ridges Defense Rejected in Black Ice Case

In the case of *Maisonet v. Heidenberg Prop., LLC*, No. 5931-CV-2019 (C.P. Monroe Co. Feb. 13, 2023 Zulick, J.), the court denied the Defendants' Motions for Summary Judgment in a slip and fall case involving black ice.

The Defendants attempted to argue the hills and ridges doctrine.

The Plaintiff presented expert testimony that the slippery condition was caused by a re-freezing of water which created a black ice condition in a pedestrian pathway.

The court found that issues of fact prevented the entry of summary judgment.

Evidence of Prior Fall Down Events Precluded

In the case of *Kunsman v. Wawa, Inc.*, No. 2017-23859 (C.P. Montg. Co. June 2, 2023 Saltz, J.), the court issued a Rule 1925 Opinion requesting that the Superior Court affirm the verdict in favor of the Defendant in a slip and fall case.

According to the Opinion, the Plaintiff allegedly slipped and fell on a yellow-painted surface in the parking area at the Defendant's store.

One of the issues on appeal was the trial court's ruling on the Defendant's Pre-Trial Motion In Limine to prevent the Plaintiffs from offering evidence of prior lawsuits or claims against the Defendant. The subject of that motion was a list of fourteen (14) prior claims, each of which

involved in a slip and fall accident on yellow traffic paint, which information was provided to the Plaintiff by the Defendant in discovery.

During depositions, the Defendant's Senior General Liability Specialist indicated that only one (1) of the fourteen (14) claims was at the same store where the Plaintiff fell.

In the end, the trial court authorized the admission of the evidence of that particular claim, but not the others.

In this Opinion, the court noted that the Plaintiff did not sustain their burden of proving that the claims of the other prior incidents on the list, other than the incident that occurred at the same store, were "sufficiently similar" under the "sufficiently similar circumstances" test. The trial court requested the Superior Court to affirm its decision in this regard.

Violation of Dog Law Is Negligence Per Se But Still Have to Prove Causation

In the case of *Goodell v. Stroble*, No. 22-00906 (C.P. Lyc. Co. July 26, 2023 Carlucci, J.), the court granted in part and denied in part a Plaintiff's Motion for Summary Judgment in a dog bite case.

According to the Opinion, the Defendant dog owner attended an estate sale. The subject incident occurred when the Defendant was putting her purchases in her vehicle and her dog jumped out of the vehicle and allegedly attacked the nearby Plaintiff.

The Plaintiff filed a Motion for Summary Judgment arguing that the Defendant's failure to restrain her dog on a leash or within the vehicle violated the Dog Law, making the Defendant negligent as a matter of law on a negligence per se basis.

While the court agreed that Pennsylvania law requires owners to control their dogs and that a deliberate violation of the Dog Law does constitute negligence per se, claims of absolute liability as a result can still be defended if a Defendant provides an appropriate defense.

In this regard, the court noted that there still remained the crucial question as to whether or not the dog owner's negligence was the proximate cause of the Plaintiff's injuries. The court explained that proximate cause refers to a direct link between a Defendant's actions and a Plaintiff's harm.

The court emphasized that the question of proximate cause generally remains a question to be decided by a jury.

As such, the court granted the Plaintiff's Motion for Summary Judgment in part and denied it in part. More specifically, the court ruled that the Defendant's conduct in this case was negligent per se under the Dog Law violation. However, the motion was denied in part on the question of proximate causation.

Dog Bite - Out-of-Possession Landlord

In the case of *Eggleston v. Richards*, No. 10753 of 2019, C.A. (C.P. Lawr. Co. Sept. 29, 2022 Motto, P.J.), the court granted in part and denied in part a Motion for Summary Judgment in a dog bite case. As part of its decision, the court struck the Plaintiff's claim for punitive damages.

According to the Opinion, the Defendants were out-of-possession landlords who asserted that they could not be held liable for the injuries sustained by the minor Plaintiff because the Defendants did not have actual knowledge of the dog's alleged dangerous propensities. They also moved for summary judgment on the Plaintiff's claims for punitive damages as there was, according to the defense, no evidence of any evil motive or outrageous conduct.

The dog involved was a pit bull named "Smoke" who was owned by a tenant of the Defendants. According to the Opinion, the landlord Defendants were aware that the dog was on the premises.

With regard to the subject incident, the minor Plaintiff was walking in an alley near the property when the pit bull chased the minor into the woods while biting the minor's arm and leg, requiring stitches and other medical care for the Plaintiff thereafter.

The court reviewed the law of Pennsylvania regarding the liability of landlords out-of-possession in dog bite cases.

The court found that there were issues of material fact that existed as to whether the landlord out-of-possession had knowledge of the dog's alleged aggressiveness or propensity to viciousness. As such, the summary judgment motion was denied in this regard.

According to the record before the court, the landlord visited the premises on numerous occasions and was able to view the dog's behavior.

It was noted that, during one incident, when the landlord approached the residence, the dog ran towards the door and was barking, which caused the landlord to step backwards. It was also noted that the tenant would keep the dog away from the landlord for the landlord's safety whenever the landlord visited the premises.

There was also evidence that there was a prior incident involving the same dog. Whether or not the landlord Defendant was aware of that prior incident, the court noted that it was otherwise admitted that the landlord and the tenant had numerous conversations in general about the dog.

With regards to the court's granting of summary judgment relative to the punitive damages claim given the absence of any evidence of evil motive or outrageous conduct, the court noted that the Plaintiff had acknowledged that there was insufficient evidence to allow for an award of punitive damages. As such, the Plaintiff had stipulated that the claim for punitive damages should be stricken.

Injury From Falling Tree

In the case of *Schmidt v. Penn. Dep't. of Transp.*, No. 2019-CV-12057 (C.P. Montg. Co. Feb. 27, 2023 Saltz, J.), the court denied a Motion to Dismiss filed by PennDOT in a case involving a tree that fell upon a passing vehicle on a Commonwealth owned road.

PennDOT filed a Motion to Dismiss asserting sovereign immunity.

The court reviewed the real estate exception to sovereign immunity cases involving fallen trees.

The court noted that, while the Commonwealth of Pennsylvania is generally immune from suit, the Pennsylvania legislature had waived that immunity in certain limited instances as outlined in 42 Pa. C.S.A. §8522(b). The exception applicable in this case applied to alleged dangerous conditions on the Commonwealth's real estate, highways, and sidewalks.

In this matter, the court found that the applicability of the real estate exception depended not on the characteristics of the portion of the tree that constituted the dangerous condition, but on the location of that portion of the tree with respect to the Commonwealth's property.

The court determined that the Plaintiff had properly asserted that the tree fell within the Defendant's right-of-way. As such, the court rejected PennDOT's argument that the exception did not apply because only a portion of the tree fell within that right-of-way.

The court additionally noted that the Plaintiff's evidence presented to date, which included expert testimony, implicated the real estate exception to the sovereign immunity afforded to the Commonwealth of Pennsylvania in this case.

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

Injury From Tree

In the case of *Cox v. Cemex, Inc.*, No. 10132 of 2020, C.A. (C.P. Lawr. Co. Dec. 19, 2022 Motto, P.J.), the court denied the Defendant's Motion for Summary Judgment in a case in which a Plaintiff, who was a passenger in a vehicle at the time of this accident, was struck in the abdomen by a tree as the vehicle drove by the Defendant's property. It was alleged that the tree at issue was located on the Defendant's property and was allegedly protruding over the roadway.

There was evidence in the case that, during the course of the accident, the vehicle in which the Plaintiff was located was traveling on a curve in the road and that vehicle was allegedly forced to swerve over towards a berm due to an oncoming vehicle.

In addressing the Motion for Summary Judgment at issue, the court held that, while liability can be imposed upon a landowner and a municipality where an object obstructs a roadway and causes injury, in this case, there were genuine issues of material facts regarding whether the tree that injured the Plaintiff was indeed protruding over the roadway from the landowner's property at the time of the accident. As such, the Defendants' Motion for Summary Judgment was denied.

Service of Alcohol to Minors

In the case of *Sheik v. Morgan*, No. 10244 of 2022 C.A. (C.P. Lawr. Co. Nov. 30, 2022 Motto, P.J.), the court overruled a Defendant's Preliminary Objections in part in a case in which the Plaintiffs allege negligence against adult Defendants for allowing or encouraging underage drinking in their homes.

According to the Opinion, the case arose out of an event during which the Plaintiff's child spent the night at a friend's house at which she was allegedly allowed to consume alcohol at that home and two (2) other homes that were visited during the course of the evening. While the minor was at one of the residences, the minor, in an allegedly intoxicated state, allegedly attempted to take steps leading from a garage to a basement when she allegedly fell and allegedly suffered injuries to her head. The minor tragically died from her injuries approximately six (6) days later.

The court found that the facts alleged in the Plaintiff's Complaint were sufficient to establish a legally cognizable claim for negligence as adults owe a duty of care to minor guests in their home and the adults in this matter allegedly breached that duty by serving alcoholic beverages to minors in any event.

Food Poisoning

In the case of *Connell v. Zheng*, No. 1696 of 2017 G.D. (C.P. Fay. Co. Aug. 15, 2022 Cordaro, J.), the court addressed a summary judgment motion in a food poisoning case filed against a Chinese restaurant.

According to the Opinion, the case involved the death of the Plaintiff's decedent from complications of an infection caused by a bacteria typically found in shellfish that can be transmitted to humans through consumption of raw or undercooked shellfish. The Plaintiff was suing a Chinese restaurant and others involved for the injuries claimed.

The Motion for Summary Judgment at issue in this case was filed by an Additional Defendant relative to claims asserted by an original Defendant in a Joinder Complaint.

Of note, the original Defendants opposed the motion, in part, on the basis that discovery was still ongoing and that the Motion for Summary Judgment was, therefore, premature.

The court noted that, while an adverse party must be given adequate time to develop the case and that a Motion for Summary Judgment will be found to be premature if filed before the adverse party has completed discovery relevant to the motion in question, "the discovery period cannot extend indefinitely; parties must conduct discovery in a timely way and proceed with due diligence." *See* Op. at XI. [citations omitted].

Referring to the local rules of court, the judge in this matter ruled that ample time had been provided for the completion of relevant discovery. It was also noted that no party had moved for any different deadlines for the completion of discovery. It was additionally indicated by the court that the party opposing the Motion for Summary Judgment had not moved to compel any discovery.

As such, the court found that the parties did have adequate time to prepare and pursue relevant discovery. As such, the court deemed that discovery was complete relative to the motion in question.

In the end, the court found that the Defendants had not brought forward any evidence to support the facts essential to their cause of action against the Additional Defendants. As such, the court entered summary judgment in favor of the Additional Defendant.

Also notable in this decision is the court's indication that non-binding case law can certainly be considered for its persuasive value.

Summary Judgment Denied in Skiing Case

Typically, ski resorts prevail in premises liability cases based upon the law and release provisions contained on ski lift tickets. But not always.

In the case of *Mattei v. Tuthill Corp.*, No. 3:19-CV-2196 (M.D. Pa. Feb. 28, 2023 Mannion, J.), the court denied a Defendant's Motion for Summary Judgment in a case arising out of a skiing accident.

As noted by Judge Malachy E. Mannion at the outset of his Opinion, this case raised questions as to the inherent risks of downhill skiing, the enforceability of releases on lift tickets, and the legal sufficiency of the facts alleged by the Plaintiff relative to the Defendant's alleged gross negligence and recklessness.

The court reviewed the terms of the Pennsylvania Skier's Responsibility Act and ruled that the "no duty" rule relieving ski resorts of liability under the Act for common and inherent risk attendant with skiing was in dispute in this matter because it was unclear as to whether the Plaintiff was skiing on or off a designated trail at the Blue Mountain Resort in the Poconos.

Judge Malachy E. Mannion additionally noted that there was other conflicting evidence as to whether the hazard at issue was perceptible to skiers.

The court found that whether a certain danger is perceptible to skiers is generally relevant to the question of whether that risk is inherent to downhill skiing.

The court additionally found that the Defendant had not proven that the Plaintiff's negligence claims were barred by the exculpatory release contained on the back of the lift ticket.

Judge Mannion noted that, in this case, the lift ticket was an exemplar. There was no other proof offered beyond a disputed inference that the Plaintiff actually received a lift ticket.

Given that the court also found that there were genuine issues of material fact relative to the Defendant's alleged gross negligence and recklessness involving an alleged conscious disregard of the risk of harm allegedly posed by an alleged five foot ditch on the ski trail, summary judgment was denied.

CIVIL RIGHTS LITIGATION

Allegations of Excessive Force

In the case of *Thompkins v. Klobucher*, No. 2:21-CV-00320-CRE (W.D. Pa. Oct. 3, 2022 Reedy Eddy, M.J.), the court addressed a Motion for Summary Judgment filed by a Defendant police officer in a §1983 Civil Rights Action alleging excessive use of force.

According to the Opinion, the Plaintiff wife's arm was broken as she was being arrested for domestic violence.

In reviewing the Defendant police officer's Motion for Summary Judgment, the court found that there were genuine issues of material fact to be decided by a jury with regards to the alleged excessive force claim.

The court also found that the police officer was not entitled to qualified immunity at this stage of the proceedings.

As such, the police officer's Motion for Summary Judgment was granted in part and denied in part.

Inadequate Medical Care For Prisoners

In the case of *Cyr v. Schuylkill County*, No. 3:22-CV-00453 (M.D. Pa. Jan. 30, 2023 Saporito, M.J.), the court denied the Defendant nurse's and prison medical care company's Motion to Dismiss a claim for an alleged §1983 denial of medical care and failure to intervene action after the Plaintiff's son died in prison of an alleged drug overdose.

The court found that the Plaintiff had adequately pled a denial of medical care and a failure to intervene in the Complaint. The court found that the allegations sufficiently pled a plausible claim against the medical company.

More specifically, after reviewing the Complaint, the court noted that the Plaintiff asserted in the Complaint that the son's serious medical need was "so obvious" that a layperson could recognize it.

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The court additionally found that the Complaint sufficiently alleged deliberate indifference to substantiate a denial of medical care claim.

Judge Saporito also pointed to the fact that the Plaintiff had identified several policies, customs, or practices that the nurses and medical company allegedly violated which allegedly caused the deprivation of the son's constitutional rights. Those alleged policies included alleged insufficient staffing, failing to train employees on diagnosing intoxicated or overdosing inmates, and not monitoring inmates in need or emergency care.

The court additionally found that the Plaintiff plausibly pled a failure to intervene claim.

BAD FAITH

First Party Benefits Allegations Don't Apply in UM Claim

In the case of *Deal v. Nationwide, Prop. & Cas. Ins. Co.*, No. 2:22-CV-01269-MH (W.D. Pa. Oct. 31, 2022 Horan, J.), the court granted in part and denied in part a UIM carrier's Partial Motion to Dismiss that was filed in a bad faith claim.

After finding that the Plaintiff had stated a valid statutory bad faith claim such that that part of the Defendant's Motion to Dismiss should be denied, the court did grant a dismissal of the Plaintiff's UTPCPL claim in that the Plaintiff had failed to allege specific representations that Nationwide had allegedly made they sold the policy to the Plaintiff.

Of note, the Plaintiff's claim of a violation of the mandates of 75 Pa. C.S.A. §1716 by the UIM carrier was dismissed. The court noted that §1716 of the MVFRL dealt with first party benefits.

The Plaintiff's argued that UM benefits should be considered to be a hybrid of first-party and third-party claims and, therefore, should be entitled to the protections afforded under §1716. The court rejected this argument.

The court noted that the MVFRL was organized into subchapters with each chapter dealing with a separate type of benefits., including a separate chapter on UIM benefits.

The court found that §1716 fell under the subchapter for first-party benefits.

Accordingly, the court ruled that §1716 plainly could not apply to UM benefits, which were covered by their own separate subchapter under the MVFRL.

First Party Benefits Case

In the case of *Loughery v. Mid-Century Ins. Co.*, No. 2:-19-CV-00383-WSH (W.D. Pa. Dec. 20, 2022 Hardy J.), the court addressed cross Motion for Summary Judgment on a Plaintiff's claim for statutory bad faith alleging that a Defendant carrier requested an independent medical examination in an auto accident first party benefits case without first obtaining a court order and without good cause.

In denying the Plaintiff's Motion for Summary Judgment, the court found that the Plaintiff did not show that the Defendant carrier acted unreasonably and in bad faith in failing to pay on the claims presented as there was a split of opinion in the courts as to the validity of the IME clause at issue.

The court also noted that the Defendant carrier's interpretation of the provision was in accordance with the interpretation of the law as expressed by some of those courts.

As such, the court granted the Defendant carrier's Motion for Summary Judgment.

Failure to Secure Sign-Down Form

In the case of *Woloszyn v. Nationwide Prop. & Cas. Ins. Co.*, No. 10246 of 2022, C.A. (C.P. Lawr. Co. Oct. 6, 2022 Hodge, J.), the court denied a Defendant carrier's Motion to Dismiss a Plaintiff's bad faith insurance claim.

In this matter, which arose out of a motor vehicle accident, the Defendant carrier argued that it was not obligated to provide coverage because the carrier had secured a sign down form from the Plaintiff relative to the Plaintiff's previous policy with the carrier. The carrier noted that the more recent insurance policy provided to the Plaintiff, which was in effect at the time of the accident, was just a rewriting of the previous policy. As such, the carrier asserted that the securing of another sign down form was not required.

The court in this matter disagreed with the carrier's argument and held that, under 75 Pa. C.S.A. §1731, the carrier was required to secure another sign down form and that, therefore, the Defendant's argument that the old coverage limits transferred to the new policy failed as a matter of law.

The court noted that, while the Defendant carrier argued that the new policy simply assumed the sign-down provision of the Plaintiff's previous policy, the court noted that the Defendants had failed to produce a signed copy of the previous rejection form indicating that the Plaintiffs understood that they were rejecting underinsured and uninsured motorist coverage.

Based upon these reasons, the court denied the Defendant's Motion to Dismiss.

Bad Faith Claim Based on Claims Handling Dismissed

In the case of *Solano-Sanchez v. State Farm Mut. Auto. Ins. Co*., No. 5:19-CV-04016-DS (E.D. Pa. Dec. 16, 2022 Strawbridge M.J.), the court granted a carrier's Partial Motion for Summary Judgment in a UIM bad faith case.

In this case, the carrier moved for a partial summary judgment in the Plaintiff's bad faith and breach of contract claims over allegations that the carrier failed to pay her full benefits under the UIM provisions of the policy.

Reviewing the record before it, the court found that the carrier had a reasonable basis for conducting an investigation, that the carrier acted reasonably throughout the investigation, and that the carrier had a reasonable basis for denying full benefits based upon the results of that investigation.

No Coverage, No Bad Faith

In the case of *Cushman & Wakefield of Pa., LLC v. Illinois Nat'l Ins. Program*, Oct. Term 2019, No. 885 (C.P. Phila. Co. Oct. 19, 2022 Djerassi, J.), the court granted a Defendant insurance company's Motion to Dismiss claims for breach of contract and statutory bad faith stemming from the Defendant's refusal to indemnify Plaintiff's litigation cost in an action for fraudulent misrepresentation.

Although the Plaintiff argued that the Defendant insurance company had a duty to indemnify the Plaintiff under the policy, the trial court in this matter disagreed and held that the language of the insured's policy specifically excluded coverage for matters arising out of a Plaintiff's fraudulent conduct.

Valid UIM Bad Faith Claim Stated

In the case of *Perhosky v. State Farm Mut. Auto. Ins. Co*., No. 2:23-CV-00025 (W.D. Pa. May 4, 2023 Lenihan, J.), the court denied a Defendant's carrier's Motion to Dismiss a Plaintiff's bad faith claim over the carrier's alleged failure to pay UIM benefits after the Plaintiff was injured in a motor vehicle accident.

The court found that, based upon the pleadings in the Complaint, the Plaintiff had pled a plausible bad faith claim.

The court noted that the Plaintiff averred that the Defendant carrier failed to provide any explanation for its offer to settle the Plaintiff's claim for $25,000.00. The Plaintiff also asserted

that the carrier did not conduct any investigation and did not refer the Plaintiff to an independent medical examination.

In so ruling, the court rejected the Defendant carrier's arguments that the Plaintiff did not take into account that the Defendant had factored into its evaluation and liability credit of $100,000.00 from the Plaintiff's prior settlement with other insurance carriers.

The court also rejected the Defendant's argument that the bad faith claim was simply based upon the Plaintiff's disagreement with the carrier's evaluation and that the carrier had not yet completed its investigation.

PRODUCTS LIABILITY

Flea Market Is Not a 'Seller'

In the case of *Liebig v. MTD Products, Inc.*, No. 22-4427 (E.D. Pa. May 25, 2023 Murphy, J.), the court denied a Motion to Remand in a products liability case.

The court reasoned that the Plaintiff's alleged products liability claims against a non-diverse Pennsylvania flea market were not colorable such that a finding that that Defendant was fraudulently joined was appropriate.

In this case, the product was apparently purchased at a flea market.

The court noted that a flea market is not a seller of a product as that term is defined in the products liability context. Rather, flea markets are markets that merely provide space for third parties to sell ordinary household items to each other. Flea markets are not to be considered manufacturers, distributors, or sellers of products under the contexts of product liability cases.

Failure to Warn Claims Fail Where Plaintiff Did Not Read Warnings

In the case of *Mains v. The Sherwin-Williams Co.*, 5:20-CV-00112 (E.D. Pa. Nov. 10, 2022 Gallagher, J.), the Eastern District Court of Pennsylvania addressed the validity of a warning defect theory put forth by a Plaintiff in a products liability case.

This matter arose out of an incident during which the Plaintiff's deck caught on fire. The Plaintiffs alleged that the product they used to stain their deck self-heated and caused a fire on their property. More specifically, the Plaintiff's alleged that they placed application materials with the product left on it on the lawn next to the deck after which those items spontaneously caught fire.

The court ruled that the Plaintiff's warning defect theory failed as a matter of law because the Plaintiff admitted in this case that they never even read the warning label on the Defendant's product.

The court therefore found that an unread warning could not be a cause of an injury in a products liability claim.

The court also noted that the Plaintiff did not show any way that a "reminder warning" might have prevented the accident.

In this particular matter, the court also found that the Plaintiff's failure to warn claim was also preempted by the Hazardous Substances Act because that Act did not require the Defendant to include a spontaneous combusting warning on the label as a principal hazard.

The court also confirmed that, in any event, the warning label on the product contained the words 'DANGER' and 'COMBUSTIBLE,' and further informed users of the product that 'rags, steel wool, other waste soaked with this product...may catch fire if improperly discarded.' Users were advised to discard such waste in a sealed water filled metal container.

The court additionally noted that the Plaintiff was unable to establish any design or manufacturing defect because the Plaintiff's lacked any expert evidence that the product, whether it was defective or not, actually caused the fire that injured them.

The court confirmed that the Plaintiff did not identify a cause and origin expert with regards to the fire in question. It was additionally held that lay opinion testimony is speculative and no substitute for expert fire causation testimony, particularly where there were possible alternative origins for the fire in this case. The court also noted that scientific knowledge about the chemical components of the product and their corresponding combustibility was beyond the understanding of a layperson and, therefore, required the testimony of an expert.

The court also found that the Plaintiff could not rely upon a malfunction theory of liability to establish an alleged manufacturing defect because the Plaintiffs did not have the expert testimony necessary to eliminate other possible causes.

The court also found that the Plaintiff's implied warranty of merchantability claim was similar to a strict liability claim and that this implied warranty of merchantability claim failed because the Plaintiffs were not able to establish a product defect.

Admissibility of Contributory Negligence Evidence

In the case of *Cote v. Schnell Industries*, No. 4:18-CV--1440 (M.D. Pa. Nov. 8, 2022 Brann, J.), the court addressed several issues with respect to the admissibility of alleged misconduct by a Plaintiff in a products liability case.

According to the Opinion, this case involved a machine involved in a workplace accident that nearly severed the Plaintiff's hand.

The court noted that a Plaintiff's comparative negligence is not admissible in a strict liability action, except as a superceding cause where the Plaintiff is the sole cause of the accident. The court otherwise noted that negligence that relates to the product itself cannot be a sole cause.

Here, the court found that the Plaintiff's conduct in putting his hand in a dangerous position in the product relates to the product and was, therefore, inadmissible to be used against the Plaintiff.

The court also noted that the Plaintiff's conduct is not relevant to the consumer expectation or risk-utility factors applicable to a products liability action because these tests to determine a product defect are concerned with the actions of an "ordinary" person, and not any particular Plaintiff.

However, the court did note that evidence of a Plaintiff's voluntary assumption of the risks, misuse of a product, or highly reckless conduct is admissible to prove the issue of causation.

Chief Judge Matthew W. Brann

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Chief Judge Matthew W. Brann stated that, under Pennsylvania law, the assumption of the risk doctrine requires a knowing and voluntary exposure of oneself to a known risk. The court found that his assumption of the risk doctrine is inapplicable where a Plaintiff was required to use equipment provided by an employer.

Judge Brann additionally noted that product misuse and highly reckless conduct involve a Plaintiff's unforeseeable, outrageous, and extraordinary use of a product. Whether a Plaintiff's conduct meets this standard is for a jury to decide.

However, because a Plaintiff's misuse and highly reckless conduct cannot be a sole cause of the accident, the court found the evidence of such conduct was inadmissible.

On another issue before the Court, Judge Brann additionally noted that the Defendants could not use a Motion In Limine as a belated substitute for a Rule 702 motion relative to the competency of an expert's opinion.

Contributory Negligence Defense Rejected

In the *Cote v. Schnell Industries*, No. 4:18-CV-01440 (M.D. Pa. Nov. 8, 2022 Brann, J.), the court granted in part and denied in part Motions In Limine filed by both the Plaintiff and the Defendant in this strict products liability claim.

More specifically, the court excluded evidence of the Plaintiff's contributory negligence, recklessness, or assumption of the risk where the product manufacturer Defendant could not show that the alleged product defects contributed in no way whatsoever to the accident and that the victim's actions were therefore causally connected.

In this regard, Judge Brann noted that a products liability Defendant is not permitted to use contributory negligence concepts to excuse a product's defect or reduce recovery by comparing the fault of the parties in a strict liability case. The exception is where the accident at issue was solely caused by a Plaintiff's negligence, which was not the case here.

MEDICAL MALPRACTICE

PA Supreme Court Addresses Tolling Provision of MCARE Act

The Pennsylvania Supreme Court addressed MCARE's tolling provision recently in the case of *Reibenstein v. Barrax*, No. 32 MAP 2021 (Pa. Dec. 12, 2022) (Op. by Wecht, J.) (Sallie, Mundy, J. and Dougherty, J., concurring/dissenting).

According to the Opinion, the Plaintiff in this medical malpractice action had brought her claims against the Defendant after the two (2) year statute of limitations had expired.

The court noted that the Plaintiff's death certificate indisputably and correctly noted the medical cause of the decedent's death.

In this decision, the court made a distinction between a reference to a decedent's manner of death and a decedent's cause of death. In the context of the operation of the statute of limitations as stated under the MCARE Act, the court noted that the issue involved the legal cause of death and the medical cause of death.

The Court noted that MCARE provides a two year statute of limitations in death actions with the statute beginning to run at the time of the decedent's death. The Act provides that the statute of limitations will be tolled where there is an affirmative misrepresentation or fraudulent concealment of the cause of death.

Here, the Plaintiff brought their claims against one of the medical defendants after the two year period had run. The Court noted that the decedent's death certificate undisputedly and correctly noted the medical cause of the decedent's death.

The trial court had ruled that the phrase “cause of death” referred specifically and only to the direct medical cause of death. Accordingly, the trial court granted summary judgment to the Defendant doctor under §513(d) of the Medical Care Availability and Reduction of Error Act (MCARE Act).

The Pennsylvania Superior Court reversed the trial court decision and interpreted the “cause of death” on the death certificate more broadly to cover considerations associated with the manner of death, that is, the legal cause.

The Pennsylvania Supreme Court reversed the decision by the Superior Court and held that MCARE’s tolling provision could not support the breadth of the reading suggested by the Pennsylvania Superior Court.

The court in this matter essentially ruled that the reference to the “cause of death” refers only to the medical meaning of the phrase and not the legal interpretation.

This decision is otherwise notable in that the Pennsylvania Supreme Court majority determined that the tolling provision under the MCARE Act for instances when the decedent’s cause of death has been allegedly concealed refers only to the medical cause of death.

Medical Malpractice Claim Barred By Statute of Limitations

In the case of *Swart v. UPMC Pinnacle Hospital*, No. 2020-CV-10091 MM (C.P. Dauph. Co. May 3, 2023 McNally, J.), the Plaintiff appealed a trial court Order which dismissed her medical malpractice Complaint based upon the application of the statute of limitations.

According to the Opinion, the Plaintiff alleged medical negligence relative to hip replacement surgeries. The Plaintiff asserted that the doctor utilized prosthetics that were too short during each of the Plaintiff's surgeries, causing a painful limp. The Plaintiff also alleged that she consulted a different doctor, who performed a third surgery, and concluded that the prosthetics that the Defendant had implanted were too short and made the Plaintiff's legs uneven.

In this matter, there was a dispute between the parties as to when the Plaintiff's cause of action arose.

The Defendants asserted that the latest date that the Plaintiff's cause of action could have accrued was around July of 2018 when the Plaintiff obtained a third opinion confirming that her hip replacement surgery caused her to have a shorter right leg and corresponding pain.

The Plaintiffs asserted that the discovery rule should be applied such that the accrual of the cause of action would not be until after the third surgery was completed in October of 2018 when the first doctor's alleged negligence was allegedly confirmed.

The trial court considered the discovery rule and concluded that the Plaintiff's cause of action accrued no later than July of 2018 as evidenced by the record and the Plaintiff's own deposition testimony.

More specifically, the record indicated that the Plaintiff was, at that point, aware of significant harm and a causal connection between the harm and the doctor's actions, even though the Plaintiff did not have complete knowledge of the injury's full extent or precise cause of the same.

The court confirmed that the Plaintiff testified at her deposition with admissions that she knew by July of 2018 that she was suffering pain, leg length discrepancy, and physical limitations after the second surgery and that she believed that the doctor's surgeries were responsible.

Accordingly, since the Plaintiff filed suit beyond the two (2) year statute of limitations, the court ruled in favor of the Defendants and dismissed the Complaint.

Certificate of Merit Sufficient to Start the Case, But Not to Survive Summary Judgment

In the case of *Dodson v. Univ. of Pitts. Med. Ctr.*, No. CV-19-01803 (C.P. Lyc. Co. Jan. 9, 2023 Linhardt, J.), the court granted a medical malpractice Defendant's Motion for Summary Judgment after finding that, while a Plaintiff produced a physician's statement that satisfied the Pennsylvania Rules of Civil Procedure regarding Certificate of Merit given that statement asserted that deviations from some applicable standard of care likely caused the Plaintiff's injuries, that same statement was found to have failed to establish the elements of the Plaintiff's medical malpractice claim to a *prima facie* level to enable the Plaintiff to proceed to a jury trial. This matter arose out of medical treatment that included surgery which the Plaintiff alleged resulted in a serious infection that required additional surgery. The Plaintiff alleged that the Defendant was negligent in the performance of both procedures, which resulted in a below knee amputation.

The court found that the Plaintiff's physician's statement was conclusory, lacking in detail, and was based upon limited medical information. While the Certificate of Merit was challenged earlier in the case, the case was allowed to proceed because the Certificate of Merit asserted some deviation from an applicable standard of care and contained a conclusion that those deviations likely caused the Plaintiff harm.

However, at this later summary judgment stage, the court noted that, in medical malpractice suits, parties are required to produce their expert reports in order to proceed to a trial. In this matter, the Defendant asserted that the Plaintiff failed to produce any expert report other than the above statement that had been provided relative to the Certificate of Merit.

The court agreed and found that the statement provided by the Plaintiff with the Certificate of Merit failed to establish the elements of the Plaintiff's medical malpractice claim to even a prima facie level.

The court noted that, when it had previously denied the Defendant's Motion to Strike the Certificate of Merit, the court had foreshadowed in that decision that the Plaintiff had failed to produce any evidence that any particular doctor had violated any duty of care while treating the Plaintiff.

Judge Linhardt otherwise noted that the mere fact of an infection, or of a surgical complication, in and of itself, was insufficient, in and of itself, to establish that negligence had occurred, let alone who was responsible for it.

As such, the Defendant's Motion for Summary Judgment was granted.

Efforts to Extend Med Mal Liability to Landlord of Nursing Home Rejected

In the case of *Drake v. Schwartz*, No. 2019 - 07345-PL (C.P. Chester Co. Dec. 12, 2022 Binder, J.), an interesting and innovative theory of liability in a medical malpractice case was attempted by a plaintiff but rejected by the court.

In this case, the court granted the Motion for Summary Judgment filed by the Defendant, who was the owner and out-of-possession landlord of a property leased to a nursing home.

The landowner Defendant had been brought into this nursing home negligence case under a theory that one of the dangerous conditions that caused the patient's injuries was a condition of

severe understaffing at the nursing home that was caused, in part, by financial hardships imposed on the tenant nursing home by its lease agreement with the landlord.

The trial court noted that the issue presented was one of first impression. In its filings, the Plaintiffs acknowledged that they had no authority for extending a landlord's control over a dangerous condition to a lease that was allegedly unduly economically burdensome to a tenant. The court declined to create a new avenue for liability against the out-of-possession landlord based solely on a tenant's invitee alleging that the tenant's lease was overly costly or burdensome.

As such, the Defendants' Motion for Summary Judgment was granted.

Discoverability of Peer Review Documents

In the case of *Sanders v. Children's Hosp. of Phila*., No. 646 EDA 2021 (Pa. Super. Nov. 22, 2022 Bowes, J., McLaughlin, J., and Stabile, J.) (Op. by Bowes, J.) (McLaughlin, J., concurring/dissenting), the Pennsylvania Superior Court affirmed in part and reversed in part a trial court's decision relative to a Defendant hospital's challenges on alleged privileged documents in a Plaintiff's medical malpractice wrongful death and survival action. The appellate court found that most of the documents and reports at issue were protected from discovery by the Peer Review Protection Act or the Medical Care Availability and Reduction of Error Act (MCARE Act).

According to the Opinion, the court involved twenty three (23) infants at the hospital who had allegedly contracted an adeno-virus in the hospital's NICU. Testing allegedly revealed the presence of the virus on equipment used for an eye exam and the virus was allegedly transmitted to patients by doctors touching the equipment and then touching the patients.

A doctor who led the investigation into the matter reported to the Patient Safety Committee and held "safety huddles" using powerpoint presentations with members of the Infection Prevention and Control Department and the NICU doctors and nurses. Several conferences were also held by the Defendant medical providers as a result of which a root cause analysis report was created.

The investigating doctor also published an abstract and an article about the method of transmission.

The Plaintiff sought documents at issue in discovery.

On appeal, the court ruled that certain documents were admissible and certain documents were privileged. In the opinion, the court provided a nice overview of the application of the Peer Review Protection Act and the Medical Care Availability and Reduction of Error Act.

Peer Review Documents Discoverable

In the case of *Lahr v. Young*, No. 2021-C-0010 (C.P. Leh. Co. Oct. 3, 2022 Caffrey, J.), the court ruled that patient safety reports that the Plaintiff sought in discover from the Defendants in this medical malpractice action were solely prepared for compliance with the Medical Care Availability and Reduction of Error Act reporting requirements.

The court noted that the Peer Review Protection Act grants qualified immunity for healthcare providers participating in a peer review process and establishes an evidentiary privilege applicable to peer review proceedings to protect the process which is designed to improve the practice of medicine.

However, the court noted that these documents were not immune from discovery because they did not arise out of matters reviewed by a patient safety committee. It was emphasized that the documents at issue consisted of information that was otherwise available from original sources. As such, the court vacated a prior Order and issued a new Order granting discovery.

The court granted this Motion after an in-camera review of the documents at issue.

Liability of Ambulance Crew Members

In the case of *Balderach v. Pennsylvania Medical Transport, Inc*., No. 30007 of 2016, C.A. (C.P. Lawr. Co. Nov. 5, 2022 Cox, J.), the court denied a Defendant's Motion for Summary Judgment in a medical malpractice case.

The court noted that, while the Pennsylvania Emergency Medical Services Systems Act provides that emergency medical services providers are immune from suit unless the claimant establishes gross negligence or willful misconduct, the Plaintiff's evidence in this matter, which included two (2) medical expert reports, served to raise genuine issues of material fact on the question of whether the Defendants acted with gross negligence in treating the decedent during a cardiac event.

The court pointed to the record that the Plaintiff's experts asserted that the two (2) EMTs involved were allegedly grossly negligent in their attempts to resuscitate the decedent. One of the experts also asserted that the EMTs should have transported the decedent to a closer medical facility.

Cumulative Expert Testimony Precluded

In the case of *Evans v. Lavallee*, No. CV 20-00879 (C.P. Lyc. Co. 2022 Carlucci, J.), the court granted in part and denied in part a Plaintiff's Motion In Limine relative to the testimony of defense medical expert in a medical malpractice case.

According to the Opinion, this matter arose out of an accident during which the Plaintiff sustained burns when oxygen was allegedly caused to ignite, resulting in burns to the Plaintiff during the course of a surgery.

The Plaintiffs argued that the expert testimony of the expert in question should be precluded because the expert report was provided after the deadline for experts had expired, because the expert was not of an appropriate specialty, and because the expert testimony would be cumulative or duplicative with the testimony of other defense experts.

The court ruled that, in the event the expert is found to be competent at trial, the expert would be allowed to testify in his field of plastic surgery.

However, the court noted that, unless the Defendants established a need at trial for testimony from this plastic surgeon expert on the separate subject of the operating room standard of care for an anesthesiologist, the plastic surgeon expert testimony would be precluded as cumulative given that the Defendants had other experts to testify in that regard.

Measures of Damages With Older Plaintiff

In the case of *Williams v. Glenmaura Senior Living at Montage*, LLC, No. 21-CV-1494 (C.P. Lacka. Co. Nov. 4, 2022 Nealon, J.), Judge Terrence R. Nealon addressed the proper damages recoverable and the supporting evidence required in a medical professional liability action involving the death of a retired older adult.

In particular the court addressed this issue in terms of a Plaintiff's effort to seek to recover damages under the Wrongful Death Act, 42 Pa. C.S.A. §8301, and the Survival Act, 42 Pa. C.S.A. §8302.

After outlining what types of damages are available to be recovered under each of these elements of avenues of damagers.

After reviewing the record before him, the court found that, since the Plaintiff had not produced an expert report to provide the jury with evidence of the effect of productivity and inflation over time, the applicable discount rate required by the law, and the decedent's personal maintenance cost, for food, clothing, shelter, medical attention, and some recreation, the Plaintiff could not satisfy her burden of proof under the law in order to advance and sustain a claim in the Survival action for the decedent's loss of earnings or income.

The court further found that the Plaintiff's intended use of the decedent's adjusted gross income as the measure of his estate's recoverable economic damages would erroneously include forms of income that did not arise from the decedent's intellectual or body laborer and, as such, are not proper items of damages under the Survival Act.

Accordingly, the court ruled that the Defendant's Motion In Limine to preclude the Plaintiff from pursuing any type of claim for loss of earnings/income at the trial of the case was granted.