AUTO LAW UPDATE 2015

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TABLE OF CONTENTS

PLEADINGS	**1**
DISCOVERY	**8**
EXPERTS	**14**
EVIDENTIARY ISSUES	**19**
DAMAGES	**26**
APPEAL	**33**
GENERAL AUTO LAW UPDATE	**34**
UM/UIM UPDATE	**45**
POST-KOKEN UPDATE	**47**
BAD FAITH UPDATE	**60**
PREMISES LIABILITY	**64**
PRODUCTS LIABILITY	**76**
MEDICAL MALPRACTICE	**79**
POST-KOKEN SCORECARD UPDATE 2015	**83**
FORM POST-KOKEN TRIAL JURY INSTRUCTIONS	**144**
FACEBOOK DISCOVERY UPDATE 2015	**192**
CELLPHONE USE AND PUNITIVE DAMAGES UPDATE 2015	**199**

PLEADINGS

<u>Statute of Limitations/Discovery Rule in Limited Tort Case</u>

In its decision from earlier this week in the case of *Varner-Mort v. Kapfhammer*, No. 261 WDA 2014, 2015 Pa. Super. 14 (Pa. Super. Jan. 21, 2015 Ford Elliott, P.J.E, Allen, and Strassburger, J.J.)(Op. by Strassburger), the Pennsylvania Superior Court addressed the application of the discovery rule in the context of a limited tort case. In the end, the court reversed a trial court's entry of summary judgment in favor of a defendant.

This matter arose out of a motor vehicle accident that occurred on May 6, 2009. There was no dispute that the Plaintiffs were covered by the Limited Tort Election.

Over two years later, on June 27, 2011, the husband and wife Plaintiffs filed their negligence personal injury/loss of consortium Complaint.

In his Answer and New Matter, the Defendant asserted a statute of limitations defense. The defense later filed a motion for summary judgment alleging, in part, that medical records produced in discovery confirmed that the Plaintiff sought out medical treatment on the date of the accident and was diagnosed with injuries. The injuries were initially diagnosed as a back sprain with paresthesia (numbness and tingling) to the lower extremity.

Accordingly, it was the defense position that the injured party Plaintiff was aware of her alleged car accident-related injuries from the date of the subject accident. The defense also noted that the records confirmed that the Plaintiff continued to treat for low back complaints up through 2011.

As such, it was the defense position that, pursuant to the applicable two year statute of limitations, the Plaintiffs were required to file their claim by May 6, 2011. The defense contended that, since the Complaint was not filed until June of 2011, the Plaintiffs' claims were barred by the statute of limitations.

Given the application of the limited tort election, the Plaintiffs countered with the creative argument that, under the discovery rule, the statute of limitations should not be deemed to begin to run until the injured party Plaintiff discovered that she sustained a "serious injury" as a result of the accident. In this regard, the Plaintiffs argued that the injured party did not have an MRI until August of 2009. Accordingly, there was an alleged genuine issue of material fact as to when the Plaintiff discovered that she sustained a "serious injury" such that the motion for summary judgment should be rejected and the case allowed to proceed to a jury.

Whereas the trial court in Blair County rejected the Plaintiffs' argument and granted summary judgment on the statute of limitations issue, the Pennsylvania Superior Court accepted this argument of the Plaintiffs and overruled the trial court.

In so ruling the *Varner-Mort* relied upon the prior similar case of *Walls v. Scheckler*, 700 A.2d 532 (Pa. Super. 1997), which addressed the same issue and came to the same result, i.e., the statute of limitations in limited tort case should be deemed to start to run when a Plaintiff is aware that he or she may have sustained a "serious injury."

The *Walls* court reasoned that "Since, under the provisions of [Section 1705, the limited tort statute], a limited tort plaintiff does not have a valid cause of action unless and until an injury rises to the level of a 'serious injury,' and since the statute of limitations period does not ordinarily begin to run until a cause of action accrues, we conclude that the statute of limitations period cannot begin to run on a limited tort plaintiff until he knows or reasonably should know that he has sustained the requisite serious injury." *Walls*, 700 A.2d at 533-534.

Notably, the Judges deciding this *Varner-Mort* case stated that, while they were bound to follow the *Walls* decision as binding precedent, the *Varner-Mort* majority viewed the *Walls* decision as being **"just plain wrong."** *Varner-Mort* at p. 7. The *Varner-Mort* majority would have preferred to follow the discovery rule in its ordinary application.

This was particularly so given that, regardless of the Plaintiff's tort status, the Plaintiff was still entitled to pursue a claim economic damages, such as wage losses or medical expenses, even if the Plaintiff failed to show that she sustained a serious injury. The *Varner-Mort* majority failed to see why a limited tort plaintiff should be treated any differently in terms of the statute of limitations beginning to run when the Plaintiff was aware of her physical injury from the accident at the scene or when it was diagnosed in the emergency room on the day of the accident.

Nevertheless, the *Varner-Mort* court obviously reluctantly applied the law as stated in the *Walls* case and ruled that genuine issues of material fact existed as to when the Plaintiff would have been aware that she sustained a serious injury such that the trial court's entry of summary judgment would be reversed and the case remanded for further proceedings.

Service of Process

The law pertaining to perfecting service upon a Defendant in a personal injury matter was recently discussed in the Lehigh County case of *Parsons v. Rose Valley Partnership, Inc.*, PICS Case No. 14-1715 (C.P. Lehigh Co. Oct. 3, 2014 Varricchio, J.), with the end result being the Defendant’s Preliminary Objections being sustained and the Plaintiff’s Writ of Summons stricken and dismissed.

According to the summary of the Opinion, the Plaintiff alleged personal injuries as a result of a slip and fall that occurred on May 6, 2011. The Plaintiff filed suit on May 3, 2013, three (3) days before the running of the statute of limitations.

Thereafter, the Plaintiff filed a Praecipe to Reissue the Writ on May 17, 2013 and every month thereafter until the Complaint was finally filed on March 31, 2014.

The record confirms that there was no attempt to serve the Defendants for approximately eleven (11) months. It was also established that the Plaintiff did not deliver the Writ of Summons to the Sheriff for service. Plaintiff’s counsel attempted to explain a way of delay by indicating that counsel needed more time to prepare the case.

The defense argued in their Preliminary Objections that the Plaintiff did not make any good faith efforts to complete service of the Writ.

The Plaintiff countered with an argument that the Defendants had knowledge of the suit by contact by the Plaintiff’s counsel’s office and the liability carrier. The Plaintiff also argued that there was no harm sustained by the Defendants in terms of their delay.

After reviewing Pennsylvania law requiring the Plaintiff to make a good faith effort to effectuate service of process in a timely manner beginning from the date the suit is originally commenced, and noting that the statute of limitations will only be tolled if the Plaintiff makes such a good faith effort, the court dismissed the Writ after finding that the Plaintiff had delayed for nearly two (2) years after the accident before filing the Writ three (3) days before the statute of limitations ran.

Although there was no technically error committed by the Plaintiff under the Rules of Civil Procedure in terms of having the Writ continually reissued, the court noted that there was no effort made to serve original process within the first eleven (11) months without any reasonable basis being provided for failing to serve the Writ earlier than eleven (11) months after the running the statute of limitations.

The court also noted that the Plaintiff had a nearly three (3) year head start to collect evidence, including photographs of the scene, pertaining to the subject incident. The court noted that there may have been substantial changes in the area of the alleged trip and fall such that the Defendants were indeed prejudiced by the time delay relative to the service.

The court granted the Defendants’ Preliminary Objections and dismissed the Writ of Summons after finding that the Plaintiff failed to serve the Writ within the statutory period, failed to have

the reissued Writs served, failed to deliver the Writs to the Sheriff for service, and otherwise failed to establish a good faith effort at service of the original process.

Service of Process

In his recent decision in the case of *Fritzinger v. Duhart*, PICS Case No. 14-1850 (C.P. Monroe Co. Nov. 6, 2014 Zulick, J.), Judge Arthur Zulick of the Monroe County Court of Common Pleas granted a Defendant's Preliminary Objections and dismissed the Plaintiff's Complaint in a personal injury action where the Plaintiff failed to make a good faith effort to perfect service of a Writ of Summons upon a Defendant.

Judge Arthur Zulick
Monroe County

According to a summary of the Opinion, the Plaintiff commenced this automobile accident litigation with a Writ of Summons on November 20, 2012. This action was filed within the statute of limitations. The court noted that the docket did not reflect any attempt to serve the Writ of Summons at that time.

The court also noted that there is no evidence of any effort by the Plaintiff to serve the Writ upon the Defendant until after new counsel entered an appearance 19 months later on June 6, 2014.

Relying upon the Pennsylvania Supreme Court decision in the case of *Lamp v. Heyman*, the court found that there was no indication that the Plaintiff's first counsel acted in attempting a good faith effort to serve the Writ. Since the failure to serve the Writ evidenced an intention to stall the judicial machinery as prohibited by the Pennsylvania Supreme Court in *Lamp v. Heyman*, Judge Zulick granted the Defendant's Preliminary Objections and dismissed the Plaintiff's Complaint.

Transfer of Venue

In its recent decision in the case of *Bratic v. Rubendall*, No. 21 EAP 2013 (Pa. Aug. 18, 2014) (Op. by Eakin, J., with Castille, C.J., Baer, J., Todd, J., and McCaffery, J. joining)(Saylor, J., concurring), the Pennsylvania Supreme Court essentially widened the discretion of trial court to

grant a transfer of venue under the forum non conveniens doctrine when witnesses hail from distant counties.

In so ruling, the Pennsylvania Supreme Court reaffirmed the standard set forth in the case of *Cheeseman v. Lethal Exterminator* but noted that the "showing of oppression needed for a judge to exercise discretion in favor of granting a forum non conveniens motion is not as severe as suggested by the Superior Court's post-*Cheeseman* cases."

The Pennsylvania Supreme Court went on to note that "[m]ere inconvenience remains insufficient, but there is no burden to show near-draconian consequences."

In the *Bratic* case, the trial court had been persuaded to transfer venue from Philadelphia to Dauphin County by the fact that eight of the witnesses were located in Dauphin County. On appeal, the Superior Court held that the Defendant did not provide enough information to properly demonstrate that the original venue in Philadelphia was oppressive.

The Pennsylvania Supreme Court responded by indicating that the standard for showing that a Plaintiff's chose of venue is "vexatious and oppressive" as outlining the Supreme Court's ruling in the *Cheeseman* case should not be read to require Defendants to provide detailed specifics about the venue change would impact the parties.

More specifically, Justice Eakin wrote that "[t]he witnesses need not detail what clients or task will be postponed or opportunities lost in order for the judge to exercise common sense in evaluating their worth; indeed, no one can foretell such detail."

The court went on to state that "[o]ne hopes a judge may comprehend the existence of relevant general disruption from the allegations in the affidavit, sufficiently to rule on the issue."

The court admitted that it was "unsure what extra detail must be enumerated" but noted that "interference with one's business and personal life caused by the participatory demands of a distance law suit is patent." The distance that parties or witnesses would have to travel was deemed to be an important consideration in this analysis.

<u>Forum Non Conveniens Test</u>

In its recent decision in the case of *Lee v. Bower Lewis Thrower Architects*, 2014 Pa.Super. 240 (Pa. Super. Oct. 22, 2014 Gantman, P.J., Bender, P.J.E., and Platt, J.)(Op. by Gantman, P.J.), the Pennsylvania Superior Court upheld a Philadelphia Court of Common Pleas judge's ruling granting a Defendant's Motion to Transfer under the doctrine of Forum Non Conveniens.

This case represents one of the first appellate decisions applying the Pennsylvania Supreme Court's recent Forum Non Conveniens ruling in the case of *Bractic v. Rubendall*. **[To review the prior Tort Talk post on the *Bratic* case along with a link to that decision, please click <u>HERE.]</u>.**

In this motor vehicle accident case of *Lee*, which involved an accident that occurred in Centre County, Pennsylvania, the Defendants filed a Motion to Transfer the case to Centre County after the Plaintiff filed the suit in Philadelphia County.

The Superior Court applied the Pennsylvania Supreme Court's holding in *Bractic* which clarified the standard of review with respect to a Motion for Transfer of Venue under the doctrine of Forum Non Conveniens.

In *Bractic*, the Pennsylvania Supreme Court clarified the standard for showing that a Plaintiff's choice of venue was "vexatious and oppressive." The Pennsylvania Supreme Court clarified that his standard did not require Defendants to provide detailed and specific information with respect to how the venue change would impact the parties. Rather, the Pennsylvania Supreme Court reaffirmed the rule that the trial courts have the broad discretion to use a balancing test of several factors, including but not limited to, location of witnesses, distance traveled, and court congestion, in deciding such motions. Other factors to be considered included burden of travel, time out of office, disruption to business operations, difficulty in obtaining witnesses, and access to proof in general.

In the *Lee* case, the Pennsylvania Superior Court stated that, while the moving party needed to offer support for its transfer motion in the form of detailed information in the record, the *Bractic* Supreme Court held that the standard did not require "any particular proof".

After reviewing the record before it, the Pennsylvania Superior Court in *Lee* affirmed the trial court's transfer of the case from Philadelphia County to Centre County.

<u>Allegations of Recklessness in Auto Accident Case Dismissed</u>

In the case of *Roma v. Finney*, PICS Case No. 15-0641 (C.P. Northampton Co. Feb. 23, 2015 Beltrami, J.), the trial court sustained a Defendant's Preliminary Objections in an automobile accident matter and ordered that the words "reckless," "recklessness," and "recklessly" be stricken from the Complaint.

The court noted that this matter involved a negligence cause of action arising out of a rear-end motor vehicle accident. In her Complaint, the Plaintiff alleged negligence and/or recklessness on

the part of the Defendant caused the accident and injuries. Notably, the Plaintiff did not request punitive damages in the Complaint.

The Defendant filed Preliminary Objections in the nature of a Motion to Strike impertinent matter pursuant to Pa. R.C.P. 1028(a)(2).

As there were no facts plead in the Complaint to support the objected to language, and given that no claim for punitive damages was pled, the court granted the Preliminary Objections as allegations of recklessness were deemed to be immaterial to proving a negligence cause of action.

DISCOVERY

Law on Fishing Expeditions

In his recent Order of March 16, 2015, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas addressed the common issue of the allowance of liberal discovery efforts as compared to fishing expeditions in the case of *Bandru v. Fawzen*, No. 2013-CV-3959 (C.P. Lacka. Co. March 16, 2015 Nealon, J.).

This matter arose out of a motor vehicle accident. More specifically, in this case, the court addressed a Motion by the Defendant to strike the Plaintiff's objections to records subpoenas that the Defendant had addressed to the Plaintiff's healthcare providers as well as to two (2) automobile insurance carriers.

The gist of the Plaintiff's objections is that the Defendant sought medical records dating back to the Plaintiff's date of birth which was more than 52 years before. As such, the Plaintiff asserted that the records requests were overly broad and sought information that is not relevant and not likely to lead to the discovery of admissible evidence. The Plaintiff further stated that he would not object to subpoenas which were reasonably limited in time and scope.

The defense countered with an argument that the Plaintiff had admitted during his deposition that he had had extensive dental work performed in the mid-1980s (in this matter, the Plaintiff was alleging a TMJ injury), that the Plaintiff had been injured in previous motor vehicle accidents. The Defendant generally asserted that she was entitled to secured documentation relevant to the Plaintiff's past medical history and any and all documents pertaining to the Plaintiff's past medical care and treatment in order to ascertain whether any of the injuries alleged by the Plaintiff existed prior to the accident and/or whether or not the Plaintiff was involved in any other prior incidents as a result of which he sustained personal injuries.

The Plaintiff acknowledged that he was involved in prior motor vehicle accidents in 1991, 1993, and 1998. However, the Plaintiff also stated that, for years before the subject collision, he worked as a personal trainer and ran multiple marathons, along with ultramarathons of greater than 50 miles every year. The Plaintiff also described during his discovery responses that any prior treatment he had in the mid-1980s as well as in the 1990s were for unrelated conditions that had no bearing on the issues presented following the subject accident.

The Plaintiff additionally asserted that the Defendant's request for medical records and the files of the automobile insurance carriers relative to the Plaintiff's 1991, 1993, and 1998 accidents were "fishing expeditions."

Judge Terrence R. Nealon

Lackawanna County

In his Opinion, Judge Nealon set forth the current status of the discovery standards pursuant to Pa. R.C.P. 4003.1 and confirm that discovery is to be liberally permitted with respect to any matters that were not privileged, and which were relevant to the case being tried. The court also noted that any doubts regarding relevance should be resolved in favoring of allowing the requested discovery.

However, Judge Nealon also stated that it is the responsibility of the trial court to oversee discovery between the parties and to determine, within the court's broad discretion, any appropriate measures to ensure adequate and prompt discovery of matters allowed by the Pennsylvania Rules of Civil Procedure. The court reaffirmed the general rule that, while discovery should be liberally permitted, discovery requests must also be reasonable. Judge Nealon noted that the courts of Pennsylvania have repeatedly held that trial courts can prohibit the discovery of matters which would amount to a fishing expedition.

Judge Nealon emphasized that while the courts have repeatedly indicated that, "[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 with a hook or a harpoon.'" See Bandru at p. 6.

Applying this law to the case before him, Judge Nealon ruled that some of the information requested by the defense was indeed discoverable and other information was not. As such, the matter before the court was granted in part and denied in part.

Referral by Plaintiff's Attorney of Client to a Doctor Ruled Discoverable

In a recent Delaware County Court of Common Pleas decision in the case of *English v. Stepchin*, No. CP-23-CV-786-2014, 101 Del. 424 (C.P. Del. Co. Nov. 12, 2014 Kenney, P.J.), President Judge Chad F. Kenney upheld a defense attorney's right to inquire of a personal injury plaintiff whether or not plaintiff's counsel had referred the plaintiff to her treating physician.

This issue came before the court on a Motion for a Re-Deposition of the plaintiff by defense counsel.

At the original deposition, plaintiff's counsel objected to the defense counsel's question to the plaintiff as to whether or not plaintiff's counsel had referred the plaintiff to her treating physicans. Plaintiff's counsel asserted that such discovery was barred by the attorney-client privilege.

In his Opinion issued on the matter, President Judge Kenney held that, "whether counsel referred Plaintiff to her treating physicians does not constitute legal assistance so as to justify properly invoking the attorney-client privilege." More specifically, the court found that whether an attorney referred his client to a medical provider for treatment can not be considered to have been a communication from an attorney to his or her client associated with the rendering of a legal opinion or the provision of legal services so as to invoke the applicability of the attorney-client privilege.

President Judge Kenney also stated that any asserted privilege "failed to outweigh the interest of the accessibility of material evidence to further the truth-determining process" at a trial of a personal injury matter.

The Court granted Defendant's Motion and ordered a 2nd deposition limited to the issue of who referred Plaintiff to her treating physicians.

Depositions – Last Minute Cancellations

Last-minute cancellations of depositions are common, perhaps too common, in the practice of law. Most of us have been the victim of such actions but, then again, most of us have also had occasion to make such last-minute requests for a rescheduling of a deposition.

Sometimes the cancellation of depositions is done nonchalantly by one or even all attorneys involved and without due consideration for the opposing counsel or the deponent.

With respect to the deponents, most of whom are unfamiliar with the litigation process, they may have taken off of work and/or went through much trouble to make arrangements for the care of their children for the deposition.

Moreover, a cancellation of a deposition surely must be frustrating and taxing upon the deponent who was likely extremely nervous and filled with dread for the extended period of time leading up to a long-scheduled deposition only to learn that at the last minute that it will be rescheduled and the nervousness and dread will continue for another cycle.

The issue of whether a last-minute cancellation of a deposition is sanction-worthy was recently addressed in the Lackawanna County Court of Common Pleas.

In his recent Opinion in the case of *Euceda v. Green*, No. 2013-CV-3373 (C.P. Lacka. Co. Aug. 20, 2014 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas addressed an appeal by a Defendant obstetrician and his counsel in a malpractice action from the Lackawanna County Court of Common Pleas special trial master's imposition of monetary sanctions of $1,000.00 as a result of the defense counsel's allegedly late cancelation of the Plaintiffs' depositions that were scheduled by defense counsel.

In his Opinion, Judge Nealon noted that, once a party or lawyer notices a deposition pursuant to Pa. R.C.P. 4007.1, that lawyer assumes a duty under Pa. R.C.P. 4019(e) to promptly notify all other counsel and parties of the cancellation of that deposition before those individuals have incurred travel and pre-deposition preparation expenses.

Rule 4019(e) provides that, if the party who schedules "a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party given the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and his or her attorney in so attending, including attorney's fees."

In his Opinion, Judge Nealon also sited to Article II (17) of the Pennsylvania Code of Civility which provides that "[a] lawyer should demonstrate respect for other lawyers, which requires that counsel be punctual in meeting appointments with other lawyers and considerate of the schedules of other participates in the legal process…."

In this matter, Philadelphia Plaintiff's counsel confirmed by email late in the morning of April 29, 2014 that the Plaintiffs' noticed depositions would proceed the following day in Scranton as scheduled by defense counsel.

According to the Opinion, defense counsel unilaterally cancelled the depositions later in the afternoon of April 29, 2014 almost three (3) hours after receiving the email confirmation from

Plaintiffs' counsel that the depositions would go forward as planned. Upon being notified of defense counsel's cancellation of the depositions, Plaintiffs' counsel immediately contacted defense counsel's office and requested that the depositions proceed as scheduled in light of the fact that the Plaintiffs and their counsel had already completed their travel and were already located in Scranton. Defense counsel declined to proceed with the depositions.

Judge Nealon concluded that, since it was reasonably foreseeable to defense counsel that Plaintiffs' counsel would travel to Scranton to prepare Plaintiffs for their depositions prior to the time that defense counsel notified the Plaintiffs of the cancellation of those depositions, the award of counsel fees and travel expenses to the Plaintiffs was warranted under Rule 4019(e).

Accordingly, the judge affirmed the special trial masters' sanctions order but increased it to the amount of $1,347.30 to reflect the full amount of reasonable counsel's fees and travel expenses incurred.

<u>Depositions – Privilege against Self-Incrimination</u>

In his recent Opinion in the case of *Hilburn v. Jones*, 2012-CV-6401 (C.P. Lacka. Co. Aug. 4, 2014 Mazzoni, J.), Judge Robert A. Mazzoni reversed a decision by the Lackawanna County Special Trial Master regarding the issue of whether or not a deponent had the right to assert the privilege against self-incrimination at a deposition.

According to the Opinion, the case involved personal injury claims arising out of a fall by the Plaintiff on the Defendant's premises.

The Defendant wished to depose the Plaintiff's "ex-husband" regarding calls that the ex-husband allegedly made to the insurance company after the accident, in which he stated that the Plaintiff actually fell at her own home.

Judge Robert A. Mazzoni
Lackawanna County

At the deposition of the Plaintiff's ex-husband, the deponent appeared with counsel and refused to answer any questions, asserting a privilege against self-incrimination under the Fifth Amendment of the Pennsylvania Constitution.

The Defendant presented a Motion to Compel to the Lackawanna County Court of Common Pleas Special Discovery Master, which was denied.

On appeal, Judge Mazzoni found that the deponent did not have a valid and reasonable basis for the exercise of the privilege against self-incrimination. Accordingly, the court ruled that the Defendants were entitled to conduct another deposition to inquire as to the circumstances surrounding the deponent's alleged statements, his knowledge of the Plaintiff's alleged fall, her alleged injuries, and any other related matters.

EXPERTS

Parameters for Neuropsychological IME

In the Lebanon County Court of Common Pleas case of *Shearer v. Hafer*, No. 2012-01286 (C.P. Leb. Co. March 17, 2015 Charles, J.), Judge Bradford Charles ruled in favor of a defense discovery motion to compel a neuropsychological IME, with the parameters being that the Plaintiff's attorney would be allowed to be present during the preliminary interview phase by the doctor of the Plaintiff but not thereafter.

The court ruled that once the standardized testing portion of the neuropsych IME began, no one other than the doctor and the Plaintiff would be allowed in the room and no recording device would be permitted in the room.

The court also ruled that, once the IME was completed, the Plaintiff's attorney would be entitled to a copy of the standardized testing that was completed.

Request for Additional Testing for Psych IME Denied

In a recent February 10, 2015 decision in the case of *Trojanowicz v. Ford Motor Co.*, No. 2013 - CV - 223 (C.P. Lacka. Co. Feb. 10, 2015 Minora, J.), Judge Carmen D. Minora addressed issues raised by a Defendant in a motion to compel a Plaintiff to undergo additional testing requested by an Independent Psychiatric Medical Examiner in a personal injury matter arising out of a motor vehicle accident.

In this matter, the defense referred the Plaintiff to a psychiatric IME to address the Plaintiff's complaints of post-traumatic stress disorder. The Plaintiff completed an examination with the defense expert. The defense filed a motion to compel the Plaintiff to undergo additional psychiatric tests as part of, and to complete, the IME process.

The Plaintiff countered by arguing that the tests were not medically necessary, that the test were not identified to Plaintiff's counsel prior to the evaluation, and that the tests were not even going to be completed by the evaluating psychiatrist.

Judge Carmen D. Minora
Lackawanna County

Judge Minora essentially denied the Defendant's appeal from the decision of the Lackawanna County Special Trial Master as untimely but went on to note how he would have ruled on the merits. As such, Judge Minora's findings noted below are arguably *dicta*.

Citing to Pa.R.C.P. 4010, Judge Minora noted that whether or not to allow additional examinations was a decision left to the broad discretion of the trial court. Given that the psychiatric IME doctor wrote in his initial report that he was able to come to accurate conclusions and opinions based upon the review he had completed to date, Judge Minora found that additional testing would not be allowed.

With respect to the defense argument that there would be no prejudice to the Plaintiff in allowing for additional testing, Judge Minora pointed out that prejudice to the Plaintiff was not a part of the analysis in the determination of whether to require the Plaintiff to submit to an IME.

The court also accepted as valid the Plaintiff's objections noted above with respect to the lack of notice being provided as to the type of testing, the identity of the person performing the testing, and that the additional testing was not medically necessary.

Competency of Witness – Family Doctor Can't Testify as to Spinal Laser Surgery

A plaintiff's attempt to have a family doctor testify as to the necessity of the plaintiff's laser spinal surgeries following a motor vehicle accident was rejected in a recent decision by Judge

Karen Shreeves-Johns of the Philadelphia County Court of Common Pleas in the case of *Lee v. Bernard*, PICS Case No. 14-1985 (C.P. Phila. Co. Nov. 19, 2014 Shreeves-John).

In so ruling the court rejected the plaintiff's argument that "all medical doctors are qualified to testify concerning medical subjects and it is for the jury to determine the weight to be given to the expert testimony."

Judge Shreeves-Johns wrote in her Opinion that. "Simply put, an expert must demonstrate some knowledge of the specific subject matter upon which he promises to express an opinion."

The Court went on with the following statement: "The reasonableness and necessity of a patient receiving highly complex spinal surgery is a matter of specialized knowledge which is not typically embodied within the knowledge or education of a general family practitioner and therefore was not within the ken of plaintiffs' expert...."

The judge also noted that the doctor who performed the surgeries was certainly a specialist in the field and the plaintiffs could have called him to testify about the need for the surgeries.

Parameters for Site Inspection by Expert

In his recent decision in the case of *Gardner v. MIA Products Co., et.al.*, No. 2011-CV-1560 (C.P. Lacka. Co. No. 10, 2014 Mazzoni, J.), Judge Robert Mazzoni of the Lackawanna County Court of Common Pleas denied a Plaintiff’s appeal from an Order issued by the Special Discovery Master of Lackawanna County with respect to issues raised relative to a site inspection of the Defendants’ facility.

By way of background, this case involved a slip and fall on the Defendant's premises. During the course of discovery, the Plaintiff filed a motion to compel the Defendant to allow entry on the property for a site inspection. The defense responded that it had no objection to a site inspection but required that those entering the premises would be required to sign in and present valid photo identification. The defense also requested copies of all photos and videos taken on the date of the inspection.

The Plaintiff argued that, under the applicable Rules, the Plaintiff was not required to disclose the identity of various individuals that would be participating in the site inspection as such disclosures would permit the Defendants to learn the Plaintiff’s trial strategy, including but not limited to, the identity of potential experts, which would allegedly be prejudicial to the Plaintiff’s case.

Judge Robert A. Mazzoni

Lackawanna County

The Plaintiff also asserted that the production of all photos and videos completed during the inspection, including those not intended for trial, was not permitted under the attorney work product privilege.

Judge Mazzoni noted that the defense presented evidence that its sign in and photo I.D. requirement had long been in place and was not specific to this case.

The court additionally reviewed the applicable law under Pa.R.C.P. 4003.5 pertaining to "Discovery of Expert Testimony. Trial Preparation Material."

While the court agreed that, under that Rule, disclosure of the opinions of experts that a party retained but did not intend to present at trial was protected, the Rule is silent on the issue of the mere "identification" of such experts. Judge Mazzoni went on to note that he did not see how the identification of experts in this regard would compromise the trial strategy of a Plaintiff in a slip and fall case. No opinions would be disclosed with such information. The court also noted that the Defendant had bona fide reasons behind its policy of generally requiring those entering the premises to sign in and identify themselves.

Judge Mazzoni also found the Plaintiff's reliance upon the work product doctrine to be misplaced with respect to the assertion that Plaintiff need not turn over photos or videos generated during the site inspection. The court noted that no attorney mental impressions, conclusions, or opinions would be disclosed by way of the production of such photos or videos.

As stated, Plaintiff’s appeal of the Special Discovery Master’s Order was denied.

Limitations on Cross-Examination of Expert on Bias

In *Flenke v. Huntington*, 2015 Pa. Super. 50, 467 MDA 2014 (March 17, 2015 Stabile, Bowes, Ott J.J.)(Op. by Stabile, J.), the Pennsylvania Superior Court ruled that, while e expert witnesses may be impeached for bias, including frequent work for the same side in litigation, including for insurance carriers, there are limits to such cross-examination.

This case arose out of a motor vehicle accident. The specific evidentiary issues in this matter centered around the Plaintiff's cross-examination of the defense medical expert.

Under the well-established rule of law that holds that a witness cannot be cross-examined on collateral matters, *see J.S. v. Whetzel*, 860 A.2d 1112, 1120 (Pa.Super. 2004), the court in *Flenke* noted that even bias evidence can become too intrusive and collateral.

In this matter, as is becoming more and more frequent in civil litigation matters ever since the *Cooper v. Schoffstall* and *Feldman v. Ide* decisions set down the parameters for gathering discovery on an expert's litigation-related activity and compensation, the jury heard, and plaintiff hammered home during closing argument, the income and litigation-activity bias evidence concerning the defendant's expert.

On appeal, the Plaintiff was challenging the trial court's limitations on the use of this type of evidence at trial. The Superior Court found that the additional income testimony that was excluded, even if error, was cumulative under Pa.R.E. 403 and was, therefore, harmless in the end.

The Superior court more specifically found that detailed review of the expert's fifty most recent reports involving other persons would have introduced collateral issues into the case. As such, this evidence was found to have been properly excluded by the trial court.

The Superior Court also ruled that evidence of the expert's work for defendant's "insurance company" was properly excluded as it would have introduced the impermissible topic of insurance into the case.

In the end, the Superior Court affirmed the trial court's denial of the Plaintiff's request for a new trial.

EVIDENTIARY ISSUES

IME Expert May Rely on Opinion of Previous IME Expert

In the case of *Feld v. Primus Technologies Corp.*, No. 4:12-CV-01492, 2015 U.S. Dist. Lexis 55270 (M.D. Pa. April 28, 2015 Brann, J.), Judge Matthew W. Brann of the Middle District Federal Court of Pennsylvania relied upon Fed.R.E. 703 in ruling that Defendants in tort litigation may utilize independent medical examinations of the plaintiff prepared in separate worker's compensation proceedings.

The court denied a Plaintiff's Motion in Limine in this regard reasoning that, even if such IME reports may be arguably biased, IME reports are the kind of records that a medical expert would legitimately rely upon, i.e, the records of other doctors.

Judge Matthew W. Brann

Judge Brann did emphasize, however, that while an expert may rely on IME reports, the expert's opinion testimony must still satisfy the usual evidentiary requirements, such as the hearsay rule, before the opinion may be admitted into evidence.

Police Reports

In the case of *Harris v. Phila. Facilities Mgmt. Corp.*, No. 39 C.D. 2014 (Pa. Cmwlth. Dec. 2, 2014 Simpson, McCullough, and Covey, J.J.)(Op. by McCullough, J.), the Pennsylvania Commonwealth Court addressed the propriety of a reference to a police report in a jury trial arising out of a motor vehicle accident.

In this matter, the Plaintiff motorcyclists wished to make reference a police officer's observations in his police report concerning a pothole in the area of the accident, which was allegedly a central fact and/or issue in the happening of the accident. While the trial court noted that some basic facts contained in a police report may be referenced at trial under appropriate circumstances, since the pothole issue was central to this matter, the trial court excluded the police report as a whole.

In this matter, on cross-examination by Plaintiff's counsel, a police officer witness admitted that, prior to taking the witness stand, he had referred to the police report another officer wrote up. The testifying officer did this to refresh his recollection but stated, on the stand, that he was otherwise testifying from his memory and without reference to the report while sitting on the stand.

In *Harris*, the Commonwealth Court reiterated the general rule that a police accident report is inadmissible in an auto accident case as hearsay evidence.

However the appellate court went on to find that, under Pa.R.E. 612, it was within the trial court's discretion to allow for the witness to review the police report as part of an effort to refresh the witness's recollection. Such a refreshing of a witness's recollection could be accomplished by presenting the witness with documents to review either before the witness takes the stand, or during the time the witness is on the stand.

This decision also supports the long-standing proposition that an expert accident reconstructionist may rely upon, and refer to, a police report in reconstructing an accident. Citing to Pa.R.E. 703, the court noted that a police report is the type of data that such an expert witness is permitted to rely upon in formulating is opinion. Here, the defense expert merely stated that he had relied upon the police report in formulating his opinion and there was no effort on the part of that expert to simply, and impermissibly restate, opinions contained in the police report on central issues to the case.

The *Harris* court likewise upheld the trial court's rejection of the efforts by the Plaintiff to introduce favorable opinions contained in the police report through the testimony of the Plaintiff's experts. The appellate court cited to 75 Pa.C.S.A. Section 3751(b)(4) to support the ruling that a police report prepared by a police officer who did not witness the accident is inadmissible hearsay evidence and should not be admitted into evidence. The court also noted that a party is not allowed to get such a report into evidence in an indirect manner.

Accordingly, based upon these rulings the appellate court did not find any errors that would require the granting of a new trial as requested.

Admissibility of BAC Evidence Requires Proof of Intoxication

In his recent February 9, 2015 Opinion in the case of *Ritter v. Van Campen Motors, Inc.*, No. 12-00,379 (C.P. Lycoming Co. Feb. 9, 2015 Anderson, J.), Judge Dudley M. Anderson addressed Motions in Limine pertaining to DUI evidence filed by a Defendant in a motor vehicle accident case.

According to the Opinion, this matter involved a motor vehicle accident during which each party claimed that the other driver crossed the centerline resulting in the fatal accident. Accident reconstruction experts offered by each party came to opposite conclusions.

The Defendant filed a Motion In Limine to preclude evidence that the Defendant driver had a BAC of .257 at the time of the accident as confirmed by an autopsy report, testimony that the Defendant had been drinking prior to driving that day, and evidence that there was beer in the Defendant's vehicle at the time of the accident. The Defendant contended that the BAC evidence was inadmissible absent proof of intoxication.

Judge Anderson noted that, while the court agreed with the principle argument presented by the defense, the court found that the defense argument did not apply as there was indeed proof of intoxication in the record.

For example, in the autopsy report, an expert forensic pathologist concluded that the Defendant was "markedly" intoxicated at the time of the accident. In a supplemental report, the pathologist reiterated this opinion of intoxication and noted the mental effects that would result from such intoxication.

Accordingly, the court found that the evidence of intoxication presented was more than sufficient to support the evidence of consumption of alcohol which the defense sought to preclude.

The Defendant filed an additional motion preclude the supplemental report of the forensic pathologist on the basis that it was submitted outside the discovery deadline and given that the opinion of the expert was allegedly beyond the scope of that pathologist's expertise.

The court confirmed that, with respect to the latter portion of this argument, the Plaintiffs had agreed not to use the objected to portion of the report which was allegedly outside the scope of the expert's expertise.

With regard to the timeliness of the report, the court noted that the Plaintiff submitted a supplemental report of the pathologist in response to the Defendant's Motion In Limine to exclude evidence of alcohol consumption. Given that the supplemental report only addressed the issue of intoxication and further explained the statements made by the pathologist in his first

report, Judge Anderson felt that it was not necessary to exclude the report on the basis of timing. The court opined that the Defendant had enough notice with the first report as to the pathologist's opinion on the issue of intoxication such that the defense had sufficient time to seek a contrary opinion if they wished.

Overall, the defense Motions In Limine were denied.

Limitations on Cross-Examination of Lay Witnesses/Parties

In a recent detailed Order issued in the case of *Detrick v. Burrus,* No. 2011 CV 1333 (C.P. Lacka. Co. Feb. 23, 2015 Nealon, J.), Judge Terrence R. Nealon addressed a Motion in Limine filed by the Plaintiff in an automobile accident suit seeking to preclude evidence of a post-accident drug screen ordered by the Plaintiff's treating doctor that contained a positive result for marijuana use.

According to the Court Order, following the subject motor vehicle accident, the Plaintiff began to treat with a medical provider who ordered a urine drug screen of the Plaintiff prior to considering the possibility of prescribing additional medications for the Plaintiff. That test came back as positive, in part, for marijuana in the Plaintiff's system.

Citing Pa. R.E. 401 and 403, pertaining to relevancy, the Plaintiff contended that any evidence of the drug test was inadmissible because it was irrelevant and unduly prejudicial.

The Defendant countered with the argument that, since the medical records confirmed that Plaintiff had denied the use of marijuana during her initial visit with the medical provider, and since the Plaintiff had also denied at her deposition under oath that she ever smoked marijuana, evidence of the Plaintiff's positive drug screen was admissible to impeach the Plaintiff's credibility and show the jury that she was a liar, even when under oath.

The defense also had evidence in the Plaintiff's family doctor's records confirming that the Plaintiff had otherwise admitted to that other doctor that she had indeed used marijuana in the past, contrary to her denials noted above.

The Defendant further asserted that the evidence of the urine drug screen tests ordered by the Plaintiff's post-accident doctor was separately relevant under Pa. R.E. 401 as such evidence made the existence of the fact that the Plaintiff's own post-accident treating provider had serious questions and concerns as to the Plaintiff's medication use more probable than such a conclusion would be without this evidence.

Moreover, with respect to the claims by the Plaintiff that the reference to the positive urine tests for marijuana at trial would be unduly prejudicial, the defense argued in its Brief that any negative connotations pertaining to marijuana use that were prevalent back during the Cheech and Chong years were long gone and that there was a liberalization of the public opinion in this regard.

The defense also pointed out that there were currently 23 states in the nation that have since legalized medicinal marijuana and even noted that the new Governor of Pennsylvania was considering the possibility of legalizing medicinal marijuana in Pennsylvania. As such, it was asserted that the admission of this evidence would not be unduly prejudicial as alleged by the Plaintiff.

In his Opinion, Judge Nealon noted that questions concerned the admissibility of evidence lie within with sound discretion of the trial court and would not be disturbed on appeal absent a clear abuse of that discretion. Judge Nealon also cited the law that held that evidence to impeach the credibility of a witness is admissible so long as it is relevant to that purpose and not otherwise barred.

In granting the Plaintiff's Motion In Limine to preclude this evidence, the court relied upon the law that a witness may not be impeached or contradicted on a "collateral" matter.

In so ruling, Judge Nealon noted that the Pennsylvania appellate courts have repeatedly held that "no witness can be contradicted on everything he testifies to in order to 'test his credibility.' The pivotal issues in a trial cannot be 'sidetracked' for the determination of whether or not a witness lied in making a statement about something that has no relationship to the case on trial." See Op. at 2 [citations omitted]. The court otherwise noted that it is a well-settled principle of Pennsylvania law that the [t]he purpose of trial is not to determine the ratings of witnesses for general veracity." See Op. at p. 2. Judge Nealon also cited to a criminal court case holding that "[g]eneral questioning concerning the use of drugs does not bear on the witnesses' 'character for truth.'" See Op. at p. 2-3.

After reviewing this law, the court found that the Defendant had not identified an independent basis to introducing evidence of the Plaintiff's apparent use of marijuana more than eleven (11) months after the subject car accident. Judge Nealon ruled that absent proof that the Plaintiff's marijuana use was admissible on grounds independent of the proposed impeachment, such evidence was inadmissible.

The court went to find that, even if such evidence was somehow relevant, this evidence was inadmissible under Pa. R.E. 403 since its probative value was outweighed by the danger of unfair prejudice. The court found that evidence of the Plaintiff's marijuana use or positive drug screen

could arguably divert the jury's focus from its job of deciding the disputed issues of damages, or could otherwise result in the production of a damages award set upon an improper basis.

As such, the court granted the Plaintiff's Motion In Limine to preclude any evidence of or reference to Plaintiff's positive pre-screen urine drug test.

It is noted that this case proceeded to trial and a defense verdict was entered by the jury on the limited tort question. No appeal was filed.

Limitations on Cross-Examination of Expert on Bias

In *Flenke v. Huntington*, 2015 Pa. Super. 50, 467 MDA 2014 (March 17, 2015 Stabile, Bowes, Ott J.J.)(Op. by Stabile, J.), the Pennsylvania Superior Court ruled that, while e expert witnesses may be impeached for bias, including frequent work for the same side in litigation, including for insurance carriers, there are limits to such cross-examination.

This case arose out of a motor vehicle accident. The specific evidentiary issues in this matter centered around the Plaintiff's cross-examination of the defense medical expert.

Under the well-established rule of law that holds that a witness cannot be cross-examined on collateral matters, *see J.S. v. Whetzel*, 860 A.2d 1112, 1120 (Pa.Super. 2004), the court in *Flenke* noted that even bias evidence can become too intrusive and collateral.

In this matter, as is becoming more and more frequent in civil litigation matters ever since the *Cooper v. Schoffstall* and *Feldman v. Ide* decisions set down the parameters for gathering discovery on an expert's litigation-related activity and compensation, the jury heard, and plaintiff hammered home during closing argument, the income and litigation-activity bias evidence concerning the defendant's expert.

On appeal, the Plaintiff was challenging the trial court's limitations on the use of this type of evidence at trial. The Superior Court found that the additional income testimony that was excluded, even if error, was cumulative under Pa.R.E. 403 and was, therefore, harmless in the end.

The Superior court more specifically found that detailed review of the expert's fifty most recent reports involving other persons would have introduced collateral issues into the case. As such, this evidence was found to have been properly excluded by the trial court.

The Superior Court also ruled that evidence of the expert's work for defendant's "insurance company" was properly excluded as it would have introduced the impermissible topic of insurance into the case.

In the end, the Superior Court affirmed the trial court's denial of the Plaintiff's request for a new trial.

DAMAGES

__Collateral Estoppel – Extent of Injuries Determined in Previous Worker's Comp Claim__

In his recent decision in the case of *McConnell v. Delprincipe*, PICS Case No. 14-1674 (C.P. Lawrence Co. Oct. 2, 2014 Cox, J.), Judge J. Craig Cox of the Lawrence County Court of Common Pleas ruled that the judicial findings reached in a Plaintiff's previous workers' compensation case arising out of the same accident precluded the re-litigation of identical issues in a collateral civil lawsuit.

In this matter, the Plaintiff was a tow truck driver who was injured on a roadway while assisting a stranded motorist. The accident occurred while the injured party was acting in the course and scope of his employment.

The Plaintiff's claim that the Plaintiff sustained cervical spine injuries including herniated disc, headaches, cervical sprain and strain, and numbness and tingling in his upper extremities along with a thoracic strain/sprain, and a lumbar sprain/strain.

The Plaintiff filed both a workers' compensation claim as well as a personal injury claim.

At the workers' compensation hearing, the Plaintiff presented a testimony of his treating doctor who opined that the Plaintiff sustained a cervical strain/sprain as well an aggravation of his underlying degenerative disc disease in his neck. The treating physician opined that the Plaintiff could continue to work as he had recovered from his cervical injury.

At the workers' compensation hearing, the employer presented a testimony of a medical expert who had reviewed the records and completed an examination of the Plaintiff. The defense medical expert opined that the MRI studies showed age-appropriate degenerative changes that were not aggravated by the subject accident. The defense expert agreed with the Plaintiff's medical expert that the Plaintiff had sustained a cervical spine sprain/strain.

The workers' compensation judge concluded that the Plaintiff did indeed sustain a neck injury as a result of the accident, but did not suffer an aggravation of this pre-existing degenerative disc disease. The workers' compensation judge had also concluded that the Plaintiff had fully recovered from his work-related injury and was not disabled.

The workers' compensation decision was not appealed by the Plaintiff.

In the separate civil litigation lawsuit, the Plaintiff sought to recover for damages beyond the cervical spine/strain injury.

The trial court judge rejected this effort by the Plaintiff finding that all of the elements for the collateral estoppel test had been met. First, the issue decided at the workers' compensation hearing was identical to the issue raised in the personal injury lawsuit. The trial court also confirmed that the Plaintiff presented evidence at the workers' compensation hearing in an effort to prove that he sustained an aggravation of his degenerative disc disease in addition to the sprain/strain injury. The trial court in the personal injury case indicated that the Plaintiff had a full and fair opportunity to litigate that issue and that the workers' compensation judge had rendered a final judgment on the merits of that issue which was not appealed.

Accordingly, Judge Cox held that the findings in the workers' compensation case precluded the re-litigation of the identical issues in the companion personal injury lawsuit. As such, the trial court ruled that the findings of the workers' compensation judge precluded the Plaintiff from seeking damages beyond a cervical sprain/strain injury.

As such, the Defendant's Motion for Partial Summary Judgment arguing that the Plaintiff were collaterally estopped from asserting injuries beyond that which had been determined in the previous workers' compensation matter was granted.

Mentioning Affordable Care Act Violates Collateral Source Rule

A recent trend in Pennsylvania personal injury matters involves defense counsel pointing to the Affordable Care Act to support an argument against any recovery of alleged medical expenses claimed by the Plaintiff. The argument is that such expenses are or will be covered by insurance under the Affordable Care Act and therefore, they need not be awarded by a jury.

Plaintiffs argue that the well-settled Collateral Source Rule should preclude any mention of any benefits from a collateral source in an effort to preclude or diminish the recovery of compensation from the alleged wrongdoer.

While the Collateral Source Rule has been around for a while, the Affordable Care Act is a relatively new law.

The Affordable Care Act actually refers to two separate pieces of legislation — the Patient Protection and Affordable Care Act (P.L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) — that, together expand Medicaid coverage to millions of low-income Americans.

The issue of whether the defense in a personal injury litigation may refer to the Affordable Care Act during the course of a jury trial was recently addressed in the case of *Deeds v. University of Pennsylvania*, No. 755 EDA 2014, 2015 Pa. Super. 21 (Pa. Super. Jan. 30, 2015 Lazarus, Wecht, and Strassburger, J.J.)(Opinion by Wecht, J.).

In *Deeds*, a defense verdict in a medical malpractice case was reversed and remanded for a new trial.

On appeal, the Plaintiff argued, in part, that she was "entitled to a new trial because the trial court violated the collateral source rule when it 'improperly allowed [the Defendants] to inform the jury that [the Plaintiffs'] substantial medical needs were all being attended to at little to no cost to [the Plaintiffs'] legal guardian due to the existence of state and federal education and medical benefits programs." Op. at p. 4. The defense referred to Medicaid as well as to how President Obama's Affordable Care Act would impact the future care costs in the case.

The Superior Court found these references at trial to be a patent violation of the long-standing Collateral Source Rule, the purpose of which is to "avoid the preclusion or diminution of the damages otherwise recoverable from the wrongdoer based on compensation recovered from a collateral source," and, as such, remanded the case for a new trial.

Interplay of Future Medical Expenses and Collateral Soure Rule

The interplay of the prospect of future medical expenses and the collateral source rule came up in the Federal Middle District of Pennsylvania case of *Coyne v. Midland Steel Warehouse*, No. 3:13-CV-02728 (M.D.Pa. Feb. 20, 2015 Kosik, J.), in which the Plaintiff's expert intended to offer testimony that Plaintiff's gross future medicals were around $150,000.

However, according to defense counsel, at the time of the accident, and obviously going forward, Plaintiff, due to her age, was Medicare eligible. Defense counsel reported that Medicare had actually paid for the Plaintiff's medical care up to the time of trial and was asserting a lien for a fraction of the gross cost.

Based upon this scenario, the defense filed a Motion in Limine in which the following issues were raised.

First, the defense sought to have the alleged future medicals capped to the Medicare amount.

Second, and in the alternative, permission was requested by the defense to cross-examine the Plaintiff's expert on the Medicare amount.

Third, the defense additionally requested permission to produce a rebuttal expert to discuss the Medicare pricing of the alleged future medical care.

According to the copy of the Order only (without Opinion) secured from this case, Judge Kosik granted the defense motion in part and permitted the defense to cross-examine the Plaintiff's expert and/or call a Medicare expert.

According to defense counsel, the case settled on the eve of trial.

Keeping Settling Defendants on the Verdict Slip

In his recent decision in the case of *Stang v. Smith*, PICS Case No. 14-1199 (C.P. Carbon Co. July 28, 2014 Nanovic, P.J.), Judge Roger Nanovic of the Carbon County Court of Common Pleas addressed the issue of whether settling Defendants under a joint tortfeasor release could be required to be on the verdict slip at a medical malpractice trial.

In this medical malpractice case, several of the Defendants had settled out prior to trial utilizing a pro rata joint tortfeasor release in accordance Uniform Contribution Among Tort-Feasor's Act. At trial, all of the Defendants were identified. The jury entered a defense verdict and the Plaintiff moved for a new trial asserting that the court erred in denying her Motion to Discontinue her suit against the settling Defendants. The Plaintiff also argued that the court erred by placing the names of the settling Defendants on the jury verdict slip in order for the jury to determine the comparative liability of the settling doctors as well as the non-settling Defendants.

Judge Nanovic ruled that, under Pennsylvania law, the non-settling Defendants were entitled to have the settling Defendants remain as parties in order to establish their status as joint tortfeasor and, if found to be joint tortfeasor, to have the jury apportion liability amongst them so that the amount of damages be non-settling Defendants might be liability to pay could be determined.

While Judge Nanovic noted that, although the non-settling Defendants had a right to inquire a settling Defendant to remain as a party, there was no absolute right to have a settling Defendant noted on the verdict slip. Rather, in order to ensure that a settling Defendant would be included on the verdict slip, evidence had to be presented to establish a prima facie case of negligence against that settling Defendant.

Applying the law to the case before him, Judge Nanovic found that evidence was presented which compelled the victim of all Defendants, settling and non-settling, upon the verdict slip.

Claim for Emotional Distress Due to Fear of Ability to Work Into Future Rejected

In his recent decision in the case of *Lazar v. Cedar Lake Camp*, 3:13 CV 973, 2014 U.S. Dist. Lexis 100112 (M.D. Pa. July 23, 2014 Munley, J), Judge James Munley of the Federal Middle District Court of Pennsylvania granted a Defendant's Motion in Limine to preclude the Plaintiff's proposed testimony/evidence in support of a claim of fear of losing his job due to personal injuries impacting his ability to work.

According to the Opinion, the Plaintiff became stuck on a sliding board that extended into a lake at a camp. The Plaintiff was instructed by the lifeguard to jump from the slide and into the water. The water was too shallow and the Plaintiff broke his ankle in the jump.

The Plaintiff sued the camp and, as part of the claim, produced an expert medical witness who was prepared to testify, in part and in effect, that although the Plaintiff's injuries had not affected his current employment status due to the flexibility of the Plaintiff's employer, if the Plaintiff were to lose this job, he would be a less desirable potential employee for other employers.

The Plaintiff was employed as a senior marketing director of a company.

The defense sought to preclude this testimony on the grounds that it was unduly speculative, irrelevant, and prejudicial. The defense pointed out that no wage loss claims were presented and that the Plaintiff was incorrectly attempting to have the doctor testify as a vocational expert would.

The Plaintiff countered with the argument that the doctor's evidence supported the Plaintiff's claims for *non-economic* such as increased anxiety at the dire prospects for re-employment due to his accident-related injuries should he lose his current job.

Judge Munley reasoned that where the plaintiff has not lost his job due to injury and has no wage loss claim, testimony about plaintiff’s alleged emotional distress from fear of losing his job is "too attenuated to be admissible." Accordingly, the court granted the Motion in Limine and excluded the Plaintiff's proposed vocational evidence from his medical expert in this regard.

Punitive Damages – Cell Phone Use

In a recent Centre County Court of Common Pleas decision in the case of *Gunsallus v. Smith*, No. 2013-3765 (C.P. Centre Co. April 7, 2015 Kistler, J.), Judge Thomas K. Kistler granted summary judgment in favor of the defense and dismissed a punitive damages claim against a tortfeasor Defendant based upon cell phone use during the course of a motor vehicle accident.

The Plaintiff's claim for punitive damages was based upon allegations that the tortfeasor was speeding immediately prior to the accident on a road unfamiliar to him and allegations that the defendant was talking on a cell phone which caused him to drive with his non-dominant hand.

In its Opinion, the court noted that talking on a cell phone while driving is "conduct which is permitted under Pennsylvania law."

After discovery, the Defendant filed a Motion for Partial Summary Judgment seeking a dismissal of the punitive damages claims on the basis that the Plaintiff did not produce any evidence to prove that the tortfeasor's conduct was outrageous as required under the law pertaining to punitive damages.

In his Opinion, Judge Kistler set forth the law of punitive damages and note the court's role in initially determining whether or not the Plaintiff has presented sufficient evidence to take such a claim to the jury.

After noting that there still appears to be no Pennsylvania appellate court decision on the issue of cell phone use as supporting a claim for punitive damages, Judge Kistler ruled that, while the facts presented "may have created a situation that was not the most ideal, taken together, they do not rise to the level of outrageous or reckless conduct" sufficient to allow for a claim for punitive damages to proceed.

As such, Defendant's Motion for Partial Summary Judgment was granted and the Plaintiff's claim for punitive damages was dismissed with prejudice.

Compromise Verdict Upheld Despite Stipulated Medical Expenses

In its recent decision in *Kinderman v. Cunningham*, No. 1604 EDA 2013, 2015 Pa. Super. 30 (Pa. Super. Feb. 11, 2015 Bowes, Ott, Jenkins, J.J.) (Op. by Bowes, J.)(Ott, J., Dissenting), the Pennsylvania Superior Court ruled that a new trial ordered by the lower court on the issue of damages was improper where the jury's award of only a fraction of the uncontested economic damages presented at trial likely represented a compromise verdict based upon the substantial conflict over the issue of liability.

This case arose out of a fractured ankle that allegedly resulted from a boating accident. In its Opinion, the court noted that the issue of liability was hotly contested and witnesses provided conflicting accounts as to how the accident happened and who was at fault.

At trial, the Plaintiff's medical bills and lost wages were stipulated to by both parties. More specifically, the parties agreed that the Plaintiff's medical expenses amounted to $28,541.15 and his wage losses totalled $8,872.50. As such, going into the trial, the parties had stipulated that the Plaintiff's economic damages claims amounted to a total sum of $37,413.65.

Nevertheless, the jury returned a verdict finding the Plaintiff and the Defendant equally negligent (i.e., 50-50) and awarded damages only in the amount of $10,000.00, which were reduced to $5,000.00 to reflect the Plaintiff's 50% contributory negligence.

On appeal, the Plaintiff argued that the jury's award was arbitrary and contrary to the uncontested evidence of the economic damages presented.

The defense argued that the jury was permitted to compromise its award of damages in light of the contested issues of liability.

The Pennsylvania Superior Court recognized that compromise verdicts were permissible under Pennsylvania law. The appellate court again emphasized that there were contested arguments and conflicting testimony on the liability issues. It appeared to the Pennsylvania Superior Court that it was likely that the jury reached an impasse and compromised on the verdict to reach an agreement on the question of liability. Ultimately, the Superior Court found that the jury's verdict was sufficiently supported by the record.

As such, the Pennsylvania Superior Court found that, where a substantial conflict on the issue of liability indicated that the jury reached a compromise verdict, it would have been an abuse of discretion for the trial court to grant a new trial on the issue of damages. As such, Superior Court ruled that the trial court properly denied a request for a new trial in this regard.

APPEAL

<u>Final Order as to All Parties Required for Appeal as of Right</u>

In the recent Superior Court case of *Malanchuk v. Tsimura*, 2014 Pa. Super. 277, 1379 EDA 2012 (Dec. 17, 2014 Ford Elliot, P.J.E.), an e*n banc* Court ruled in this construction accident personal injury case that the Plaintiff could not take an appeal from a Summary Judgment against a single Defendant when that negligence case was consolidated with a negligence case against another action where the other Defendant did not receive a Summary Judgment.

The court rejected the Plaintiff's argument that, although the separate claims against the separate Defendants were consolidated, the entry of summary judgments against one Defendant but not the other should be viewed as separate final Orders from the trial court capable of being appealed.

Rather the *Malanchuk* Court ruled that the Order appealed from was interlocutory in nature as the Order did not dispose of all parties or all claims. The Plaintiff did not follow the required procedures to seek permission to file an appeal from an interlocutory Order. As such the appeal was quashed.

GENERAL AUTO LAW UPDATE

Reservation Rights Letters

In an April 15, 2015 decision in the case of *Erie Ins Exch. v. Lobenthal*, 2015 Pa.Super. 78 (Pa. Super. 2015 Ford Elliott, P.J.E., Shogun, Musmanno, J.J.)(Op. by Ford Elliott, P.J.E.), the Pennsylvania Superior Court addressed the validity of a reservation of rights letter issued by the carrier to its insured defendant in a motor vehicle accident matter. According to the opinion, the carrier insured the defendant driver's parents but the defendant driver was also an insured by virtue of the fact that the defendant driver resided with her parents.

The defendant driver was involved in a motor vehicle accident while she was allegedly driving under the influence. At some point after the accident, a reservation of rights letter, raising certain coverage issues was sent to the parents only.

After the underlying personal injury suit was filed by the allegedly injured plaintiff against the parents, as owners of the vehicle, and the defendant driver-daughter, the parents filed preliminary objections and were dismissed from the matter.

Thereafter, about three and a half months after that dismissal of the parent defendants, and about seven months after the filing of the Complaint, the liability carrier issued a reservation of rights letter to the lawyer of the defendant driver daughter.

In this separate declaratory judgment action, the parties were seeking a judicial declaration on whether the liability carrier was required to defend or indemnify the defendant daughter driver in the underlying action based upon the application of certain exclusions in the liability policy. The main issue before the trial court was whether, after tendering a defense for the insured defendant driver, the liability carrier ever properly preserved its right to challenge coverage and deny a defense to its insured in the reservation of rights letters the carrier sent out.

The trial court granted the carrier's disclaimer of coverage with respect to the defendant driver on the basis of a "controlled substances" exclusion contained in the policy. The insured defendant driver and the underlying plaintiff appealed that decision to the Superior Court.

The Superior Court reversed the trial court and held that liability coverage should be afforded by the carrier to the defendant driver because carrier did not reserves its rights properly and waited too long to reserve its rights and disclaim coverage for the driver.

The Court noted that the reservation of right letter to the defendant driver was only addressed to the parent named insureds and not the daughter driver. Accordingly, the Court found that that letter did not properly notify the daughter of the reservation of the rights to the claim against her.

The Superior Court also ruled that the fact that the reservation of rights letter was sent to the defendant driver's counsel did not serve to impute notice to the insured. The court also found that the reservation of rights letter which was not sent to the defendant driver until seven months after the filing of the Complaint was not timely.

The appellate court rejected the liability carrier's argument that there was no prejudice to the defendant driver with respect to the timeliness of the reservation of rights letter given the fact that the defendant driver was defended by assigned counsel all the while. The court noted that Pennsylvania law allows for prejudice to the insured defendant may be presumed in these circumstances where a liability carrier allegedly fails to issue a timely reservation of rights letter.

For these primary reasons, the Superior Court reversed the trial court's ruling in favor of the liability carrier's disclaimer of coverage for the defendant driver.

Named Driver Only Policy Upheld

Rather, a "Named Driver Only" policy is an automobile insurance policy that provides liability coverage only for the named insured driver that is listed in the policy.

As an update, it is noted that, in what may be an appellate decision of first impression, the Pennsylvania Superior Court has affirmed the trial court decision in this case at 2015 Pa.Super. 84 (Pa. Super. April 17, 2015 Gantman, P.J., Shogun, and Allen, JJ)(Op. by Shogun), thereby upholding the validity of these types of automobile insurance policies.

The policy at issue contained a "named driver only exclusion" which excluded coverage for any person not listed as a driver on the policy.

The Defendant driver involved in the accident was not listed on the policy. Rather, only the owner of the vehicle was the sole driver listed under the terms of the policy.

This matter was a declaratory judgment action on the issue of whether or not the carrier had to provide a defense and indemnity under the circumstances presented.

The Pennsylvania Superior Court agreed with the notion that, where the application for insurance coverage and the policy documents repeatedly and clearly expressed that coverage would only be

provided to the driver identified in the policy (and for a substantially reduced premium), the parties would be held to their agreement in this regard in the insurance contract and the provisions should be upheld.

The court found that this type of insurance agreement did not violate the provisions of Pennsylvania's Motor Vehicle Financial Responsibility Law or the public policy of Pennsylvania.

Coverage Questions – Regular Use Exclusion

In his recent decision in the Tioga County case of *Maser v. Erie Ins. Exchange*, No. 998 of 2012 Civil Div. (C.P. Tioga Co. Aug. 28, 2014 Leete, S.J), Senior Judge Leete of Potter County, specially presiding in Tioga County, upheld Erie Insurance's application of the Regular Use Exclusion.

Under the Erie Insurance policy terms at issue, it was provided in a Regular Use Exclusion that Erie would not provide UIM coverage for any vehicle that its insured did not own, but regularly used.

In *Maser*, the Plaintiff was injured while driving his employer's dump truck, which he did every work day. The Plaintiff admitted that the vehicle was available for his "regular use" per the policy.

However, the Plaintiff challenged the exclusion on public policy grounds, arguing that the carrier could ask about other vehicles the policyholder regularly used and charge an increased premium.

The Plaintiff also argued that the UIM coverage under the Erie policy was "illusory" because the claimant drove the dump truck most of the time and hardly ever drove the insured vehicles.

Judge Leete rejected these arguments of the Plaintiff and followed the several appellate cases upholding the enforceability of the regularly used non-owned vehicle exclusion.

To review other Tort Talk posts on the Regular Use Exclusion, you can always go to the Tort Talk blog at www.TortTalk.com and scroll down the right hand column to the **"Labels"** section and click on the Label for **"Regularly Used Non-Owned Exclusion."**

Coverage Questions – Household Exclusion

In *Clarke v. MMG Ins. Co.*, No. 2937 EDA 2013, --- A.3d --- (Pa. Super. Sept. 4, 2014)(Panella, Lazarus, and Jenkins, JJ)(Op. by Jenkins, J.)(Panella, Dissenting), the Pennsylvania Superior Court overturned a trial court's reliance upon a Household Exclusion in a UIM case.

The injured insured was operating his motorcycle insured by American Modern Select insurance company when he was allegedly seriously injured by another vehicle.

The Plaintiff settled the third party claim and the claim for underinsured motorist (UIM) coverage on the motorcycle and then sought underinsured motorist coverage on a policy with MMG which insured the Plaintiff's other personal automobiles.

MMG denied the UIM claim on the basis of the household exclusion. The trial court found in favor of the insurance company and the insured appealed.

The Superior Court reversed.

The insurance policy at issue had differing language when one compared the UIM household exclusion in the policy to the household exclusion noted under the UM part of the policy.

The MMG policy language was read as only excluding UIM coverage when the insured is operating a "vehicle that is not insured for this coverage."

However, additional language in the separate uninsured (UM) endorsement provided that coverage was excluded when an insured was operating a vehicle "not insured for this coverage *under this policy*." [Emphasis added here].

While the trial court read both provisions as a whole and excluded coverage, the Superior Court differed and opined that the provisions were separate and distinct and had different meanings and applications. The Superior Court rejected the notion that the additional language in the separate UM exclusion was mere surplusage.

Accordingly, the Superior Court ruled that under the specific language of the UIM endorsement the Plaintiff was entitled to UIM coverage because he was operating a vehicle that was indeed insured for UIM coverage (albeit under another policy). Under the unambiguous policy language at issue, the Superior Court found that it did not matter if the vehicle was covered under the same policy.

Dram Shop Liability

***Jenkins v. Krivosh*, PICS Case No. 14-1224 (C.P. Lawrence Co. July 16, 2014 Cox, J.)**

Plaintiff's failed to present sufficient evidence to create question of fact to proceed to jury on issue of whether employees served alcohol to a visibly intoxicated person. Motion for Summary Judgment by Defendant granted.

Dram Shop Liability

***Faust v. J.P. MacGrady's*, 58 Northampton 331 (Nov. 19, 2013)**

Defendant's preliminary objections to Plaintiff's punitive damages count in a dram shop case denied where Plaintiff alleged sufficient facts in support of claim of outrageous conduct by tavern where Plaintiff asserted that the tavern disregarded known risk of serving visibly intoxicated person while knowing that the patron would be driving home. Case involved a subsequent fatal car accident.

Limited Tort – Statute of Limitation/Discovery Rule

In its decision from earlier this week in the case of *Varner-Mort v. Kapfhammer*, No. 261 WDA 2014, 2015 Pa. Super. 14 (Pa. Super. Jan. 21, 2015 Ford Elliott, P.J.E, Allen, and Strassburger, J.J.)(Op. by Strassburger), the Pennsylvania Superior Court addressed the application of the discovery rule in the context of a limited tort case. In the end, the court reversed a trial court's entry of summary judgment in favor of a defendant.

This matter arose out of a motor vehicle accident that occurred on May 6, 2009. There was no dispute that the Plaintiffs were covered by the Limited Tort Election.

Over two years later, on June 27, 2011, the husband and wife Plaintiffs filed their negligence personal injury/loss of consortium Complaint.

In his Answer and New Matter, the Defendant asserted a statute of limitations defense. The defense later filed a motion for summary judgment alleging, in part, that medical records produced in discovery confirmed that the Plaintiff sought out medical treatment on the date of the accident and was diagnosed with injuries. The injuries were initially diagnosed as a back sprain with paresthesia (numbness and tingling) to the lower extremity.

Accordingly, it was the defense position that the injured party Plaintiff was aware of her alleged car accident-related injuries from the date of the subject accident. The defense also noted that the records confirmed that the Plaintiff continued to treat for low back complaints up through 2011.

As such, it was the defense position that, pursuant to the applicable two year statute of limitations, the Plaintiffs were required to file their claim by May 6, 2011. The defense contended that, since the Complaint was not filed until June of 2011, the Plaintiffs' claims were barred by the statute of limitations.

Given the application of the limited tort election, the Plaintiffs countered with the creative argument that, under the discovery rule, the statute of limitations should not be deemed to begin to run until the injured party Plaintiff discovered that she sustained a "serious injury" as a result of the accident. In this regard, the Plaintiffs argued that the injured party did not have an MRI until August of 2009. Accordingly, there was an alleged genuine issue of material fact as to when the Plaintiff discovered that she sustained a "serious injury" such that the motion for summary judgment should be rejected and the case allowed to proceed to a jury.

Whereas the trial court in Blair County rejected the Plaintiffs' argument and granted summary judgment on the statute of limitations issue, the Pennsylvania Superior Court accepted this argument of the Plaintiffs and overruled the trial court.

In so ruling the *Varner-Mort* relied upon the prior similar case of *Walls v. Scheckler*, 700 A.2d 532 (Pa. Super. 1997), which addressed the same issue and came to the same result, i.e., the statute of limitations in limited tort case should be deemed to start to run when a Plaintiff is aware that he or she may have sustained a "serious injury."

The *Walls* court reasoned that "Since, under the provisions of [Section 1705, the limited tort statute], a limited tort plaintiff does not have a valid cause of action unless and until an injury rises to the level of a 'serious injury,' and since the statute of limitations period does not ordinarily begin to run until a cause of action accrues, we conclude that the statute of limitations period cannot begin to run on a limited tort plaintiff until he knows or reasonably should know that he has sustained the requisite serious injury." *Walls*, 700 A.2d at 533-534.

Notably, the Judges deciding this *Varner-Mort* case stated that, while they were bound to follow the *Walls* decision as binding precedent, the *Varner-Mort* majority viewed the *Walls* decision as being **"just plain wrong."** *Varner-Mort* at p. 7. The *Varner-Mort* majority would have preferred to follow the discovery rule in its ordinary application.

This was particularly so given that, regardless of the Plaintiff's tort status, the Plaintiff was still entitled to pursue a claim economic damages, such as wage losses or medical expenses, even if the Plaintiff failed to show that she sustained a serious injury. The *Varner-Mort* majority failed to see why a limited tort plaintiff should be treated any differently in terms of the statute of limitations beginning to run when the Plaintiff was aware of her physical injury from the accident at the scene or when it was diagnosed in the emergency room on the day of the accident.

Nevertheless, the *Varner-Mort* court obviously reluctantly applied the law as stated in the *Walls* case and ruled that genuine issues of material fact existed as to when the Plaintiff would have been aware that she sustained a serious injury such that the trial court's entry of summary judgment would be reversed and the case remanded for further proceedings.

Limited Tort – Which Tort Option Applies

In his recent decision in the case of Edgington v. Abersold, PICS Case No. 14-1630 (C.P. Lawrence Co. Sept. 24, 2014 Piccione, J.), Judge Thomas M. Piccione addressed the issue of determining a Plaintiff's tort coverage where more than one private passenger motor vehicle accident policy was applicable and the policies had conflicting tort options.

In his decision, Judge Piccione applied the provisions of the Motor Vehicle Financial Responsibility Law that provide "where more than one private passenger motor vehicle policy is applicable to an insured and the policies have conflicting tort options, the insured is bound by the tort option of the policy associated with the private passenger motor vehicle in which the insured is an occupant at the time of the accident if he is an insured on that policy and bound by the full tort option otherwise." See 75 Pa.C.S.A. Section 1705(b)(2).

According to the Opinion, the injured Plaintiff in this case did not have a driver's license and did not own a vehicle. The Plaintiff was an insured under a limited tort policy purchased by her husband.

However, at the time of the accident, the injured party Plaintiff was riding in her mother's vehicle as a passenger. The Plaintiff's mother had a full tort policy on that vehicle.

Judge Piccione applied the facts to the above stated provision of the Motor Vehicle Financial Responsibility Law and held that a passenger with no driver's license and who did not own a vehicle is bound under the insurance coverage and tort option selected by a spouse unless, as here, the passenger was riding in a car of a different owner with different coverage.

Since the injured party Plaintiff was found to be an insured under her mother's full tort insurance policy, the Plaintiff was deemed capable of seeking recovery for both economic and non-economic damages as a full tort Plaintiff.

Below is a Limited Tort Primer I created once when faced with the issue of which Tort Option would apply in different scenarios--rather than having to go look it up every time, I like to keep this list handy for easy reference. Hope it helps to kickstart your research whenever you are faced with the same issue:

A. WHO IS COVERED BY LIMITED TORT

The issue of who is covered by the limited tort election is governed by an application of 75 Pa.C.S. §1705(b)(2), which provides, as follows:

(2) The tort option elected by the named insured shall apply to all insureds under the private passenger motor vehicle policy who are not named insureds under another private passenger motor vehicle policy. In the case where more than one private passenger motor vehicle policy is applicable to an insured and the policies have conflicting tort options, the insured is bound by the tort option of the policy associated with the private passenger motor vehicle in which the insured is an occupant at the time of the accident if he is an insured on that policy and bound by the full tort option otherwise.

The Pennsylvania Supreme Court has stated that "[t]he formula [for determining who is a limited tort plaintiff] is clear—where there is only one insurance policy, sentence one [of §1705(b)(2) above] applies; where there is more than one policy with conflicting tort options, sentence two determines the applicable coverage." Hoffman v. Troncelliti, 839 A.2d 1013 (Pa. 2003).

POTENTIAL LIMITED TORT SCENARIOS

-Named insured is bound by limited tort selection in own insured vehicle at time of accident

-Named insured's selection of limited tort under policy shall also apply to all other insureds under that policy who are not named insureds under their own separate insurance policy. 75 Pa.C.S. §1705(b)(2).

-If there is more than one policy covering an insured, and the policies have conflicting tort option, the insured will be bound by the tort option selected in the policy covering the vehicle the insured was an occupant of when involved in the accident if the insured is covered under that policy. *Carns v. Smith*, 118 Dauph. Co. Rpts. 417 (1998).

-Where injured party is an “insured” under a full tort policy covering the vehicle she is occupying at the time of the accident, but is a “named insured” under a limited tort policy, the Pennsylvania Supreme Court has held that the second sentence of 75 Pa.C.S. §1705(a)(2) applies, which entitles the injured party to full tort coverage because at the time of the accident she was the occupant of a vehicle that had full tort coverage and she was also an insured under that policy (she was a resident relative). *Hoffman v. Troncelliti*, 839 A.2d 1013 (Pa. 2003).

-Where the injured party selected limited tort coverage as a named insured under her own policy but is injured while riding as a passenger in a vehicle covered by a full tort policy, but the injured party does not qualify as an “insured” under that full tort policy, then there are no conflicting tort options and the passenger is bound by her limited tort election. *Perry v. Leader Ins. Co.*, 54 Northampton Co. Rpt. 465 (2005).

-Where the injured party has selected the full tort option on his own policy but is a passenger/insured in a vehicle covered by a limited tort policy, one court has found the injured party in this scenario to be covered by the limited tort option. *Clikeman v. Bahrenburg*, No. 1124 EDA 2005 (Pa.Super. 11/22/05)(mem. op.)

-A person who is not the owner of a registered motor vehicle and who is not a named insured or insured under any automobile insurance policy is considered a full tort plaintiff. 75 Pa.C.S. §1705(b)(3)

-A person who owns a registered but uninsured motor vehicle shall be deemed to have selected the limited tort option . 75 Pa.C.S. §1705(a)(5); However, the children of a person who has a registered but uninsured motor vehicle will not be punished with a deemed limited tort status—they are considered to be full tort. *Holland v. Marcy*, 883 A.2d 449 (Pa. 2005).

-A pedestrian who is covered by the limited tort option will not be bound by that election when hit by a car. *L.S. v. David Eschbach, Jr., Inc.*, 874 A.2d 1150 (Pa. 2005).

<u>Breach of Limited Tort Threshold Finding Upheld</u>

In its recent decision in the case of *Brown v. Trinidad*, 2015 Pa. Super. 46 (Pa. Super. March 9, 2015 Lazarus, Wecht, and Strassburger, J.J.)(Op. by Lazarus, J.)(Concurring Op. by Strassburger, J.), the Pennsylvania Superior Court reviewed the current status of Limited Tort law in Pennsylvania and affirmed a trial court's denial of a defendant's request for a new trial after a Philadelphia County jury awarded a verdict to a Limited Tort plaintiff.

On appeal, the Superior Court noted that the medical evidence presented by the Plaintiff contained references to expert testimony from the Plaintiff's side that the Plaintiff sustained a lumbar spine disc herniation as a result of the subject accident that not only impaired the Plaintiff in his every day activities but also made the Plaintiff more susceptible to the work injury he sustained three months after the accident. The Plaintiff's evidence also included references to neck and mid-back injuries, pain, and residual limitations.

The court also noted that while the Plaintiff, who was in his mid-twenties, admitted that he did not feel pain on the date of the accident, he quickly developed low back pain in the days that followed the accident. When the pain allegedly became severe, the Plaintiff sought out treatment. The Plaintiff advised that he stopped treating approximately four months after the accident after being allegedly advised by his medical providers that his injuries could not be fixed.

The record before the court also confirmed that with regards to substantial impairments, the Plaintiff had testified at trial that he had difficulty playing with his young daughter and that he could no longer run or jump, as compared to prior to the accident when the Plaintiff enjoyed bowling, playing basketball, and ice skating.

As noted, the Pennsylvania Superior Court affirmed the trial court's denial of the Defendant's request for a new trial.

Subrogation by Worker’s Comp Carrier or Employer

In its recent decision in the case of *Liberty Mut. Ins. Co. v. Dotmar Paper Co.*, 19 WAP 2014 (Pa. April 27, 2015)(Maj. Op. by Baer, J.)(Saylor, C.J., Dissenting)(, the Pennsylvania Supreme Court addressed the right of an employer, and/or the employer's worker's compensation carrier, to pursue a subrogation claim directly against a third party tortfeasor when the injured employee has not filed a claim against the tortfeasor or assigned his or her right to do so to another.

According to the Opinion, the injured employee was in the scope and course of his employment with Schnidier National slipped and fell in the parking lot of the tortfeasor Defendant Dotmar Paper Company. The employee was allegedly injured and was paid worker's compensation benefits by his employer's worker's compensation carrier

When the injured employee did not sue the landowner, or otherwise assign his right to sue to anyone, the worker's compensation carrier took it upon itself to sue the landowner, seeking to recover the worker's compensation benefits it paid out to the injured employee. The landowner defendant filed a demurrer essentially arguing that the worker's compensation carrier had no standing to bring such a suit under the law.

Both the Elk County trial court and the Pennsylvania Superior Court ruled that Section 319 of the Worker's Compensation Act did not permit such a claim and the insurer appealed. The Pennsylvania Supreme Court affirmed the Superior Court's decision.

The Pennsylvania Superior Court reaffirmed the rule that, under Section 319 of the Worker's Compensation Act, a right of action is granted to the injured party employee. The Court held that the employer's/worker's comp insurer's right of subrogation pursuant to Section 319 must be asserted through a single action brought in the name of the injured employee or included in any claim brought by the injured employee against the tortfeasor.

In this matter, the injured employee never pursued a case and the Pennsylvania Supreme Court ruled that the employer and/or the worker's compensation carrier could not otherwise pursue any subrogation claim for worker's compensation benefits paid out to the injured employee related injuries caused by the tortfeasor.

UM/UIM UPDATE

Rejection of UIM Forms

In a December 10, 2014 Memorandum Opinion out of the Federal District Court for the Eastern District of Pennsylvania in the case of *Lieb v. Allstate Prop. And Cas. Ins. Co.*, NO. 14-4225 (E.D. Pa. Dec. 10, 2014 Rufe, J.), the court upheld the validity of a UIM rejection form even though the insured was not the one who dated the document.

According to the Opinion, this case involved a motor vehicle accident after which the Plaintiff secured a third party settlement and then pursued a UIM claim.

The UIM carrier rejected the claim on the basis of a valid rejection of UIM coverage form having been executed by the insured.

The Plaintiff argued that the rejection form was void because the form was not dated by the insured, only signed. According to the Opinion, the date was pre-printed on the form.

The Court held that that the rejection form was valid given that the form met all of the statutory requirements.

After reviewing the MVFRL, and in particular, the language of Section 1731, the Court noted that the statute only required that the form "must be signed by the first named insured and dated to be valid."

In other words, the statute does not require that the "form must be signed and dated by the first named insured."

Accordingly, the court found that no requirement existed for the insured to actually date the form. As such, since the UIM rejection form was signed by the insured, the Court held that the form was valid.

Rejection of UIM Forms

In the case of *Connolly v. Progressive Northern Ins. Co.*, 3:13-CV-2717 (M.D. Pa. Feb. 4, 2015 Conaboy, J.), Judge Richard P. Conaboy of the Federal Middle District Court for the Middle District of Pennsylvania addressed a carrier's motion for summary judgment in a case involving a challenge to the carrier's rejection of stacking form in an underinsured (UIM) motorists benefits matter.

Before the court were insurance application documents concerning an underinsured motorist claim (UIM) and the applicability of a rejection of stacking form signed when the policy was first purchased in 1998. The UIM limits under the policy were $100,000 per person. The stacking issue was important as there were three vehicles on the policy.

The Plaintiff asserted that, since there was only a rejection of stacking form signed at the inception of the policy, then stacking should apply because the policy numbers were different every time the policy was renewed. According to the Plaintiff's argument, this represented the creation of a new policy, which, in turn, arguably required the need for the carrier to obtain a new rejection of stacking form.

The insurance company argued that the last numbers were only changed but that the policy remained the same.

Judge Conaboy agreed with the defense position that, under the *Sackett* line of cases, once a valid rejection of stacking form was secured, the carrier need not secure a rejection of stacking form every time the same policy came up for a renewal or when a car was added to the policy.

According to the Opinion, however, the carrier never explained in its argument why the suffixes were different or why the company periodically modified the final number on the policy. In other words, the court was unable to state, as a matter of law, that there were not any substantive differences in the policy over the course of the 21 renewals in 10 years. Simply put, based upon the record before the court, Judge Conaboy could not state that the policy at issue was identical to the one originally issued at the inception of the policy back in 1998 when the rejection form was signed.

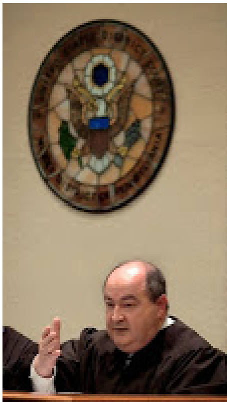
As such, the *Connolly* court ultimately held that."[d]ue to uncertainty in the record, the Court must deny the Defendant's Motion for Summary Judgment."

Judge Conaboy also allowed the Plaintiff's bad faith claim to proceed.

POST-KOKEN UPDATE

Judge Robert D. Mariani of the Federal Middle District Court of Pennsylvania ruled in *Lane v. State Farm*, No. 3-14-CV-01045 (M.D. Pa. May 18, 2015 Mariani, J.), that the mental impressions of the carrier's claims professionals recorded after the Plaintiff's Complaint was filed, as well as notes of the carrier's auto evaluation which referenced the carrier's defense attorneys' mental impressions, were considered privileged information and were, therefore, not discoverable. Plaintiff's motion to compel was denied.

In this matter, the carrier produced redacted documents from the claims file along with a privilege log. The Plaintiff filed a motion seeking an Order requiring that certain redacted portions of State Farm's privilege log to be revealed. The Plaintiff claimed, in part, that could not confirm whether the portions redacted by the carrier did constitute privileged information.



Judge Robert D. Mariani
M.D. Pa.

The court ruled that the redacted portions did not have to be produced because the privileged nature of the documents were adequately described in the privilege log by defense counsel as an officer of the court. For example, the redacted pages were marked as billing invoices for legal services or letters between the carrier and its defense counsel.

In ruling that the redacted portions need not be disclosed, the court noted that a hypothetical suggestion that representations made by a duly licensed attorney and officer of this court could be found to be utter fabrications is insufficient to carry plaintiff's burden in overcoming the privilege,.

The court also rejected the Plaintiff's request for an *in camera* review of the redacted portions by the court to confirm the propriety of the redactions by defense counsel.

Judge Mariani otherwise provided instruction in his decision on the extent to which the post-Complaint mental impressions of a claims representative may be discoverable in a bad faith claim. Concisely, Judge Mariani held that the mere existence of a bad faith claim in a Complaint "does not make otherwise privileged information per se discoverable."

Rather, a party seeking such discovery must meet its burden of persuading the court that such documents are not protected from discovery under the particular facts of the case.

<u>Evidence That UIM Carrier Paid First Party Medical Benefits Not Admissible</u>

In the case of *Moritz v. Hora ce Mann Insuranc*e*,* 2014 WL 5817681, No. 2013-CV-544 (C.P. Lacka. Co. Nov. 10, 2014 Nealon, J.), Judge Terrence R. Nealon addressed a Motion In Limine filed by the Plaintiff seeking to introduce evidence that the same insurance company paid for the Plaintiff's total treatment and surgery under the first party medical benefits coverage as a means of rebutting the carrier's argument, as a UIM Defendant, that the Plaintiff's shoulder injury and surgery were not accident related.

The court sustained the UIM carrier's objections to that evidence and ruled it inadmissible. In support of this ruling, Judge Nealon relied upon the case of Pantelis v. Erie Insurance Exchange, 890 A.2d 1063 (Pa. Super. 2006).

In Pantelis, the same argument was raised by the Plaintiff. However, the Superior Court noted that "[t]he statutory framework and applicable case law establishes that payment of UM/UIM claims is subject to a different analysis then payment of first party benefits." Pantelis, 890 A.2d at 1068.

Accordingly, the Pantelis court ruled that "the trial court directly determined that payment of first party benefits does not preclude an insurer and later denying third party UM/UIM benefits" since "an insurer's payment of first party benefits does not, without more, constitute a binding admission of causation under either the statute or case law." Id. at 1067-68. Judge Nealon cited a number of other federal courts reaching the same conclusion.

Judge Nealon also ruled that, even if this evidence is found to arguably be relevant, its probative value was outweighed by the danger of unfair prejudice since the admission of that evidence could sway the jury to render a verdict on an improper basis. The court noted that the admission of the fact that the insurance company had paid medical expense benefits could be equally prejudicial to both the injured party Plaintiff and the insurance company Defendant. For example, the jury could conclude that those medical expense payments, like the payment that the

Plaintiff already received from the liability carrier, should likewise be deducted from its award of damages and thereby reduce its verdict without prompting or suggesting by the court.

As such, Judge Nealon denied the Plaintiff's request to utilize the evidence at issue.

Request for Bifurcated Trial Granted

In a recent Order without Opinion in the Post-Koken case of *Oaks v. Erie Insurance Exchange and Austin*, No. 2012 - CV - 3741 - CV (C.P. Dauphin Co. May 8, 2015 Bratton, J.) handed down after a mistrial in a matter, Judge Bruce F. Bratton of the Dauphin County Court of Common Pleas granted the tortfeasor Defendant's Motion for Reconsideration of the court's prior denial of the tortfeasor's Motion to Sever the negligence claims asserted against him by the Plaintiff from the Plaintiff's UIM claims against the carrier.

According to information received on this case, the case proceeded through the pleadings and discovery phases in a consolidated fashion. A motion to sever the cases was originally filed shortly before the first trial and was denied. During jury deliberations after the first trial, the jury submitted a number of written questions that suggest that the jury was aware that the tortfeasor had insurance coverage and that the jury was focusing on matters that were asserted to be prejudicial to the Defendants. As such, Judge Bratton granted a motion for a mistrial. The Motion for Reconsideration which is the subject of this *Oaks* decision was filed after the mistrial.

This Motion for Reconsideration was granted and in that Order the court held that the negligence claims asserted by the Plaintiff against the Defendant would be severed, for the purposes of the retrial of this matter, from the UIM claims against the carrier Defendant.

In other words, the retrial of this matter was held to proceed in a bifurcated fashion with one trial on the negligence claim against the tortfeasor, and a separate trial on the UIM claim against the carrier.

Unfortunately no rationale or reasoning behind this decision in contained in the court's Order.

Request for Bifurcated Trial Denied

Jury Instructions in a Case Against Both Third Party Tortfeasor and UIM Carrier

In his April 15, 2015 decision in the case of *Kujawski v. Fogmeg and Allstate*, No. 2012-CV-3395 (C.P. Lacka. Co. April 15, 2015, Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County

Court of Common Pleas issued another notable post-Koken decision in which he became one of the first few judges from across the Commonwealth of Pennsylvania to address the issue of whether or not a post-Koken third party/UIM matter should proceed to trial in a consolidated or bifurcated fashion - - Judge Nealon came down on the side of the consolidation and against bifurcation.

However, Judge Nealon did rule that separate coverage issues presented with respect to the UIM claim should and would be bifurcated from the liability and damages claims presented in the negligence and UIM matter.

According to the Opinion, the issue before the court revolved around whether a Plaintiff's third party liability claim and underinsured motorists (UIM) claim may be tried in a single proceeding before the same jury, and if so, what jury instructions should be provided regarding the named parties and the questions to be decided by the jury.

In this matter, the tortfeasor Defendant was objecting to a consolidated trial with an insurance company as a Co-Defendant. According to the Opinion, the UIM carrier did not object to a consolidated trial.

Judge Terrence R. Nealon

Lackawanna County

Judge Nealon ruled that, since the potential liabilities of the tortfeasor and the UIM carrier for damages arose out of the same factual background and involved common questions of law in fact, the Plaintiff's liability and UIM claims would be consolidated for a single trial pursuant to Pa. R.C.P. 2229(b).

The court also ruled that, given that the identification of the UIM carrier as a real party in interest and as a potential provider of UIM coverage did not introduce evidence of the tortfeasor's liability insurance in violation of Pa. R.E. 411, the UIM carrier would be identified to the jury as a named Defendant who was furnishing prospective UIM coverage. Judge Nealon noted that this

identification of the UIM carrier by name as well as the reason as to why that carrier was in the case was necessary so that the jury would understand the participating UIM insurance carrier's status as an adverse party to the Plaintiff.

As noted above, Judge Nealon separately ruled that the UIM coverage dispute involving the Plaintiff's residency and her entitlement to UIM benefits from the UIM carrier did not arise out of the same occurrence or involve common questions of law or fact as the parties' liability and damages disputes. Accordingly, the court ruled that the trial would be bifurcated on that separate issue pursuant to Pa. R.C.P. 213(b). The court noted that the jury would first address the merits of the Plaintiff's personal injury claims and render a verdict on the liability and damages issues.

Judge Nealon went on to note that, if the jury awarded damages in excess of the tortfeasor's liability insurance policy limits, such that UIM coverage was triggered, the second phase of trial would be conducted on the coverage issue to determine whether the Plaintiff was a resident of her grandparents' home at the time of the accident so as to be entitled to UIM benefits under that UIM policy at issue.

Judge Nealon further noted that, in the event a jury awards damages in an amount less than the tortfeasor's liability insurance limits, the issue of the Plaintiff's residency and the applicability of her grandparents' UIM coverage would be rendered moot.

In his thorough Opinion on the issue of joinder or bifurcation of post-Koken claims at trial, Judge Nealon confirmed that he had reviewed the law of other jurisdictions in this case as well as in his prior decision in the case of Bingham v. Poswistilo, 24 Pa. D. & C. 5th 17 (C.P. Lacka. Co. 2011 Nealon, J.), which research revealed that of the decisions on the separate, but similar, issue of consolidation/severance at the commencement of the case arising out of 33 other states, 27 jurisdictions allowed for the joinder of UM/UIM claims with civil actions against tortfeasors, while six (6) states favored severance of UM/UIM claims from tort actions.

In ruling that liability in UIM claims may be joined for a single trial, Judge Nealon relied in part on the Pennsylvania Superior Court decision in Stepanovich v. McGraw and State Farm, 78 A.3d 1147 (Pa. Super. 2013), appeal denied, 89 A.3d 1286 (Pa. 2014).

On the separate issue of the content of the jury instructions for a Post-Koken trial, the Plaintiff requested the court to utilize those instructions Judge Nealon had crafted in his prior decision in the case of Moritz v. Horace Mann Property and Casualty Insurance Company, 2014 W.L. 5817681 (C.P. Lacka. Co. 2014 Nealon, J.). The court noted that Allstate objected to certain portions of those jury instructions set forth in the Moritz case.

The tortfeasor Defendant was additionally arguing that neither the identity of the UIM carrier as a party, nor the question of the Plaintiff's UIM claims, should be disclosed to the jury in the jury instructions.

Judge Nealon agreed that the entirety of his proposed jury instructions as crafted in the Moritz case should not be read to the jury in this matter as the jury instructions drafted in the Moritz case were "appropriate only a case in which the Plaintiff has sued the UIM insurer alone after having secured payment of the tortfeasor's insurance policy limits."

For this reason, Judge Nealon agreed to somewhat limit the extent of his jury instructions in this case involving both a negligence claim against the third party tortfeasor and a UIM claim against the Plaintiff's own carrier. The court also tailored its jury instructions in this matter in light of the separate coverage dispute that was still pending with regards to the potential UIM claim.

Overall, Judge Nealon agreed that the jury instructions in this matter should not reference the existence or amount of the tortfeasor's liability insurance coverage as that would prejudice the tortfeasor in violation of the mandate under Pa. R.E. 411 prohibiting any reference to a tortfeasor's liability coverage at trial.

In this Kujawski case, Judge Nealon stated that he would instruct the jury that the Plaintiff was required by law to establish by a preponderance of the evidence that the tortfeasor was negligent, that the tortfeasor's negligence caused harm to the Plaintiff, and that the Plaintiff suffered damages as a result of her injuries.

The court noted that the jury would also be informed in this Post-Koken matter that the policy of the UIM carrier (referenced by name in the instructions) provided underinsured motorists coverage, which may be available to pay some of the damages that may be awarded.

Judge Nealon also planned to instruct the jury that the UIM carrier (again, referenced by name) should not be treated "any differently than any other Defendant in a civil action simply because [name of the UIM carrier] is an insurance company."

Judge Nealon also ruled that, given his ruling in favor of bifurcation on the separate coverage issue, the jury would also be advised that, depending upon its verdict at the conclusion of the liability and damages portion of the trial, the jury may be required to hear additional evidence and render a second verdict with regards to the Plaintiff's residency at the time of the accident.

Jury Instructions in Case Against Insurance Carrier Only

In his recent decision in the case of *Moritz v. Hora ce Mann Insuranc*e, 2014 WL 5817681, No. 2013-CV-544 (C.P. Lacka. Co. Nov. 10, 2014 Nealon, J.), Judge Terrence R. Nealon addressed important issues with respect to a post-Koken automobile accident matter that is headed towards trial.

In what appears to be the first reported decision on the issue, Judge Nealon set forth the instructions that he would provide to the jury in a UIM jury trial.

According to the Opinion, the defense wanted minimalist instructions to the jury that this matter involved an admitted liability accident for which the jurors were to decide the amount of damages recoverable. In contrast, the Plaintiff was requesting some explanation of the UIM coverage and claims presented.

Judge Nealon noted that there are no standard jury instructions for UIM trials that have been promulgated to date. Accordingly, he reviewed jury instructions from other states and then formulated his own instructions.

Judge Terrence R. Nealon
Lackawanna County

In so ruling, Judge Nealon referred to his prior decision in the case of Bingham v. Poswistilo, 24 Pa. D. & C. 5th 17, 44 (C.P. Lacka. Co. 2011, Nealon, J.) for the proposition that not only made Pennsylvania trial courts join and try tort UIM claims in a single action without running afoul of Pa. R.E. 411, pertaining to "Liability Insurance," and that a trial court may consider evidence of insurance as being offered for another purpose under Rule 411 such that a UIM carrier was allowed to be identified to the jury and the tort and UIM issues could be tried jointly as guided by "carefully crafted instructions to the jury."

Judge Nealon noted that the Pennsylvania Superior Court more recently addressed the application of Pa. R.E. 411 in a jury trial where a liability and UIM claim are joined for a single trial and held that “a course of action identifying [the UIM insurer] as a party would not necessarily run afoul of…. Rule 411” in such a trial. Moritz, citing Stepanovich v. McGraw, 78 A.3d 1147, 1150 (Pa. 2013), appeal denied, 89 A.3d 1286 (Pa. 2014).

In Moritz, Judge Nealon stated that he would instruct the jury, as follows:

(1) Plaintiffs have brought this action against their own insurance company under coverage known as underinsured motorist coverage, which served to provide compensation to a Plaintiff for damages that would have been recoverable if the underinsured motorist had maintained an insurance policy which adequately covered the Plaintiff’s damages from an accident;
(2) To recover against the Defendant, the Plaintiff must prove that the other driver was negligent, that the negligence caused harm to the Plaintiff, and that the other driver did not have adequate liability insurance;

(3) The Defendant had stipulated that the Plaintiffs’ insurance policy provides underinsured motorist coverage and that the policy was in effect at the time of the accident, such that the jurors need not concern themselves with the specifics of the policy;

(4) The Defendant has also agreed that the other driver was negligent and caused the accident, such that the jury need only determine whether the Plaintiff suffered harm as a result of the accident and, if so, what amount of money damages will fairly and adequately compensate the Plaintiff;

(5) The fact that the Plaintiffs are suing the Defendant for underinsured motorist benefits suggests that the other driver had some insurance which was recovered by the Plaintiff;

(6) The Plaintiffs will not receive compensation twice for the same damages since any jury award of damages in this case will be reduced by any amount that the Plaintiffs have already received from the other driver and her insurer; and,

(7) The jury should determine an amount of money damages that will fairly and adequately compensate the Plaintiff for all the physical and financial injuries they have sustained as a result of the accident, without consideration of any amount that the Plaintiff may have received from the other driver or her insurer, since any such amount will be deducted by the court from the total sum that the jury may award.

In his Opinion, Judge Nealon went on to more specifically apply the above to the facts of the case presented in terms of the jury instructions to be provided.

Sampling of Post-Koken Verdicts from Around Commonwealth

Below is a sampling of Post-Koken jury verdict results uncovered to date from a review of cases that have gone up the appellate ladder and from research on verdicts from valid sources such as the *Pennsylvania Law Weekly*.

This list is NOT represented to be exhaustive. Rather, it only lists those cases my research has uncovered to date. There certainly could be, and likely are, many more Post-Koken jury verdicts that have not been generally publicized.

Please let me know if you are aware of any other such cases--I can be reached at dancummins@comcast.net.

I will update this list periodically with new information. Note that it is not my plan to identify the attorneys involved in the summaries of the verdicts reviewed.

It is my understanding that there may have been at least one other defense verdict in a Post-Koken case, but I will not reference that case until I have confirmed such results as being accurate.

An analysis of the below sampling of Post-Koken jury verdicts reveals no clear trends. Stated otherwise, the risks attendant with proceeding to a jury trial in an auto accident case remain to be considered by all parties involved.

STATE COURT

Allegheny County

***Stepanovich v. McGraw and State Farm*, 78 A.3d 1147 (Pa. Super. 2013) *appeal denied* 11 WAL 2014 (Pa. 2014)(Allegheny County case)**

Post-Koken UIM claim. Plaintiff sued tortfeasor Defendant and UIM carrier. Disputed negligence case over who had the red light in a pedestrian versus vehicle case. Both tortfeasor's defense counsel and UIM carrier's defense counsel were allowed to participate in the defense with the only limitation being on cumulative questioning. Jury not informed of involvement of UIM carrier as a party Defendant. Defense verdict entered.

***Marlette v. State Farm*, 57 A.3d 1224 (Pa. 2012) (Allegheny County case)**

Uninsured motorist case. Plaintiff's sued uninsured tortfeasor and their own UM carrier, State Farm Mutual Automobile Insurance Company. Liability was uncontested and the case proceeded to trial on damages for the injured husband and wife Plaintiffs. Following a two (2) day trial, the jury entered a verdict in favor of the Plaintiff-husband in the amount of $550,000.00 for his bodily injuries and lost wages and in the amount of $150,000.00 to the Plaintiff-wife for loss of consortium. The total $700,000.00 verdict was molded down to the uninsured motorists policy limits of $250,000.00.

Philadelphia County

***Patterson v. Travelers Home and Marine Ins. Co.*, No. 130502892 (C.P. Phila. Co. July 9, 2014)**

Plaintiff complained of neck, back, right knee injuries; tortfeasor tendered his $50,000.00 liability limits. Plaintiff demanded Travelers' $25,000.00 UIM limits; jury awarded $86,000.00 in UIM benefits; verdict molded to limits.

***Phy v. Nikulin and Progressive Advanced Insurance Company*, No. 130203316 (C.P. Phila. Co. June 14, 2014)**

UM claim; rear–end accident caused by uninsured driver. Plaintiff complains of headaches, neck pain, thoracic pain, low back pain. Plaintiff did not report to an emergency room and did not treat for one (1) month following the accident. Plaintiff's primary treatment was approximately five (5) months of chiropractic treatment. MRIs revealed bulging discs. Uninsured tortfeasor was not represented and did not appear for trial. Progressive's Motion In Limine to preclude any mention of Progressive as UIM carrier was granted; however, Progressive attorney was allowed to defend the matter. Plaintiff demanded Progressive's $15,000.00 in uninsured motorists benefits. Progressive offered $4,500.00. Jury awarded $250,000.00 for pain and suffering (there were no economic damages claims for medical expenses or wage loss)).

***Casino v. Progressive Specialty Ins. Co.*, No. 130200693 (C.P. Phila. Co. Apr. 23, 2014)**

Clear liability case. Plaintiff alleges a torn meniscus in right knee. After his emergency room visit on the day of the accident, there was then a 45 day gap in treatment. Surgery was allegedly recommended but not completed by the Plaintiff allegedly due to financial constraints. Plaintiff settled with tortfeasor for $13,500.00 out of $15,000.00 liability limits. The Plaintiff demanded

Progressive's $15,000.00 in UIM limits. At a court mandated arbitration, a panel ruled in favor of Progressive and the Plaintiff appealed to a jury trial. After a jury trial, the jury entered an award in favor of the Plaintiff in the amount of $60,000.00.

***Hall v. Irving, et.al.*, November Term, 2012 No.: 0220 (C.P. Phila., 1/29/2014) (Allen, J.)**

A Philadelphia jury returned a verdict in favor a limited tort plaintiff and awarded $100,000.00 in a combined negligence/UM action.

While a passenger in her husband's automobile, plaintiff was injured when her vehicle was struck by the third-party defendant, who was operating an uninsured motor vehicle.

The third-party defendant claimed the plaintiff's injuries were not serious enough to entitle her to non-economic damages.

Prior to trial, the court granted the UM carrier's motion in limine, which precluded any mention of the UM carrier or any reference to or introduction into evidence of any matters concerning plaintiff's insurance coverage. Counsel for the UM carrier was permitted to participate at trial, but the UM carrier was never identified to the jury.

The jury found that plaintiff's two herniated discs in her neck constituted a serious impairment of a bodily function and awarded $100,000.00 to compensate her for past and future pain and suffering.

***Mitchell v. Progressive Specialty Ins. Co.*, No.: June Term, 2012 No.: 03679 (C.P. Philadelphia, 10/3/2013) (Maier, J.)**

Limited Tort Plaintiff's vehicle was struck by a taxi cab in Philadelphia County. Following the accident, plaintiff settled with the driver of the taxi cab for $13,000.00 (policy limits of $15,000.00) and pursued UIM benefits against her own UIM insurer, Progressive.

At trial against the UIM carrier only, plaintiff showed that she went to work the day of the accident, but treated with an acupuncturist the next day, and received physical therapy for five months. An MRI confirmed an aggravation of plaintiff's pre-existing cervical herniation.

Prior to the accident, plaintiff had reached a tolerable baseline condition with respect to her previous cervical-spine injury. After the accident, however, her condition was allegedly worsened.

The jury found that plaintiff's injuries were sufficiently serious to pierce the limited tort threshold and awarded $70,000.00. Post-trial, the trial court molded the award to $15,136.00 to

reflect the limits of plaintiff's UIM policy after application of a credit from the amount previously received from the third-party tortfeasor.

Luzerne County

***Borthwick v. Webb and GEICO,* No. No. 2735-Civil-2010 (C.P. Luz. Co. 2012 Vough, J.)**

Combined third party tortfeasor and UIM carrier case. Limited Tort defense. Both defense attorneys participate.

Liability admitted by third party tortfeasor thereby precluding UIM carrier from arguing contributory negligence. Plaintiff alleges aggravation of pre-existing thoracic and lumbar spine disc disease. Vocational claim in approximate amount of $40,000.

Tortfeasor's third party liability limits were $50,000 of which $20,000 was offered in settlement.

UIM carrier's limits were $1.2 million dollars. No offer by GEICO.

Jury was informed that the Plaintiff had an insurance policy with GEICO. No more detailed mentioning of insurance at trial.

Jury awarded $2,000 in wage loss and $0 for pain and suffering, equating to a UIM defense verdict.

***Brobst v. Komrowski, Progressive Ins., and GEICO*, No. 16180-CV-2010 (C.P. Luz. Co. 2012 Hughes, J.)**

Disputed liability case. Third party and UIM defendants. Progressive settled out prior to trial with $4,000 payment. Third party defense attorney and GEICO defense attorney both participate.

Plaintiff alleges soft tissue strain injuries to neck and mid-back along with contusions to elbow, right rib, and leg. Plaintiff's demand was $40,000.

Third party tortfeasor had $100,000 in liability limits of which $8,600 was offered in settlement.

First-level UIM carrier, Progressive had $50,000 in UIM limits and, as noted, settled out for $4,000.

Second-level UIM carrier, GEICO had $100,000 in UIM limits and did not have an offer out at the time of trial.

Jury was informed that the Plaintiff had an insurance policy with GEICO. No more detailed mentioning of insurance at trial.

Jury assessed 50% contributory negligence on the Plaintiff and awarded $3,696 for lost wages only. Equates to defense verdict for UIM carrier.

<u>Susquehanna County</u>

***Strohl v. Olmstead and State Farm*, No. 2011-CV-1333 (C.P. Susq. Co. February, 2015 Corso, S.J.)**

Uninsured motorist claim against State Farm. Third party tortfeasor in caption but does not appear for trial. Defense verdict on limited tort issue.

FEDERAL COURT

<u>Eastern District Court of Pennsylvania</u>

***Heebner v. Nationwide Insurance Enterprise*, 818 F. Supp. 2nd 853 (E.D. Pa. 2011)**

Plaintiff involved in an accident with an uninsured/underinsured motorist. The Plaintiff's Complaint described the motorist as "self-insured". As required under the Nationwide policy, the Plaintiff sued the motorist. Jury entered an award of $85,000.00 in compensatory damages on top of which was added delay damages of $48,201.96.

<u>Middle District Court of Pennsylvania</u>

***Calestini v. Progressive Cas. Ins. Co.*, No. 3:09-CV-1679 (M.D.Pa. 2010 Caputo, J.)**

Defense verdict in Limited Tort case.

BAD FAITH UPDATE

Right of Assignment in Excess Verdict Scenario

Tort Talkers may recall previous posts on the case of *Allstate Ins. Co. v. Wolfe*, in which the Pennsylvania Supreme Court accepted an issue to review on certification of a matter from the U.S. Third Circuit Court of Appeals who was seeking guidance on the question of the validity of assignment of bad faith claims by third party tortfeasors hit with excess verdicts to injured party plaintiffs seeking to recover on the amounts due over and above the tortfeasor's liability insurance policy limits.

As anticipated by many watching out for the Pennsylvania Supreme Court's decision in the case of *Allstate Ins. Co. v. Wolfe*, No. 39 MAP 2014 (Pa. Dec. 15, 2014)(Op. by Saylor, J.)(Castille, C.J, Dissenting Without Opinion), the Court ruled that a third party defendant tortfeasor hit with an excess verdict in a trial on personal injuries arising out of a motor vehicle accident may assign to the plaintiff his potential rights to sue his own automobile liability insurance carrier for a bad faith refusal to settle the case prior to trial.

The Supreme Court "conclude[d] that the entitlement to assert damages under Section 8371 may be assigned by an insured to an injured plaintiff and judgment creditor such as Wolfe. Having answered the certified question, we return the matter to the Third Circuit."

Bad Faith Claim Dismissed – Non-specific claims pled

In its recent memorandum decision in the case of *Mozzo v. Progressive Ins. Co.,* No. 14-5752 (E.D. Pa. Jan. 5, 2015 Buckwalter, S.J.) (mem.), the Federal District Court for the Eastern District of Pennsylvania dismissed a plaintiff’s auto insurance bad faith claims and granted the right to amend but stayed any bad faith discovery in the meantime.

In *Mozzo*, the Plaintiff insured sued his auto carrier alleging bad faith and breach of contract claims.

The court ruled that mere allegations that Plaintiff insured complied with investigation requests, that the auto insurer arbitrarily and capriciously failed to honor its contractual obligations, that plaintiff sustained and continues to sustain damages, and that the auto insurer has acted in bad faith, are insufficient to support a bad faith claim under Pennsylvania law. The court more specifically found that the plaintiff failed to set forth cogent facts as to the Defendant auto insurer's actions, let alone any factual support of alleged acts or omissions from which the court could even infer a proper bad faith claim.

As such, the Plaintiff's bad faith claim was dismissed. However, the court did grant the Plaintiff leave to amend.

Moreover, the court ruled that, given that the bad faith claim was dismissed, the request for attorney fees is not available and, as such, that claim was also dismissed.

Last but not least, the court further noted that the Plaintiff was not entitled to bad faith discovery until he sets forth some facts upon which the court could plausibly infer the existence of a bad faith claim.

Bad Faith under Section 8371

In his recent decision in the case of *Cicon v. State Farm Mutual Automobile Insurance Company*, No. 3:14-cv-2187 (M.D. Pa. March 4, 2015 Conaboy, J.), Federal Middle Court Judge Richard P. Conaboy, considered Defendant State Farm's Motion to Dismiss four counts of a Post-Koken Complaint filed by the Plaintiff, including Bad Faith claims.

More specifically, State Farm sought a dismissal of a Count of Breach of the Duty of Good Faith and Fair Dealing, a Count for Breach of Contract, a Count of Negligence, and a Count of Vicarious Liability, all asserted against the Uninsured Motorist (UM) Benefits carrier.

According to the Opinion, this matter arose out of personal injuries allegedly sustained as a result of a motor vehicle accident involving an uninsured vehicle. Following the accident, the Plaintiff submitted a claim for uninsured motorist benefits.

Prior to retaining any attorney, the Plaintiff attended an independent medical examination at the request of the carrier and, thereafter, attempted to settle the claim for a period of seven (7) months. When the settlement discussions failed to be successful, the Plaintiff retained counsel.

Plaintiffs' retained counsel made a demand of the $100,000.00 UM limits, and supplied State Farm with additional documentation in support of the claims presented. Defendant, State Farm responded with a $30,000.00 offer.

The Plaintiff proceeded to file suit alleging that the offer presented by State Farm was unreasonable and inconsistent with the documentation provided by the Plaintiff in terms of medical treatment and wage loss information.

With respect to the Defendant's motion for the dismissal of the Plaintiff's allegations of a violation of a contractual duty to observe the covenant of good faith and fair dealing, the court noted that the Pennsylvania Supreme Court has held that "there is no cause of action for a breach of the implied duty of good faith and fair dealing in a case for first party insurance benefits, like this one, where an insured is suing his insurer." *See Cicon* at p. 5-6 citing *D'Ambrosio v.*

Pennsylvania National Mutual Casualty Insurance Company, 494 Pa. 501, 507-10 (1981). As such, this claim was dismissed by the court.

Judge Richard P. Conaboy
Federal Middle District
of Pennsylvania

Judge Conaboy allowed the Plaintiff's Count for Breach of Contract to stand and rejected the defense argument that that Count should be dismissed as being redundant of the claims alleged Counts 1 and 2 in the Complaint for UM benefits and loss of consortium claims, respectively. Although the court noted that it was inclined to agree that the damages recoverable under all of these claims were seemingly identical and "necessarily limited by the terms of the policy," the court noted that the claims presented in these three counts were technically separate such that the Breach of Contract claim would be allowed to proceed.

Judge Conaboy went on to dismiss Count 6 of the Complaint which sounded in Negligence and was based upon an allegation that the Defendant, State Farm, owed a duty of care to the Plaintiff, failed to discharge that duty, and was allegedly therefore liable in tort.

In this regard, the court accepted the defense argument that the "gist of the action" doctrine operated to preclude the Plaintiffs' negligence count as an improper attempt to characterize an ordinary breach of contract claim as a tort action. The court ruled in this fashion despite recognizing the Plaintiffs' argument that the Supreme Court of Pennsylvania have never adopted the gist of the action doctrine in an insurance coverage dispute context.

However, Judge Conaboy felt that, after his review of the Superior Court case law, that the Pennsylvania Supreme Court would rule that the Plaintiff's negligence count should be barred by the gist of the actions doctrine under the circumstances presented if that Court was ever faced with the issue.

Judge Conaboy also agreed that the Plaintiffs' allegations of vicarious liability on the part of the Defendant State Farm, based upon the alleged negligent and intentional misconduct of its adjusters, supervisors, and defense counsel, should be dismissed.

In so ruling, the court noted that the only party in this case was the Defendant and that, as such, the party Defendant could not be vicariously liable for its own conduct. Judge Conaboy additionally noted that vicarious liability is a creature of tort law, which caused him to reiterate his finding that the gist of the action doctrine required that this case be determined under contract law concepts and not tort law principles.

Overall, the court granted the Defendant's Motion to Dismiss in part and denied it in part.

Judge Conaboy's Opinion can be read as supporting an argument by a Defendant carrier that the sole cause of action in a first party case for an alleged breach of good faith is pursuant to 42 Pa. C.S. §8371. This decision also arguably supports proposition that there is no common law cause of action for a breach of the duty of good faith and fair dealing, with its attendant consequential damages, in a first party case.

PREMISES LIABILITY

Social Host Liability

In his recent decision in the case of *Cicardo v. Mangual*, No. 7668-CV-2010 (C.P. Monroe Co. Jan. 22, 2015 Zulick, J.), Judge Arthur L. Zulick of the Monroe County Court of Common Pleas reaffirmed the law in Pennsylvania that one minor (i.e., a person under 21 in this context) cannot be liable as a social host to another minor in a case involving a motor vehicle accident allegedly arising out of a Defendant driver driving under the influence after having left house parties at which alcohol was served.

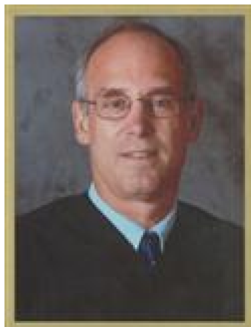
According to the Opinion, the Defendant driver was 17 years of age at the time of the accident.

The court noted that the law concerning social host liability as it relates to minors is settled in Pennsylvania.

More specifically, while adults have no duty as social host to another adult, the Pennsylvania Supreme Court held in *Congini by Congini v. Portersville Valve Co.*, 470 A.2d 515 (Pa. 1983), that an adult social host may be liable for furnishing alcohol to a minor.

Thereafter, in *Kapres v. Heller*, 640 A.2d 888 (Pa. Super. 1994), the Pennsylvania Supreme Court held that a minor cannot be liable as a social host to another minor.

In the case before Judge Zulick in *Cicardo* , the minor Defendants who allegedly provided alcohol to the then 17 year old Defendant driver were both 20 years of age at the time of the collision.



Judge Arthur L. Zulick
Monroe County

Judge Zulick rejected the Plaintiff's argument that there should be a distinction between minors age 17 and younger, and minors between the ages of 18 and 21. The Plaintiff argued that, even if there is no social host liability between minors, that rule should apply only to similarly situated individuals and that, in this case, individuals under the age of 18 and individuals between the ages of 18 and 21 were not similarly situated.

Judge Zulick noted that the holding in *Kapres* did not distinguish between minors under 18 and minors under 21. He additionally noted that the statutory language in 18 Pa. C.S.A. §6310.1 (selling or furnishing liquor or malt or brewed beverages to minors) likewise did not differentiate between minors' ages.

Rather, Judge Zulick reiterated that the "bright line rule established in *Kapres* is that 'one minor does not owe a duty to another minor regarding the furnishing or consumption of alcohol."' *Quoting Kapres*, 612 A.2d at 891.

As there were no issues of material fact presented in this matter, and given that all of the individuals involved were minors, Judge Zulick the minor Defendant social hosts were not liable under Pennsylvania law for allegedly serving alcohol to the minor Defendant driver on the evening of the subject motor vehicle accident.

Dog Bite – No Strict Liability

In the recent Lycoming County decision in the case of *Warner v. Campbell*, PICS Case No. 14-1352 (C.P. Lycoming Co. Aug. 4, 2014 Anderson, J.), the court granted a defendant's motion to dismiss a plaintiff's strict liability medical expenses claim in a dog bite case.

According to a summary of the decision, the plaintiffs were, in essence, asserting in their Complaint that the defendant dog owner was strictly liable under Section 459-502 of Pennsylvania's "Dog Law" for medical expenses incurred as a result of a dog bite.

The defense filed preliminary objections and asserted that Pennsylvania law did not recognize strict liability in this regard. The court agreed relying, in part, on the case of *Rosenberry v. Evans* which required proof of a dog owner's negligence before liability could be found.

Dog Bite – Dangerous Dog Law

In the case of *Harrison v. Haueisen*, PICS Case. No. 15-0607 (C.P. Lycoming Co. April 2, 2015 Gray, J.), Judge Richard Gray of the Lycoming County Court of Common Pleas denied a Defendant's Preliminary Objections to a Plaintiff's Complaint in a dog bite case.

According to the Opinion, the Plaintiffs were allegedly injured when they were injured attacked by a dog while walking on the sidewalk of a public street. No provocation by the Plaintiffs was indicated.

In their Complaint, the Plaintiffs alleged that the dog had previously bitten a child, that the Defendant owner knew or should have known that the dog had dangerous propensities, and that neighbors had previously complained to the Defendant about their failure to restrain the dog and about the dog's alleged vicious propensities. Moreover, it was alleged that, shortly before the incident, a complaint was made to the Williamsport Police about a separate dog biting incident.

The Defendant owner filed Preliminary Objections in the form of a demurrer based upon an alleged violation of the Dangerous Dog Law. The second preliminary objection was a demurrer to the punitive damages claim.

The court rejected the Defendant's arguments that a violation of the Dangerous Dog Law did not amount to negligence per se. To the contrary, the court ruled that the Pennsylvania Superior Court had previously held that an unexcused violation of a statute constitutes negligence per se.

As such, taking the Plaintiff's factual allegations as true as required by the standard of review, the court concluded that a violation of the Dangerous Dog Law could form the basis for a liability finding. As such, this initial Preliminary Objection was denied.

However, the court emphasized that, liability in this respect was not absolute as the negligence per se doctrine did not impose strict liability. Rather, the Plaintiff still had to prove causation and the extent of damages.

With regards to the demurrer to the claims for punitive damages, the court found that the Plaintiff had pled sufficient facts to support that claim. The Plaintiff asserted that the Defendants had a subjective appreciation of the risk of harm to which the Plaintiffs were exposed and that the Defendants acted or failed to act in a manner that showed a conscious disregard of that risk. Accordingly, this claim was allowed to proceed.

Hills and Ridges Doctrine – Applies to Natural Accumulations

In the unpublished, "Non-precedential" decision of the Pennsylvania Superior Court in the case of *Stobodzian v. PNC Fin. Serv. Grp.*, No. 33 MDA 2014 (Pa. Super. Aug. 5, 2014) (Memorandum Op.) (Lazarus, J., Wecht, J., Musmanno, J.) Opinion by Lazarus, J.), the court ruled that the trial court property applied the hills and ridges jury instruction where the Plaintiff

asserted that he was injured as a result of a slip and fall in a bank parking lot due to a natural accumulation of snow.

At trial, evidence was produced that snow fall on February 10, 2010 was approximately 22 inches and that it stopped snowing on the morning of February 11, 2010 at approximately 9:00 a.m. The Plaintiff fell the following day, February 12, 2010.

After a trial on the issues presented, the jury entered a defense verdict. The trial court denied the Plaintiff's Motions Not Withstanding the Verdict and for a new trial.

One of the issues on appeal involved the Plaintiff's argument that the trial court should not applied the hills and ridges doctrine jury instruction under the circumstances presented. The court rejected the Plaintiff's argument that the slush in the parking lot area was an artificial condition created by human intervention in the form of vehicles pulling into the parking lot and dragging snow and slush with them. The court noted that the evidence established that generally slippery conditions existed in the community due to a natural accumulation of recent snow fall. Under such circumstances, the hills and ridges jury instruction was deemed appropriate.

Hills and Ridges Doctrine – Does Not Apply to Isolated Patch of Ice

Judge Richard Gray of the Lycoming County Court of Common Pleas recently addressed the Hills and Ridges Doctrine in the case of *Gamble v. Beck*, PICS Case No. 15-0269 (C.P. Lycoming Jan. 6, 2015 Gray, J.).

After reviewing the case before him, Judge Gray granted summary judgment in favor of a tenant Defendant in a parking lot slip and fall case.

Judge Richard Gray
Lycoming County

Judge Gray stated that the store owner owed no duty to its customer who slipped on a patch of ice in the parking lot since the lease between the landlord and the tenant provided that the landlord was responsible for outside maintenance.

Judge Gray further indicated in his decision that the landlord's liability was not precluded by the Hills and Ridges Doctrine. In this regard, the Plaintiff provided evidence that it was sunny on the day of her fall and that there had been no precipitation for the 34 hours leading up to the incident. The Plaintiff additionally established that she fell on a distinct patch of ice, as opposed to generally slippery conditions in the community. Accordingly, Judge Gray found that the Hills and Ridges Doctrine did not apply.

<u>Hills and Ridges Doctrine – Sheet of Ice</u>

In their recent unpublished, "non-precedential" decision in the case of *McLamb v. Supervalu, Inc.*, No. 2139 MDA 2013 (Pa. Super. Aug. 15, 2014 Shogan, J., Lazarus, J., Musmanno, J.)(Op. by Shogan, J.), the Pennsylvania Superior Court affirmed the entry of summary judgment in favor of a Defendant landowner in a case involving an independent contractor who was allegedly injured after allegedly falling on ice and snow while returning the Defendant's tractor to its lot after delivering goods.

According to the Opinion, the Plaintiff picked up a trailer from the Defendant's distribution center and delivered goods to Philadelphia before returning to the Harrisburg area, all under snowstorm conditions. When the Plaintiff arrived back in Harrisburg, it was still snowing as he went to the Defendant's lot to return the trailer. After the Plaintiff parked the trailer in the designated spot, he got out and slipped and fell when he went to uncouple the lines from the trailer.

The Defendant moved for summary judgment based upon the hills and ridges doctrine.

The court reviewed the law of the hills and ridges doctrine and emphasized that, under the test provided, the landowner was protected from liability for generally slippery conditions from ice and snow where the owner did not permit the ice and snow to unreasonably accumulate in ridges or elevations.

The Plaintiff attempted to argue that genuine issues of material facts existed as to whether the conditions were caused naturally or were man-made. The Plaintiff stated that the conditions that caused his fall may have been the result of heavy foot traffic from other loading and unloading trailers in the area.

However, the court rejected that argument and indicated that the records establish that snow had been falling since the evening before the accident and it was clear that generally slippery conditions prevailed in the community such that the hills and ridges doctrine applied.

The court also noted that Plaintiff's testimony that the lot had not been plowed or salted and was covered due to the continuing snow fall showed nothing that would suggest any human intervention in the condition of the lot.

Moreover, the court noted that the Plaintiff admitted that the area where he fell looked "like a sheet of ice."

Accordingly, the Superior Court ruled that the trial court did not err in granting summary judgment and dismissing the Complaint.

<u>Hills and Ridges – Sheet of Ice</u>

In his recent Memorandum and Order in the case of *Schraeder v. Phillips*, No. 2011-CV-7585 (C.P. Lacka. Co. Sept. 10, 2014 O'Brien, S.J), Senior Judge Peter J. O'Brien (formerly a member of the Monroe County Court of Common Pleas) granted summary judgment in favor of a Defendant landowner and dismissed a Plaintiff's Complaint under an application of the hills and ridges doctrine.

According to the Opinion, at the time of her slip and fall, the Plaintiff was a residential tenant of the Defendant's at a property in Scranton, Pennsylvania. The Plaintiff filed a Complaint alleging that she slipped and fell due to hills and ridges of snow and ice while on a designated walkway on the premises.

In his Opinion, Judge O'Brien reviewed the records and noted that, during her deposition, the Plaintiff described the ice on the steps as appearing as if it "froze like a sheet." The court also pointed out that the Plaintiff stated that there were no footstep marks on the ice or any salt on the steps where she fell.

Judge O'Brien also held that Pennsylvania law did not impose liability upon a possessor of land for physical harm caused by a condition on the land if it is reasonable for the possessor to believe that the condition would be obvious to and discovered by an invitee. *See* Op. at p. 5 *citing Carrender v. Fitterer*, 469 A.2d 120, 124 (Pa. 1983). The court noted that the Plaintiff's testimony confirmed that, at the time of her fall, it was sleeting which, in the court's Opinion, caused an obvious condition of iciness. Judge O'Brien additionally noted that the Plaintiff's

admission during her deposition testimony indicated that she appreciated the risk when she stepped outside into the adverse weather conditions.

In any event, as noted above, the court also found that the Plaintiff failed to meet the mandates of the hills and ridges doctrine by failing to show that snow and/or ice had accumulated on the walkway in elevations of such size in character as to unreasonably obstruct travel and constitute a danger to the pedestrian traveling thereon which conditions the property owner had actual or constructive notice.

Finding that there were no genuine issues of material fact to be decided by a jury on the issues presented, the court granted summary judgment in favor of the Defendants and dismissed the Plaintiff's Complaint.

Hills and Ridges – Failure to Establish Causation

In his recent decision in the case of *Heichel v. Smith Paving and Construction Company*, PICS Case No. 14-2058 (C.P. Lawrence Co. Oct. 15, 2014 Cox, J.), Judge J. Craig Cox granted summary judgment in favor of the Defendant landowner and snow removal company after finding that the Plaintiff failed to establish a valid case for negligence in that the Plaintiff failed to prove a causal relationship between the Plaintiff's fall and the snow or ice the Plaintiff alleged was allowed to unreasonably accumulate upon a parking lot surface.

According to the summary of the Opinion, the Plaintiff failed to explain whether the parking lot, including the immediate area of her fall, was actually covered with snow or ice. The Plaintiff was also unable to recall many of the details from the incident including what type of shoes she was wearing or what time the fall occurred. She also could not state the cause of her fall.

The Defendants filed a summary judgment motion arguing that the Plaintiff was unable to establish the cause of her fall and was unable to demonstrate that any snow or ice had accumulated in ridges or elevations of such size as to unreasonably obstruct travel and create a dangerous condition as required by the Hills and Ridges Doctrine. The trial court agreed with the defense position.

The court noted that testimony suggested that there were generally slippery conditions in the parking lot that were caused by a sudden change in the weather. The only testimony with regard to ice in the parking area was provided by one of the Plaintiff's co-workers, who described the entire parking lot as being a sheet of ice due to a sudden change in the weather conditions.

Moreover, there was no specific information or testimony regarding the conditions in the very specific area where the Plaintiff allegedly fell.

In addition to granting summary judgment in favor of the landowner, the court also granted summary judgment in favor of Smith Paving, who performed snow removal services on the premises. The court concluded that, since there was no evidence concerning the condition of the area where the Plaintiff fell, there was no evidence to support any reasonable inference that any icy conditions on the lot were due to the negligence by or improper procedures utilized by Smith Paving.

As such, summary judgment motions filed by both Defendants were granted.

Trivial Defect Doctrine

The Pennsylvania Superior Court revisited the Trivial Defect Doctrine most recently in the case of *Reinoso v. Heritage Warminster SPE LLC*, 2015 Pa. Super. 8, No. 3174 EDA 2012 (Jan. 14, 2015 Stabile, Ford Elliott, Bowes, Allen, Wecht, Jenkins, J.)(Ott, Bender, Shogan, J., dissenting)

The Court reversed a trial court's entry of summary judgment in favor of a defendant possessor of land. The trial court had ruled that a 5/8 inch differential was indeed a trivial defect.

Reiterating the law that there is no bright line rule as to what constitutes a trivial defect as a matter of law and emphasizing that the Plaintiff produced an expert who opined that the alleged defect exceeded safety standards, the Superior Court reversed the entry of summary judgment, ruling that the issue should be left for a jury to decide.

In the Dissenting Opinion, in which the dissenters stated that they would have upheld the trial court's finding that a 5/8 height differential in the sidewalk surface was indeed a trivial defect as a matter of law.

Trivial Defect Doctrine

In the case of *Walker v. Community Action Realty, Inc.*, No. 13-00,418 (C.P. Lycoming Co. Oct. 13, 2014 Gray, J.), Judge Richard A. Gray of the Lycoming County Court of Common Pleas recently denied a Defendant's Motion for Summary Judgment in a slip and fall case based upon a defense allegation that the Plaintiff failed to identify the specific defect that caused her to fall and because the alleged defect was so trivial that allowing it to exist was not negligent as a matter of law.

According to the Opinion, the Plaintiff stumbled, trip, and fell down stairs onto a sidewalk outside a building, allegedly sustaining injuries. At her deposition, the Plaintiff testified that her foot came into contact with a raised portion of the pavement on the porch at the top of the stairs, causing her to trip and fall down the stairs.

It was undisputed that there was a raised area of the porch surface located a few inches from the front edge of the top step between the doormat and the front step. An investigative report noted that the irregularity was only about 1/8th of an inch high. However, the raised area of the porch surface was located directly in the middle of the steps, which was noted to be a busy, heavily traversed point of primary access into and out of the public building.

After reviewing the law pertaining to trivial defects in premises liability cases, the court denied the Defendant's Motion for Summary Judgment after noting that no definite or mathematical rule can be laid down as to the depth or size of a sidewalk defect to determine whether the defect was trivial as a matter of law.

Judge Richard Gray
Lycoming County

Applying the trivial defect doctrine to the facts before him, Judge Gray reiterated that the defect in question, the existence of which was admitted by the defense, was in the direct line of travel for persons entering and exiting the building. The court also emphasized that the irregularity in the area where the Plaintiff fell was located right in the middle of where the public would be expected to step before descending the steps out of a busy, heavily traversed public building.

Judge Gray held that the question of whether or not allowing the defect in question to exist at that location constituted negligence, was a question that should be decided by a jury.

Judge Gray further found that the Plaintiff's testimony was sufficient to also raise a question of fact for the jury to determine whether or not the cause of her fall was indeed the defect in question.

For these reasons, the Defendant's Motion for Summary Judgment was denied.

Slip and Fall (Wax Buildup on Supermarket Floor)

Summary Judgment was granted in a recent Monroe County decision by Judge Stephen M. Higgins in the premises liability case of *Zangenberg v. Weis Markets*, No. 10500 CV 2012 (C.P. Monroe Co. April 1, 2015 Higgins, J.).

The Plaintiff alleged personal injuries as a result of a slip and fall on the defendant's premises. The Defendant filed a motion for summary judgment asserting that it had no actual or constructive notice of the alleged dangerous condition.

The Plaintiff asserted that she had met her burden of proof by pointing to issues with the application of wax to the floor of the store and/or with allegations of wax buildup rendering the floor slippery.

Judge Stephen Higgins
Monroe County

Judge Higgins disagreed, noting that that the Plaintiff had not produced evidence to show that an improper application of wax to the floor that created a dangerous condition so obvious as to amount to evidence from which an inference of negligence would arise.

As an example of a different type of case where summary judgment should be denied, the court pointed to a situation of a wax buildup on a floor such that there was evidence of a skid mark by the heel of a shoe through the wax that raised sides up as if the shoe was sliding through mud.

Here, the court noted that the evidence only involved a black skid mark but there was no other concrete evidence to establish that that skid mark was caused by the Plaintiff's shoe at the time she fell. After the Plaintiff's fall, neither the Plaintiff nor any store employee saw any evidence

on the floor as to what caused the Plaintiff to fall. The Plaintiff simply testified that it was slippery in the area where she fell.

However, the court saw no evidence that would have raised an inference that the store knew or should have known that the floor was slippery in the time leading up to the Plaintiff's incident. As such, the defense motion for summary judgment was granted.

Slip and Fall – No Actual or Constructive Notice Established

In the Monroe County decision in the case of *Smith v. Chelsea Pocono Fin. LLC*, PICS Case No. 15-0602 (C.P. Monroe Dec. 29, 2015 Mark, J.), Judge Jonathan Mark of the Monroe County Court of Common Pleas granted summary judgment in favor of a landowner Defendant on the basis that the Plaintiff had failed to establish any evidence of actual or constructive notice of that Defendant of any defective condition on the stairway where the Plaintiff allegedly fell and was injured.

According to a summary of the Opinion, the Plaintiff was injured while at The Crossings Premium Outlets in the Poconos. The Plaintiff was walking down a stairwell and slipped and fell, allegedly sustaining injuries.

While the Plaintiff did not know what caused her to fall, her eyewitness husband testified that the Plaintiff slipped on a french fry or a hamburger bun fragment on the steps.

Although the court found that the Plaintiff had presented evidence to establish a jury question as to the existence of a defective or dangerous condition of the stairwell, the court granted summary judgment after finding that the Plaintiff had not established that the Defendant had any actual or constructive notice of the condition that caused the fall.

More specifically, the court found nothing in the record to suggest that the condition on the steps was traceable to the Defendants or their agents, or that the Defendant otherwise had any actual or constructive notice of the condition.

The Plaintiff attempted to argue that the Defendant's had actual notice because this type of defect occurred frequently on the premises.

This argument was rejected under the Restatement (Second) of Torts §344 as that Section, and cases related thereto, inferring actual notice under a recurring situation scenario. Judge Mark noted that those decisions came to such a finding on the basis of recurring events or conditions that had caused harm to invitees in the past in an obvious fashion.

In this *Smith* case, Judge Mark found that there was only an argument that the specific condition which allegedly caused the injury at issue had allegedly occurred generally in the past. Here, while there was evidence presented to show that food and other debris had been generally found on the property in the past, there was no allegation or proof that patrons slipping on food had become an epidemic on the premises.

The court also rejected the Plaintiff's claim that the absence of any cleaning or maintenance records was sufficient to deny and otherwise properly supported Motion for Summary Judgment. The court rejected this argument as an effort by the Plaintiff to improperly reverse the burden of proof and place it upon the Defendant.

Lastly, the court also found that the Plaintiff had failed to offer any evidence as to how long the debris had been located on the steps, or that anyone had observed it prior to the Plaintiff's incident so as to support an argument of constructive notice. The court also rejected the Plaintiff's constructive notice argument on the basis that the debris/food on the step was crushed.

The court otherwise found that the Defendant had exercised reasonable precautionary steps to prevent accidents, including the placement of a trash can within ten (10) feet of the stairway and repeated checking of the area, specifically around restaurants.

PRODUCTS LIABILITY

<u>Restatement (Second) of Tort Test Reaffirmed</u>

The Pennsylvania Supreme Court has released its much anticipated products liability decision in *Tincher v. Omega Flex, Inc.*, No. 17 MAP 2013 (Pa. Nov. 19, 2014 Castille, C.J.)

When the Court accepted the appeal in *Tincher* it defined the issue presented as "Whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement."

In the *Tincher* 128 page majority Opinion, the Court overruled the *Azzarrello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978) decision and its negligence/strict liability analysis.

While the *Tincher* court declined to adopt the Restatement Third for products cases, the Court did note that certain principles therein guided its framework for a proper analysis of such claims in the post-*Azzarrello* era.

The new strict products liability analysis adopted by the Supreme Court was enunciated, as follows:

"...we conclude that a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition." The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The burden of production and persuasion is by a preponderance of the evidence."

The Court went on to emphasize that the issue of whether or not a product is in a defective condition was a question of fact to be considered by a jury and could only be decided by a court on a motion for summary judgment if the court found that no reasonable minds on a jury could differ on a conclusion that a product was not defective.

<u>Restatement (Second) of Torts Standard Applied</u>

In what may be one of the first trial court opinions to apply the new products liability analysis enunciated in the Pennsylvania Supreme Court recent decision in *Tincher v. Omega Flex*, Lackawanna County Court of Common Pleas Judge James A. Gibbons rejected a Defendant's Motion for a New Trial and/or a Judgment Notwithstanding the Verdict in the case of *Cancelleri v. Ford Motor Co.*, No. 2011-CV-6060 (C.P. Lacka. Co. Jan. 9, 2015 Gibbons, J.).

The *Cancelleri* case involved claims that the airbag/restraint system in the Plaintiff's vehicle was defectively designed in that the driver's side airbag failed to deploy in the subject car accident.

Ford primarily argued that it was entitled to a Judgment NOV because there was not enough evidence to sustain the Plaintiff's claims pertaining to crashworthiness and malfunction theories. In addition to a myriad of other issues raised, the defense also asserted that the court failed to apply the Restatement (Third) of Torts analysis for products liability matters in Pennsylvania.

As Tort Talkers may recall, the Pennsylvania Supreme Court, in its recent November 19, 2014 Opinion in *Tincher,* rejected the Restatement (Third) analysis and advocated a continued use of the Restatement (Second) of Torts standard. For the Tort Talk blog post on the *Tincher* decision, along with a link to the Supreme Court's 128 page Opinion, click HERE.

In his Opinion in *Cancelleri*, Judge Gibbons conducted a detailed analysis of the meandering *Tincher* decision and outlined a concise recitation of the new burden of proof required to be met by plaintiffs in products cases. Applying this analysis to the trial record led Judge Gibbons to deny the post-trial motions filed by the defense. The court also granted the Plaintiff's motion for delay damages, which brought the total award in favor of the Plaintiffs to an amount in excess of $6.2 million dollars.

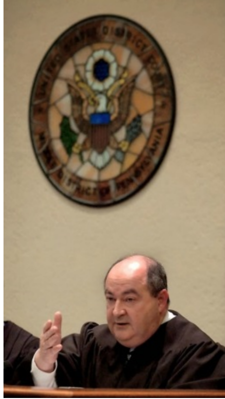
Restatement (Second) of Torts Applied

In what appears to be the first Post-*Tincher* federal court decision in Pennsylvania relative to products liability cases, Judge Robert D. Mariani of the Federal District Court for the Middle District of Pennsylvania applied *Tincher* retroactively and granted in part and denied in part a Defendant's motion for summary judgment in the case of *Nathan v. Techtronic Industries of North America, Inc.*, No. 3:12 - CV - 00679 (M.D. Pa. Feb. 17, 2015 Mariani, J.).

This case involved a products liability claim arising out of injuries from the Plaintiff's use of a table saw.

Notably the court retroactively applied *Tincher* and its analysis, including the analysis with respect to the application of the Restatement of Torts (Second) test, i.e. the risk/utility test.

In denying the Defendant's motion, the court noted feasible alternative designs that could have possibly avoided the injury.



Judge Robert D. Mariani

M.D. Pa.

Judge Mariani also noted in his Opinion that the Plaintiff's alleged removal of a safety device associated with the table saw - more specifically, the saw blade guard - was foreseeable due to the design of the guard.

The court granted summary judgment with respect to the failure to warn claims and breach of implied warranty claims in light of the Plaintiff's apparent concession on those issues.

MEDICAL MALPRACTICE

Discovery of Sentinel Report Allowed

In a recent opinion in the case of *Brink v. Marian Community Hospital*, No. 2013 CV 1314 (C.P. Lacka. March 27, 2015 Nealon, J.), Judge Terrence R. Nealon addressed a discovery issue of first impression in a psychiatric malpractice case. The issue was whether a Sentinel Event Report that is forwarded by a hospital to the private accreditation organization, The Joint Commission, is privileged and protected from discovery by Section 4 of the Peer Review Protection Act of the Medical Care Availability and Reduction of Error (MCARE) Act or the federal Patient Safety and Quality Improvement Act of 2005.

During discovery, the Plaintiff requested documentation from the hospital in terms of its accreditation and requests submitted to other entities for accreditation purposes. The hospital acknowledged that it was in possession of a Sentinel Event Report but asserted that it was not required to produce the same in discovery.

A Sentinel Event Report is a term defined by the Joint Commission charged with accreditation of hospital and refers to the reporting of what is identified as a "Sentinel Event," i.e. a patient safety event that results in death or permanent harm to the patient.

After reviewing the matter, Judge Nealon ruled that the Report authored by the hospital was discoverable as the hospital had not established that the report was prepared or even reviewed by the hospital's peer review committee. Also as it was apparent that the Report was not created for the purpose of complying with the MCARE's patient safety reporting requirements, and/or was not reviewed by the hospital's patient safety committee or board of trustees in compliance with their statutory duties under the MCARE Act, the Report was not protected from discovery by the MCARE Act.

The court also held that since the Report was not generated by the hospital for purposes of reporting to or by any federally recognized patient safety organization, the Report was not protected from discovery under the mandates of the federal Act.

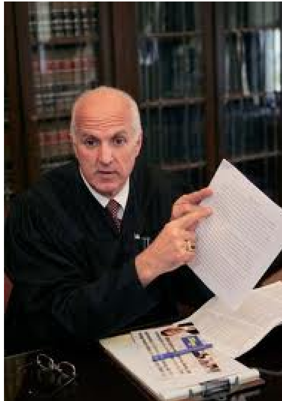
As such, Judge Nealon ruled that the patient's estate was entitled to discovery of the Sentinel Event Report.

Statute of Limitations/Discovery Rule

In his recent December 23, 2014 Opinion in the case of *Peoples v. Philbin*, No. 2010-CV-6623 (C.P. Lacka. Co. 2014 Minora, J.), Judge Carmen D. Minora granted certain Defendants a judgment on the pleadings based upon the expiration of the statute of limitations in a medical malpractice case.

By way of background, this medical malpractice case alleges a failure to timely detect or diagnose

the presence of Hodgkin's Lymphoma.   The Plaintiff filed an original Writ of Summons naming two (2) Defendants and, later, filed Amended Complaints to join two (2) more Defendants after the statute of limitations expired.



Judge Carmen D. Minora

Lackawanna County

The Defendants who were joined later in the action filed a Motion for Judgment on the Pleadings asserting that the Plaintiff did not file her claim against those particular Defendants within the two (2) year statute of limitations and further argued that, given that the Plaintiff had joined those Defendants more than four (4) years after her diagnosis, the discovery rule was inapplicable to toll the statute of limitations.

In his Opinion, Judge Minora reviewed the relevant law. Under Pennsylvania, a cause of action for negligence accrues when the Plaintiff could have first maintained the action to a successful conclusion.   Stated otherwise, in a suit to recover damages for personal injuries, the right to sue generally arises when the injury is inflicted.

Once a cause of action has accrued and the statute of limitations period has run, an injured party is barred under Pennsylvania law from bringing his action.   Fine v. Checcio, 870 A.2d 850, 858 (Pa. 2005).

As noted by Judge Minora, the Pennsylvania Supreme Court in Checcio emphasized that statute of limitations "are designed to effectuate three (3) purposes: (1) preservation of evidence; (2) the right of potential defendants to repose; and (3) administrative efficiency and convenience." *Baselice v. Franciscan Friars Assumption BVM Province, Inc*., 379 A.2d 270, 275-276 (Pa. Super. 2005).

Under the above law, the court found that the actions against the later joined Defendants were barred by the applicable two (2) year statute of limitations.

With regard to the Plaintiff's argument to extend the statute of limitations under the discovery rule, the court noted that the purpose of the discovery rule is to exclude from the running of the statute of limitations that period of time during which a party who has suffered an injury is reasonably unaware that he has been injured, in order that that party may essentially have the same rights as those who have suffered a known injury.

When the discovery rule applies, the statute of limitations does not commence the run at the instant Rather, the statute is tolled, and does not begin to run until the injured party discovers, or reasonably should have discovered, that he or she has been injured and that his injury has been caused by another party's acts or omissions.
the right to bring suit arises, i.e., when the injury occurs.

Judge Minora noted that, while the questions as to when a party's injury and its cause were discovered or discoverable is typically for a jury, under the circumstances of this matter, where even the discovery period does not sufficiently toll the statute, the court is able to rule, as a matter of law whether the statute of limitations has run on a claim presented.

More specifically, given that the later joined Defendants were not joined until four (4) years after the discovery of the Plaintiff's actual condition, (i.e. not within two years of the discovery of the injury), the discovery rule was found not to require a different result. As such, the court granted the later joined Defendants' Motion for Judgment on the Pleadings.

<u>Intentional Infliction of Emotional Distress Claims</u>

In his recent Opinion in the case of *Young v. Jameson Memorial Hospital*, PICS Case No. 15-0049 (C.P. Lawrence Co. Nov. 19, 2014 Cox, J.), Judge J. Craig Cox of the Lawrence County Court of Common Pleas ruled that the Plaintiff was not precluded from asserting a claim of intentional infliction of emotional distress in a medical malpractice claim.

According to a summary of the Opinion, the Defendants filed Preliminary Objections to the Plaintiff's Complaint alleging, in part, that the Pennsylvania Supreme Court had not adopted a tort of intentional infliction of emotional distress and that, in any event, the Plaintiff did not set forth allegations of outrageous conduct to support such a claim.

Judge Cox noted that the tort of intentional infliction of emotional distress is set forth in the Restatement (Second) of Torts §46. Although the trial court agreed that the tort had not been explicated accepted, or rejected, by the Pennsylvania Supreme Court, appellate case law, including cases from the Pennsylvania Supreme Court, the Pennsylvania Superior Court and the Third Circuit consistently addressed the tort of intentional infliction of emotional distress despite the fact that the Supreme Court had not officially adopted the Restatement standard. Accordingly, there is no indication in the case law that the Plaintiff asserting such a claim had been precluded from recovery other than for an inability to set forth adequate facts or proof in support of such claims.

As such, Judge Cox ruled in *Young* that the Plaintiff was permitted to attempt to prove such a claim. The court went on to note that the Plaintiff had asserted sufficient facts that, if proven, would sustain a claim for intentional infliction of emotional distress. The underlying facts in this case involved a hospital staff member and/or a doctor who informed the Plaintiff that her child was stillborn after a birthing procedure when, in fact, the Plaintiff gave birth to a health child.

The court additional overruled the Defendant's Preliminary Objections to the Plaintiff's for punitive damages on the grounds that the conduct necessary to support the claim of intentional infliction of emotional distress was beyond that which would also entitle Plaintiff to a recovery of punitive damages for other torts.

As such, the trial court overruled the Defendant's Preliminary Objections in this regard. The court also overruled Preliminary Objections asserted by the Defendants with respect to other issues and also denied other Preliminary Objections asserted.

<u>Proof of Informed Consent Not Admissible on Negligence Claim</u>

In the medical malpractice case of *Brady v. Urbas*, No. 74 MAP 2014 (Pa. March 25, 2015)(Op. by Saylor, C.J.), the Pennsylvania Supreme Court ruled that evidence that a patient affirmatively consented to treatment after being informed of the risks of that treatment is generally irrelevant to a cause of action sounding in medical negligence.

In other words, the Court ruled that evidence of informed consent is irrelevant in a medical malpractice case in which there is no allegations presented specifically with respect to informed consent.

The rationale is that the simple fact that a patient was aware of the risks of the treatment prior to agreeing to undergo the same is not a defense against a medical provider's allegedly negligent conduct.

POST-KOKEN SCORECARD

UPDATE 2015

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THE TORT TALK POST-KOKEN SCORECARD

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[UPDATED June 10, 2015]

Here's an update list of the post-Koken or post-Koken-like cases uncovered to date, broken down by county-to-county decisions.

The list is not represented to be exhaustive and there may be other decisions out there that I am not aware of at present.

It is important that these decisions be publicized so that a consistent common law in this novel area can be developed. I would appreciate it if you could please advise me of any new cases that you may come across on these topics.

APPELLATE DECISIONS TO DATE:

COLLATERAL ESTOPPEL

[See Trial Court Collateral Estoppel Cases below too]

[Click this LINK to view my October 7, 2014 Article on the topic of the application of the Collateral Estoppel Doctrine in UIM matters.]

USAA v. Hudson, No. 224 EDA 2014 (Pa. Super. Sept. 24, 2014 Lazarus, J., Ott, J., Strassburger, J.) (Memorandum by Ott, J.)("Non-Precedential")(The Pennsylvania Superior Court addressed the doctrine of collateral estoppel in a matter involving a claim for second level Underinsured Motorist (UIM) benefits after an arbitration award was entered for UIM benefits under a primary policy. The court ruled that since the Plaintiff's award on the first-level UIM claim was fully litigated and resulted in an award below the available first-level UIM limits, the Plaintiff was precluded from proceeding on to the second-level UIM claim.).

JOINDER OF ACTIONS

Richner v. McCance and Erie Insurance Group, 2011 WL 32499, 2011 Pa.Super. 4, No. 2045 WDA 2009 (Pa.Super. Jan. 6, 2011, Stevens, Donohue, and Ott, JJ.)(The Superior Court applied Pa.R.C.P. 2229(b), pertaining to the joinder of actions, and found that the requirements of that rule were not met to allow for a joinder of a tort claim with a declaratory judgment action on a coverage question. More specifically, the court found that, although the tort allegations and the coverage question essentially both arise out of the same accident, the liabilities of the respective defendants arise from different circumstances, i.e. one in tort and the other in contract law. In so ruling the Superior Court rejected the trial court's reliance on post-Koken cases ruling in favor of the consolidation of tort claims and claims for UIM benefits under Pa.R.C.P. 2229(b), as the analysis in those types of cases was "inapposite" to the issue in this case involving the separate and different question of the combination of a tort claim with a request for a declaratory judgment in response to a coverage question. Id. at p. 17, n. 4. In that same footnote, the Superior Court also stated, "We emphasize that we are not here deciding the propriety of the joinder of third party liability claims with post-Koken UIM benefit claims.").

VENUE

O'Hara v. The First Liberty Ins. Corp. d/b/a Liberty Mut. Ins. Group, 984 A.2d 938, 2009 WL 3720649 (November 9, 2009, Judges Freedberg, Cleland and Kelly)(Consolidation vs. severance issue not implicated as plaintiff settled with tortfeasor and only sued UIM carrier in post-Koken case; Superior Court upholds UIM carrier's forum selection clause requiring UIM lawsuit to be brought in the county of the insured's legal domicile at the time of the accident)(As of November 30, 2009, the Plaintiff had filed for re-argument en banc before the Superior Court, which request was denied by way of a December 30, 2009 Order of Court.). [appeal denied, 2010 WL 1752268, 39 EAL 2010 (May 4, 2010)].

Sehl v. Neff and State Farm, No. 3438 EDA 2009 (Pa.Super. July 25, 2011 Olson, Freedburg, Colville, JJ.)(opinion by Freedburg) (Accident and tortfeasor defendant from Montgomery County; UIM carrier's policy did not have forum selection clause; Plaintiff filed in Philadelphia County on grounds that UIM carrier conducted business in that County; Tortfeasor defendant argued, under Pa.R.C.P. 1006, that since tortfeasor and UIM carrier are not joint tortfeasors, tortfeasor defendant cannot be compelled to litigate where it might be appropriate based upon proper venue for UIM carrier. Tortfeasor defendant's preliminary objections based upon improper venue granted at trial court level and affirmed here by Superior Court. Accordingly, where there is no venue selection clause, it appears that venue in a post-Koken case is proper where the accident occurred, where the tortfeasor defendant resides, or where the tortfeasor defendant can be served as that is proper venue for the tortfeasor defendant under Pa.R.C.P. 1006 and also proper venue for the UIM carrier defendant as the UIM carrier defendant, as a corporate entity that conducts business in all counties of Pennsylvania.

TRIAL ISSUES

Stepanovich v. McGraw and State Farm, 78 A.3d 1147 (Pa.Super. Oct. 15, 2013 Ford Elliott, P.J.E., Ott, J., Musmanno, J.)(Opinion by Ott, J.)(Concurring and Dissenting Op. by Ford Elliott, P.J.E.)*, appeal denied* 11 WAL 2014 (Pa. April 22, 2014) (Superior Court found no due process violation by the trial court's decision to allow the Post-Koken trial involving a tortfeasor defendant and a UIM carrier defendant to proceed in front of a jury without mention of the UIM carrier as a party Defendant. Yet, the Court did rule that Pa.R.E. 411, pertaining to preclusion of mention of liability insurance at trial, does not apply in context of references to UIM insurance at trial. However, open issue remains on whether common law prohibition of mentioning other forms of insurance at trial serves to preclude evidence of insurance in this context; Pennsylvania Supreme Court denied Petition to Appeal.).

TRIAL COURT DECISIONS

COLLATERAL ESTOPPEL

Eastern District Federal Court of Pennsylvania

Gallagher v. Ohio Casualty Ins. Co., 13-0168 (E.D. Pa. April 9, 2014)(Judge Nitza I. Quinones Alejandro of the Federal District Court for the Eastern District found that a Non-Binding ADR Award precluded a UIM claim, not under collateral estoppel doctrine but on basis that there was evidence, by way of the mediator's "settlement valuation," which was less than the third party limits, that showed that the tortfeasor was not underinsured.)

Harvey v. Liberty Mut. Ins. Group, NO. 130-CV-04693 (E.D. Pa. March 26, 2014 Joyner, J.)(Judge J. Curtis Joyner ruled that an injured party was barred by the doctrine of collateral estoppel from proceeding on a UIM claim after having agreed to a high/low arbitration on the third party side with a high parameter below the third party liability limits and where the arbitration award was entered below that high parameter. The court ruled in this fashion even though there was an agreement between the parties in the third party liability case that the binding arbitration was not intended to preclude any subsequent proceedings.).

Delaware County

USAA v. Hudson, 101 Del. 154 (C.P. Del. Feb 21, 2014)(Court holds that doctrine of collateral estoppel precludes re-litigation on UIM claim when same issues were previously litigated.)>

Philadelphia County

Borrelli v. AIU North Americam, Inc., No. 0430, Control No. 13110820 (C.P. Phila. Jan. 15, 2014 Bernstein, J.)(Judge Mark I. Bernstein of the Philadelphia County Court of Common Pleas granted a UIM carrier's motion for summary judgment based on collateral estoppel in a case where the Plaintiff proceeded through an agreed upon high/low arbitration with the tortfeasor defendant first and was awarded an amount less than the tortfeasor's liability limits).

PLEADINGS ISSUES

POST-KOKEN DECISIONS IN FEDERAL COURT REGARDING REMOVAL/REMAND

Federal Middle District Court of Pennsylvania

Oswald v. State Farm, No. 3:09-CV-2578 (M.D.Pa. 2010, Caputo, J.) *(*Addressing an apparently novel scenario in the post-Koken context, Federal Middle District Court Judge A. Richard Caputo allowed a UIM carrier to join the third party tortfeasor into a Federal post-Koken lawsuit as a third party defendant).

Wabby v. State Farm Mutual Automobile Insurance Company, No. 3:09cv2449 (M.D. Pa. 2010, Munley, J., mem. op.),(Judge Munley delineated the standard of review on a motion to join a party in a case that has been removed to the federal court where such a joinder may serve to destroy the diversity of citizenship necessary for federal court jurisdiction; rules, under circumstances of this case that plaintiff could join non-diverse third party tortfeasor defendant into plaintiff's case against UIM carrier that had been removed to federal court by carrier; joinder of non-diverse defendant destroys diversity and leads federal court to remand case back to state court.).

POST-KOKEN TRIAL COURT DECISIONS ON CONSOLIDATION vs. SEVERANCE OF CLAIMS

PENNSYLVANIA FEDERAL DISTRICT COURT DECISIONS IN FAVOR OF CONSOLIDATION

United States Federal Middle District Court

Griffiths v. Allstate, No. 3:13 - CV - 02674 (M.D. Pa. Feb. 21, 2014 Mannion, J.)(Middle District of Pennsylvania Federal Court Judge Malachy E. Mannion issued a detailed Opinion outlining his rationale for following the majority rule in the Middle District in favor of denying Motions to Sever bad faith claims from the breach of contract claim for UIM benefits.)

Calestini v. Progressive Cas. Ins. Co., 3:09-CV-1679 (M.D.Pa. Dec. 16,2009, Caputo, J.)(Court ruled against the Defendant insurance carrier's Motion to Bifurcate and Stay Discovery in a post-Koken case in which a UIM breach of contract action was joined with the bad faith action.).

Christian v. The First Liberty Ins. Corp, No. 1:10-CV-125 (M.D.Pa. March 16, 2011, Rambo, J.)(Court denied a Plaintiff's request to consolidate the Plaintiff's negligence lawsuit against the tortfeasors with the Plaintiff's separately filed uninsured (UM) claim against the Plaintiff's own carrier under an allegation that a phantom vehicle was also involved in the accident.).

STATE TRIAL COURT DECISIONS IN FAVOR OF CONSOLIDATION

(Decisions from across 22 Counties)

Allegheny County

(Note split of authority on the issue-see Allegheny County cases under severance section below)

Gunn v. Auto. Ins. Co. of Hartford, Conn., 2008 WL 6653070, GD07-Civil-002888 (Alleg. Co. July 25, 2008, Wettick, J.)(Bad faith claim and UIM claim allowed to proceed together).

Vernon v. Erie Insurance, No. GD 08-10406 (Allegheny Co. 2009, Wettick, J.)(court issued an Order without Opinion denying Erie's motion to stay discovery and bifurcate the UIM Claim from the Bad Faith claim; the bad faith claim was scheduled to be tried immediately upon the UIM case being sent to the jury. Also, the tort action was consolidated for trial with the UIM action. Ultimately, the case settled before jury selection).

Collins v. Zeiler and State Farm, GD08-Civil-014817 (Alleg. Co. October 22, 2008, Strassburger, J.)(Preliminary objection seeking to sever claims denied.).

Richner v. McCance and Erie Insurance Group, GD 09-2578, 2045 WDA 2009(Alleg. Co. Feb. 17, 2010, Hertzberg J.)(Third party claim against defendant driver and separate declaratory judgment action on UIM coverage issue allowed to proceed in a consolidated fashion; court leaves the door open to bifurcate at time of trial, if necessary.).

Shipers and Thompson v. Brown and Safe Auto, No.: GD-13-002037 (C.P. Allegheny April 26, 2013 O'Reilly, J.) (In Order without Opinion, trial court overruled Preliminary Objections of tortfeasor Defendant seeking severance and allowed Plaintiffs' negligence and UIM claim to remain join. The trial court also noted in its Order that evidence of the third party Defendant's insurance coverage would be admissible at trial in order to determine the extent of the UIM carrier's liability).

But see Jenkins v. State Farm, G.D. 07-020234 (Alleg. Co. Sept. 9, 2009, Wettick, J.)(Motion to stay and sever granted in UIM/Bad Faith case).

But see Wutz v. Smith and State Farm, GD07-021766 (Allegh. Co. March 2, 2010, Strassburger, J.)(Court ordered the severing of a third party claim from a UIM claim and Bad Faith claim against the UIM carrier. In this case, the UIM carrier paid the third party defendant's settlement offer under Daley-Sand and thereby stepped into the Plaintiff's shoes against the third party tortfeasor. Since there was no longer any "live dispute" against a tortfeasor in this matter, Judge Strassburger thought it appropriate to sever the cases and to allow the Plaintiff to proceed on the UIM and bad faith claims first.).

Beaver County

Six v. Phillips and Nationwide Ins. Co., 12227-Civil-2008, 2009 WL 2418861 (Beaver Co. June 30, 2009,Kwidis, J.)(Preliminary objection by tortfeasor to joinder of third party claim and UIM claim under one caption rejected; court also rules that evidence of insurance may come into evidence at trial for limited purposes.).

Bradish-Klein v. Kennedy and State Farm, PICS Case No. 09-2059 (C.P. Beaver Dec. 3, 2009, Kwidis, J.)(State Farm was not only UIM carrier, but also provided the liability coverage to the third party tortfeasor; Plaintiff initially filed suit against the third party tortfeasor only and then moved to amend the Complaint to add the UIM claim against the UIM carrier, State Farm. Third party tortfeasor opposed the motion to amend on the grounds that "insurance" would then come into play during the trial; Judge Kwidis relied on his prior decision in *Six v. Phillips and Nationwide Ins. Co.* to allow the amendment and allow the joinder of the third party claim and UIM claim under one caption; court again notes that fact that evidence of insurance may come in at trial does not preclude joinder).

Bucks County

Hartman v. Schofield and Progressive, No. 2009-CV-11956 (Bucks Co. Feb. 2010, Waite, J.)(Without opinion, trial court overruled carrier's preliminary objection seeking a severance of UM claim from negligence claims against third party defendant. However, trial court sustained UM carrier's preliminary objection and severed bad faith claims from breach of contract claims against UM carrier and negligence claims against third party tortfeasor).

Cambria County

Link v. Eckenrode and State Farm, No. 2009- Civil - 1312 (Cambria Co., Jan. 10, 2011)(Opinion by President Judge Timothy P. Creany, Concurrence by Judge David J. Tulowitzki, and Dissenting Opinion by Linda Rovder Fleming)(En banc Court, by 2-1 decision, ruled that negligence claims should be allowed to proceed in a consolidated fashion with UIM claims under one caption).

Lydick v. Keilman, No. 2010- Civil - 1700 (Cambria Co., Jan. 10, 2011, Creany, J.)(En banc Court, by a 2-1 decision ruled in favor of consolidation of negligence and UIM claims).

Centre County

Murphy v. Hampton et al, No. 2012-3855 (Centre Co. Feb. 14, 2013 Grine, J.)(Court overrules tortfeasor Defendant's preliminary objections asserting misjoinder of actions and requesting severance. Case allowed to remain consolidated).

Fennessey v. Sweeney and State Farm Mut. Automobile Ins. Co., No. 2012-2865 (Centre Co. Dec. 11, 2012 Ruest, J.)(In Opinion, court denied Defendants' preliminary objections asserting misjoinder of actions and also denied companion motion to sever to allow case to proceed in consolidated fashion).

Chester County

Allen v. Schreiber, et al., No. 3787-2012 (C.P. Chester July 2, 2013 Mahon, J.)(By Order without Opinion, trial court overruled UIM carrier's Preliminary Objections seeking to sever UIM and negligence claims.).

Clinton County

Wentzel v. Swinehart and State Farm, No. 375-10 CV (June 3, 2010, Williamson, P.J.)(Court denied both the UIM carrier's Motion to Sever the Plaintiff's bad faith claim and the request that the bad faith claim be stayed pending the resolution of the underinsured motorist action.).

Dauphin County

Wolfe v. Hans and Progressive, No. 2010-CIVIL-11199 (Dauphin Co. March 21, 2011 Evans, J.)(Court denied severance in response to Preliminary Objections and a Motion to Sever filed by the tortfeasor Defendant.).

Fuhrman v. Frye and State Farm, Dauphin, 2008 CV 17687 (Without Opinion, request to sever UIM claim and third party claim denied).

Sellers v. Hindes and State Farm, Dauphin, 2009 CV 1989 (Without Opinion, request to sever UIM claim and third party claim denied).

Gingrich v Esurance and Susan Graci, No. 08795 CV 2009 (Dauphin Co. Nov. 2, 2009, J. Hoover)(Without Opinion, trial court ruled tortfeasor's preliminary objections to complaint which joined tortfeasor and the underinsured motorist causes of action under one caption denied in one line Order).

Schaeffer v. Bonny and Donegal Group, No. 2010 - Civil - 4547 (Dauph. Co., Sept. 10, 2010, Coates, J.)(Without Opinion, court denied preliminary objections filed by tortfeasor defendants and the UIM carrier and allowed the claims filed by the Plaintiff against the tortfeasor to remain consolidated under one caption with the claims against the UIM carrier).

Steele v. Kelly, No. 2009-CV-07007 (Dauphin Co., May 13, 2011, Curcillo, J.) and *Steele v. Erie Insurance Exchange*, No. 2010-CV-15431 (Dauphin Co., May 13, 2011, Curcillo, J.)(Court consolidated the Plaintiff's claims against the tortfeasor with the Plaintiff's separate claim against the underinsured motorist carrier. This may be the first case where the joinder occurred after the cases against the tortfeasor and the UIM carrier were initially filed separately.).

[But see Dauphin County decision in favor of severance in Severance section below].

Delaware County

Gallo v. Maiale & Grange Ins. Co., No. 2012-05963 (C.P. Delaware August 12, 2013 Fizzano-Cannon, J.)(Plaintiff sued third party tortfeasor and UIM carrier under one Complaint. By Order without Opinion, trial court denied UIM carrier's motion for summary judgment which sought dismissal on the grounds that the UIM claim was not ripe as the Plaintiff had not yet secured a settlement or verdict against the third party defendant driver.)

Erie County

Jordan v. White, Gonzales, and Erie Insurance Exchange, No. 15540-Civil-2009 (Erie Co. October 28, 2010, Garhart, J.)(Court denied Preliminary Objections by the UIM/UM carrier seeking severance; Court says it will entertain a motion to sever at the time of trial, if desired).

But see below in "Severance" listing Brown v. Haas and State Farm, No. 11658 - 2011 (C.P. Erie Oct. 31, 2011 Connelly, J.)(In an Opinion, court granted the preliminary objections filed by the tortfeasor defendant seeking a severance of the negligence and UIM claims on the basis that the tortfeasor would be prejudiced by the introduction of evidence of insurance in violation of Pennsylvania law. The defense also argued that the claims did not arise out of the same "occurrence" in that one action was in negligence and the other in contract. Court also struck bad faith claim filed against UIM carrier as sufficient facts not pled in support of that claim.).

Lackawanna County

(Note split of authority within county-see Lackawanna County cases under severance section below)

Decker v. Nationwide Ins. Co., 2008 WL 6653069, 2005-Civil-1863//2006-Civil 2119 (Lacka. Co. March 4, 2008, Minora, J.)(consolidation permitted of bad faith action against UIM carrier and declaratory judgment action regarding coverage).

See also Decker v. Nationwide, 2007 WL 6853118 (Lacka. Co. 2007, Minora, J.).

Augustine v. Erie Ins. Exchange, 2006-Civil-416 (Lacka. Co. August 1, 2008, Mazzoni, J.)(Court allowed discovery in a UIM/bad faith case to proceed in a consolidated fashion but noted that claims would later be severed into two separate trials).

Moyer v. Harrigan and Erie Ins. Exchange, 2008-Civil-1684 (Lacka. Co. October 24, 2008, Thomson, J. visiting judge)(Consolidation of UIM claim and claim against tortfeasor permitted).

Nehme v. Erie Insurance and Osborne, 2009-CV-4982 (Lacka. Co. Nov. 5, 2009, Thomson, S.J.)(Without Opinion, Preliminary Objections seeking, in part, a severance of the third party claims and UIM claims denied).

Yesu v. Arcieri and Encompass Insurance Company of America, No. 2010-CV-9877 (Lacka. Co. May 18, 2011, Thomson, S.J.)(Without Opinion, court overruled the Preliminary Objections of the tortfeasor Defendant seeking a severance of the negligence claims filed against the tortfeasor from the breach of contract/bad faith claims filed against the UIM carrier.).

Bingham v. Poswistilo, Ritz, and Erie Ins., No. 10 - CV - 6020 (Lacka. Co., April 8, 2011, Nealon, J.)(In the most thorough Opinion anywhere on the issue, Judge Nealon ruled in favor of consolidation of third party claims and UIM claims for discovery purposes but left door open for parties to revisit severance issue at time of trial; However, court did end up severing claims based upon venue issue, with UIM claim being kept in Lackawanna County pursuant to forum selection clause in policy and with tortfeasor claims being sent to Lehigh County where venue was proper for that part of case.).

Richards v. McPhillips and Progressive Insurance Company, 2010-CIV-7020 (Lacka. Co. June 10, 2011, Mazzoni, J.)(Court denies preliminary objections of UIM carrier to sever negligence claims against third party tortfeasor from UIM claims against carrier. A wrinkle in this case separating the facts from previous post-Koken cases on this issue is that there were punitive damages allegations asserted against the third party tortfeasor on the basis that the tortfeasor was operating his vehicle allegedly under the influence of heroin and/or as otherwise impaired. Judge Mazzoni ruled that the punitive damages claims did not change the result. However, although Judge Mazzoni ruled that the cases could remain consolidated for purposes for discovery, he left the door open for the claims to possibly be severed at the time of trial by motion to the trial court judge.).

Knott v. Walters and Nationwide Mutual Automobile Ins. Co., No. 2010 CV 4745 (Lacka. Co. Aug. 5, 2011, Mazzoni, J.)(In a detailed Order, the court denied the preliminary objections filed by the tortfeasor defendant who claimed, in part, a misjoinder of actions under the Pennsylvania Rules of Civil Procedure; Although court rules case is to proceed to trial in consolidated fashion, court also points out that trial judge retains discretion to sever or bifurcate the cases if appropriate.).

But see Mehall v. Benedetto and Erie Ins. Exchange, 09-CV-744 (Lacka. Co. 2010 Thomson, S.J.)(Court orders that third party claims should be severed from UIM claims into two separate lawsuits; Motion for Reconsideration denied by July 10, 2010Court Order by Judge Thomson).

Golin v. Baggetta and The Travelers Home and Marine Ins. Co., 2014 CV 1839 (C.P. Lacka. Co. Dec. 3, 2014 Braxton, S.J.)(Motion to Sever Bad Faith claim and Stay Bad Faith Discovery denied).

Lawrence County

Joseph v. Perrotta and State Farm, No. 10457 of 2010 (Lawrence Co. Nov. 19, 2010, Cox, J.)(UIM carrier's Motion To Consolidate separate cases against tortfeasor and UIM carrier granted; Court notes it would entertain a motion to sever at the time of trial, if desired).

Lehigh County

Serulneck v. Kilian and Allstate, 2008-Civil-2859 (Lehigh Co. April 7, 2009, McGinley, J.)(Motion of tortfeasor defendant for severance of claims against him from UIM claims under one caption denied.).

Luzerne County

Best v. Emsley and Progressive Insurance Company, No. 1549 of 2014 (C.P. Luz. Co. Aug. 29, 2014 Hughes, J.)(By Order only, Judge Richard M. Hughes, III of the Luzerne County Court of Common Pleas denied a tortfeasor Defendant's Preliminary Objections requesting the severance of the third party negligence claims from the contractual UIM claims asserted against the UIM carrier.)

Hoinski v. Farrell and Erie Ins. Co., No. 7270-CV-2013 (C.P. Luz. Co. 2013 Hughes, J.)(Judge Richard Hughes of the Luzerne County Court of Common Pleas denied Preliminary Objections filed by the UIM carrier seeking a severance of claims; tortfeasor was a DUI defendant facing punitive damages claim; court leaves door open for later motion to bifurcate.).

Weitoish v. Heck and State Farm Mutual Automobile Insurance Company, No. 13831 OF 2009 (C.P. Luz. Co. July 6, 2012, Amesbury, J.) (By Order only, Court denies Preliminary Objections of UIM carrier seeking severance of actions against UIM carrier from claims filed against third party tortfeasor).

Doran v. Williams, Price, and Nationwide, No. 7792-CV-2009 (Luz. Co. Dec. 29, 2009) (Without Opinion, court denied preliminary objections by the tortfeasor defendants as well as by Nationwide as the UIM carrier, both of which sets of preliminary objections had argued in part for the severance of the third party liability claims from the underinsured motorists (UIM) claims. As such, all claims were allowed to proceed in a consolidated fashion.)

Glushefski v. Sadowski and Erie Ins. Exchange, 1189-Civil-2009 (Luz. Co. July 24, 2009, Burke, J.)(Without Opinion, Preliminary objection by tortfeasor defendant seeking to sever third party claim from consolidated UIM claim overruled).

Rinker v. Kellar and State Farm, No. 11038 of 2009 (Luz. Co. June 25, 2010, Burke, J.)(Preliminary objection by tortfeasor defendant to sever third party claim from consolidated UIM claim overruled.).

Mitkowski v. Nationwide, No. 582-Civil-2010 (Luz. Co. July 29, 2010, Gartley, J.) and *Mitkowski v. Stefanec*, No. 17284 - Civil - 2008 (Luz. Co. July 29, 2010, Gartley, J.)(Court issued order granting UIM carrier's motion to consolidate the Plaintiff's UIM claim with the Plaintiff's third party claim against the tortfeasor.).

Borthwick v. Webb and GEICO, No. 2735-Civil-2010 (Luz. Co. Sept. 21, 2010, Cosgrove, J.)(Court denied the Preliminary Objections of Defendant GEICO, the UIM carrier, seeking a severance of the first party claims against it(breach of contract (UIM) and Bad Faith) from the third party liability claims, and, in the alternative a severance of the UIM claims and Bad Faith claims filed against GEICO. In a footnote in his Opinion, Judge Cosgrove cited to *Pennsylvania Law Weekly* article by Daniel E. Cummins, Esquire outlining decisions in this regard around the state. Case was allowed to proceed in a consolidated fashion).

Johns v. Cooper and GEICO, No. 9153 - Civil - 2010 (Luz. Co. Dec. 30, 2010, Burke, J.)(Court, in Order without Opinion, denied the tortfeasor Defendant's Preliminary Objections and Motion to Sever, thereby allowing the claims against the tortfeasor and the UIM carrier to proceed in a consolidated fashion. As support for his decision, Judge Burke cited to another Luzerne County decision, Borthwick v. Webb and GEICO, 100 Luz. Reg. Reports 135 (2010).).

Dunsmuir v. Tredinnick and State Farm, No. 12077 - Civil - 2010 (Luz. Co. June 29, 2011 Lupas, J.)(Court rejects State Farm's argument that Plaintiff's breach of contract complaint is really a bad faith complaint; case allowed to remain consolidated with third party negligence claim against tortfeasor).

Price v. Price III and State Farm, No. 13625 - Civil - 2010 (Luz. Co. Feb. 28, 2011 Gartley, J.)(Court overrules State Farm's preliminary objections requesting severance of UIM and negligence claims).

Korona v. Kemler and Mercury Insurance, No. 328 of 2011(Luz. Co. 2011 Muroski, S.J.). (Court, by Order only, denied the tortfeasor's Preliminary Objections claiming a misjoinder of actions and the case was allowed to remain consolidated.).

Monroe County

Cahill v. Fritz and Hartford Ins. Co., No. 7056-CV-2014 (C.P. Monroe Co. Jan. 16, 2015 Williamson, J.)(Court denies preliminary objections by UIM carrier seeking severance of negligence/UIM claims where defendant driver was allegedly DUI and Plaintiff pled punitive damages. Court says cases will be kept together for discovery purposes, but that a motion to bifurcate the trial could be filed at the conclusion of discovery to be considered by the court).

Cocuzza v. Castro, No. 406 – CV – 2012 (C.P. Monroe Co. July 12, 2012 Zulick, J.)(Court denies preliminary objections to sever and allows cases to remain consolidated without prejudice to parties to file motion to bifurcate trial after discovery is completed).

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Montgomery County

Dininni v. Encompass Insurance Company, No. 2010 - Civil - 04615 (Montg. Co. June 16, 2010, Tilson, J.)(Court stayed discovery as to claims of bad faith and unfair trade practices until underlying UIM claims were tried or otherwise resolved. While ruling in favor of the defense in that regard, the court did also deny the defense request that the Bad Faith Claim and Unfair Trade Practices Claim be severed from the UIM claim.).

Montour County

Slaterbeck v. Sutsko and Erie Insurance, No. 237-CV-2012 (C.P. Montour Co. Oct. 12, 2012 Norton, J.)(Court overruled the Preliminary Objections of the UIM carrier, Erie Insurance Company, to the joinder of actions in this post-Koken case thereby allowing cases to remain consolidated).

Northampton County

Firoozifard v. Krome and State Farm, 2010 WL 2666306, No. C-48-Civil-2009-14369 (Northampton Co. June 21, 2010, Beltrami, J.)(Court denied a third party tortfeasor defendant's motion to sever the third party liability claims from the UIM and UM claims; court also notes that insurance issues can be kept from jury and the task of applying third party credit to determine UIM award can be kept away from jury and handled by the court only after the verdict).

Philadelphia County

(Note split of authority on the issue-see Philadelphia County cases under severance section below)

Schlesinger v. GEICO, June Term 2014, No. 0549, Control No. 14083387 (C.P. Phila. Co. Sept. 26, 2014)(Motion to Sever denied in one line Order).

Richard Hess v. Cosgrove et al., Phila, July Term, 2008, no. 3708 (Without Opinion, request to sever UIM claim and third party claim denied).

Kelly Hess v. Dickel, et al., Phila, October Term, 2008, no. 3220 (request to sever UIM claim and third party claim denied).

Spano v. Carney and Nationwide Insurance, March Term, 2008 No. 5707 (Phila. Co. July 3, 2008 New, J.)(Preliminary objections of third party tortfeasor to joinder of negligence claims with UIM claims against insurance company overruled.).

Zerggan v. Rietman and Nationwide Insurance, No. 0906 o1752 June Term 2009 (Phila. Co. March 3, 2010, McInerney, J.)(Preliminary objections filed by the tortfeasor on a venue argument denied by court; court also denied misjoinder of causes of action preliminary objection--refuses to sever the third-party case from the underinsured motorist claim against Nationwide.

Bomentre v. Alifano and Nationwide Mut. Ins. et. al., Nov. Term, 2009 No. 4470 (Phila. Co. April 2, 2010, Glazer, J.)(Preliminary objections of third party defendant to joinder of negligence claims with UIM claims denied.)

Celia v. McQueeny [citation to be secured] (Phila. Co. 2010)(Court did not sever the UIM claims from negligence claims as requested but did transfer the consolidated case over to Bucks County pursuant to a forum selection clause under UIM policy.).

Bomentre v. Alifano and Nationwide, Nov. Term, 2009 No.: 447 (C.P. Phila. April 7, 2010 Glazer, J.) (Without Opinion, trial court denied third-party Defendant’s Preliminary Objections

to joinder of claims against third party Defendant and UIM carriers, Nationwide and State Farm. The court noted that the claims against third party Defendant and UIM carriers “may be properly joined as they arise out of the same occurrence and have common questions of law or fact….the joinder will save resources, time and expense. There is no mis-joinder and the claims will be tried together in this court”).

Spano v. Carney and Nationwide, March Term, 2008 No.: 5707 (C.P. Phila. July 3, 2008 New, J.) (Without Opinion, trial court denied Preliminary Objections of tortfeasor Defendant arguing improper joinder and that the inclusion of the UIM claim with the third party claim would impermissibly allowed evidence of insurance to be introduced in violation of Pa. R.E. 411. The court also denied tortfeasor Defendant’s Preliminary Objection on improper venue; since court denied Preliminary Objections on mis-joinder of actions, venue issue raised by Defendant was also denied.

But see Astillero v. Harris and State Farm, August Term 2009, No. 1580 (Phila. Co. Dec. 11, 2009, Fox, J.)(Order states claims are severed "for purposes of trial only" presumably meaning claims may proceed together in discovery phase).

But see Morawski v. Dunleavy and State Farm, October Term 2009, No. 03493 (Phila. Co. April 26, 2010, Overton, J.)(third party claims and UIM claims severed for all purposes, not just for trial purposes).

But see Dangler v. Robinson and AIU Insurance Company, March Term 2009, No. 4027, Control No. 09-092828 (Phila. Co. 2010, DiVito, J.)(Court issued an Order granting the tortfeasor's preliminary objections, alleging a misjoinder of actions, in a post-Koken case. The Court, by Order only and without any Opinion, severed the UIM claim and ordered that it be tried separately from the third party claim.).

But see Schramm v. McComb and Penn National Insurance and State Auto Insurance, No. 1002 03394 (Phila. Co. May 10, 2010, Tereshko, J.)(Court granted the preliminary objections of the tortfeasor defendants and severed the third party claims from the UIM claims and ordered separate trials).

But see Carter v. Gillespie and Travelers Insurance Company, April 2010 Term No. 0564 (Phila Co. May 27, 2010, Tereshko, J.) (Court granted the third party tortfeasors' Preliminary

Objections asserting a Misjoinder of Actions; Judge Tereshko ordered the actions severed and also mandated that the matters were to be tried separately.).

But see Thomas v. Titan Auto Ins., Nationwide Ins. Co., Jones, and Briel, March Term 2010 No. 03050 (May 10, 2010, Tereshko, J.)(Court granted the Petition to Sever filed by Titan/Nationwide the third party claims from the UIM claims and also granted the request that the case be therefore transferred to Montgomery County.)(Update: In the court's Rule 1925 Opinion, the trial court clarified that it was only sending negligence claim to Montgomery County and was keeping the UIM claim in Philadelphia County.).

But see Saltzburg v. Haynes and State Farm, November Term, 2010, No. 03227 (Phila. Co. Jan. 14, 2011 Tereshko, J.)(Preliminary Objections of tortfeasor defendant on basis of improper venue and improper joinder of third party negligence case with UIM case; claim against tortfeasor dismissed without prejudice to Plaintiff's right to re-file in Montgomery county).

But see Pascal v. Nalbondian, et al., July Term, 2010, No. 2118, Control No. 10121229 (Phila. Co. Jan. 14, 2011, Fox, J.)(Tortfeasor's motion to sever negligence claims from claims filed against UIM carrier granted).

But see Gollinge-Motroni v. Machado and Allstate Ins. Co., October Term 2010 No. 002528 (Phila. Co. Jan. 14, 2011, Tereshko, J.)(severance of UIM and negligence claims ordered and case transferred for improper venue).

Pike County

Jannone v. McCooey and State Farm, 2009 WL 2418862, 2320-2008-Civil (Pike Co. April 1, 2009, Chelak, J.)(Preliminary objection by tortfeasor to joinder of third party claim and UIM claim under one caption rejected; court also rules that evidence of insurance may come into evidence at trial for limited purposes).

Loiacono v. Moraza and Selective Insurance Company, No. 902-2010-Civil (Pike Co. Oct. 25, 2010, Kameen, P.J.)(Plaintiff's Preliminary Objections to Tortfeasor Defendant's untimely

Preliminary Objections seeking to sever granted. Cases remain consolidated but Court says it will entertain a motion to sever come trial time).

Schuylkill County

[SPLIT OF AUTHORITY: Note below Schuylkill County decisions in favor of severance.]

Wall v. Ebersole, Erie Ins., and Donegal Ins., No. S-495-2014 (C.P. Schuylkill Co. Oct. 29, 2014 Miller, J.)(Judge Charles M. Miller denied a second-level UIM carrier's request for a severance of claims and a directive to the Plaintiff to file a separate, later suit against the second-level UIM carrier once the liability claims and first-level UIM claims were concluded.)

Foster v. Naresh and Atlantic States Ins. Co., No. S-2298-2013 (C.P. Schuylkill Co. April 29, 2014 Domalakes, J.)(Court issues Opinion in favor of consolidation of claims.).

Washington County

Koontz v. Mast, No. 2011-Civil-142 (C.P. Wash. Co. Nov. 21, 2011 Emery, J.)(Court denied a post-Koken Motion to Sever and Preliminary Objections seeking to divide the negligence claims against the tortfeasor from the UIM breach of contract claims against the UIM carrier.).

Hoffman v. Ellis and State Farm, No. 2011-8417 (C.P. Wash. Co. Feb. 15, 2011 DiSale, J.,) (Court issued Order overruling a Defendant's Preliminary Objections and Motion to Sever a post-Koken automobile accident litigation. The Court did state in its Order that it would "reconsider the issue of Severance prior to trial.").

TRIAL COURT DECISIONS IN FAVOR OF SEVERANCE

(Decisions from across 22 Counties)

EASTERN DISTRICT FEDERAL COURT

Morninghoff v. Tilet and Allstate Insurance Company, No. 11-Civil-7406 (E.D. Pa. June 27, 2012 McLaughlin, J.), Federal Eastern District Court Judge Mary A. McLaughlin granted the

Defendant, Allstate Insurance Company's Motion to Stay Plaintiffs' bad faith claims in a post-Koken litigation.

Adams County

Megert v. Stambaugh, Erie Ins. Co., and The Hartford, 2010 WL 231525, No. 2009-S-1416 (Adams Co., Jan. 15, 2010, Kuhn, P.J.)(Court rules in favor of the severance of the third party claims against the tortfeasor from the UIM claims asserted against the two separate levels of UIM carriers).

Michaleski v. National Indemnity Co., No. 09-S-1529 (Adams Co. Dec. 22, 2009, Kuhn, J.)(Carrier's preliminary objections to Plaintiff's attempt to join suit against third party tortfeasor for damages with declaratory judgment suit against first party carrier granted as claims do not arise out of same transaction or occurrence.).

Allegheny County

(Note split of authority-See Allegheny County cases under consolidation section above)

Jenkins v. State Farm, G.D. 07-020234 (Allegh. Co. Aug. 30, 2009, Wettick, J.)(Motion to Sever and Stay Bad Faith claim granted in UIM/Bad Faith litigation).

Wutz v. Smith and State Farm, GD07-021766 (Allegh. Co. March 2, 2010, Strassburger, J.)(Court ordered the severing of a third party claim from a UIM claim and Bad Faith claim against the UIM carrier. In this case, the UIM carrier paid the third party defendant's settlement offer under Daley-Sand and thereby stepped into the Plaintiff's shoes against the third party tortfeasor. Since there was no longer any "live dispute" against a tortfeasor in this matter, Judge Strassburger thought it appropriate to sever the cases and to allow the Plaintiff to proceed on the UIM and bad faith claims first.).

Beaver County

Muller v. Erie Insurance Exchange et al., No. 11362-2011 (C.P. Beaver Co., February 1, 2012, Kunselman, J.)(Court granted the preliminary objections of Erie Insurance Exchange and ordered the contractual and statutory bad faith counts to be severed from the underinsured motorist breach of contract count. The Court also issued a stay order on the bad faith action.).

Butler County

Weichey v. Marten and Allstate, 2009 WL 4395727, A.D. No. 09-10116 (Butler Co., June 11, 2009, Yeager, J.)(Court orders severance of UIM and third party claims under the general rationale that insurance is not admissible in third party negligence actions).

Marburger v. Erie Ins. Exchange, 2009-Civil-10927 (Butler Co. June 19, 2009, Horan, J.)(Motion to Sever and Stay on behalf of Erie granted; court precluded plaintiffs from conducting any bad faith discovery until further Order of court and permitted severance and stay of plaintiff's bad faith action pending resolution of UIM claim).

Baptiste v. Strobel and State Farm Mut. Auto. Ins. Co., 2009 WL 3793590, A.D. 09-11444 (Butler Co. Nov. 5, 2009, Horan, J)(Court orders UIM claim and third party claim severed)(Judge Horan more recently issued another Order in this case denying Plaintiff's Motion for Reconsideration of the court's decision ordering the claims severed. The Judge did amend her Order to allow discovery on the UIM and tort claims to proceed concurrently. It was indicated to me that no party objected to this request pertaining to the discovery.)

See also Lowry v. Aliquo and Erie Insurance Exchange, 159 PLJ 35 (Alleg. Co. 2010, Strassburger, J.)(Allegheny County Court of Court enforced the carrier's forum selection clause for a UIM claim which required venue against carrier to be in Butler County under facts presented. Allegheny County Court notes that severance is the rule in Butler County and therefore severed the UIM claim and transferred only that claim to Butler County.).

Crawford County

Rucci v. Erie Insurance Exchange, No. A.D. 2014 - 803 (C.P. Crawford Co. February 5, 2015 Stevens, J.)(In an Opinion, the court ruled in favor of the UIM carrier's severance of and stay of bad faith claims in the combined UIM Breach of Contract and Bad Faith cause of action in the case).

Cumberland County

Stumpf v. Erie Ins. Exchange and Barricklow, No. 2011 - Civil - 7290 (C.P. Cumb. Co. Feb. 2, 2012 Hess, P.J.)(President Judge Kevin Hess of the Cumberland County Court of Common Pleas issued an Order directing the severance of the liability claims (negligence) and the UIM claims (breach of contract) found in a single Complaint into separate trials; Order allows claims to remain consolidated for discovery purposes.).

Henry v. Amin and Westfield Ins. Co., No. 11-4881 Civil (C.P. Cumberland Sept. 1, 2011 Ebert, J.)(By Order only, court severs negligence claims against tortfeasor from breach of contract claims against UIM carrier; court also orders that negligence claim is to be tried first).

Dauphin County [Split of authority]

Oaks v. Erie Insurance Exchange and Austin, No. 2012 - CV - 3741 - CV (C.P. Dauphin Co. May 8, 2015 Bratton, J.)(In a decision handed down after a mistrial in a matter, Judge Bruce F. Bratton of the Dauphin County Court of Common Pleas granted the tortfeasor Defendant's Motion for Reconsideration of the court's prior denial of the tortfeasor's Motion to Sever the negligence claims asserted against him by the Plaintiff from the Plaintiff's UIM claims against the carrier for purposes of the retrial of the matter.).

Phaler v. Ray and Westfield Ins. Co., No. 2014 CV 7332 (C.P. Dauph. Co. April 3, 2015 Bratton, J.) (By Order only, the court granted a third party tortfeasor's Preliminary Objections seeking the severance of the negligence claims asserted against him from the breach of contract claims asserted against the UIM carrier.)

[See several Dauphin County decisions above in favor of consolidation in Consolidation section above].

Delaware County

Bryant v. Graham and Allstate, No. 09-11736 (Del. Co. May 26, 2010, Pagano, J.)(Order only)(Court grants Motion to Sever breach of contract and bad faith claims asserted against UM carrier from the UM claim and the negligence claim against the tortfeasor; no motion to sever UM claim from negligence claim filed).

Ryan and Neilson v. Hatala and Allstate, No.: 12-004323 (C.P. Delaware Nov. 12, 2012 Proud, J.) (In Order without Opinion, the trial court sustain the third party Defendant's Preliminary Objections under arguments that the presence of the UIM carrier in action would cause the tortfeasor Defendant undue prejudice and would violate Pa. R.E. 411. The third party Defendants also argued that the causes of action were impermissibly joined together under Pa. R.C.P. 2229(b) because the issues and proofs at issue in the Plaintiffs' negligence claims were different from the issues and proofs at issue in their claims against the UIM carrier. The court granted the Preliminary Objections of the third party Defendants and dismissed them from the action without prejudice to the Plaintiffs' right to institute a separate action against them).

Erie County

Crownover v. Orzano, Liberty Mutual Group, Inc., et.al., No. 14329-2011 (C.P. Erie Co. March 9, 2012 Garhart, J.)(Court sustained a tortfeasor's Preliminary Objections on the subject of improper joinder and ordered that the Plaintiff "shall try their liability claims against [the tortfeasor Defendant] separately from their contract/UIM claims against the other Defendants.").

Santos v. Erie Insurance Exchange, No. 12835-Civil-2011 (C.P. Erie Co. Feb. 22, 2012 Connelly, J.)(Court granted the carrier's Motion to Sever the Plaintiffs' UIM breach of contract claim and bad faith claim in a post-Koken matter. The Court also sustained the Defendant's Motion to Strike claims for punitive damages and attorney's fees asserted under the breach of contract portion of the claim.

Brown v. Haas and State Farm, No. 11658 - 2011 (C.P. Erie Oct. 31, 2011 Connelly, J.)(In an Opinion, court granted the preliminary objections filed by the tortfeasor defendant seeking a severance of the negligence and UIM claims on the basis that the tortfeasor would be prejudiced by the introduction of evidence of insurance in violation of Pennsylvania law. The defense also argued that the claims did not arise out of the same "occurrence" in that one action was in negligence and the other in contract. Court also struck bad faith claim filed against UIM carrier as sufficient facts not pled in support of that claim.).

But see above in "Consolidation" listing Jordan v. White, Gonzales, and Erie Insurance Exchange, No. 15540-Civil-2009 (Erie Co. October 28, 2010, Garhart, J.)(Court denied Preliminary Objections by the UIM/UM carrier seeking severance; Court says it will entertain a motion to sever at the time of trial, if desired).

Forest/Warren Counties (37 Judicial District combined)

Burr v. Erie Ins. Exchange, No. 008-Civil-2011/Forest County Branch (Warren and Forest Co., April 6, 2011, Hammond, J.)(Court ruled in an Order only that a combined UIM and Bad Faith lawsuit would be severed and that the discovery and trial in the Bad Faith aspect of the case could only occur after the resolution of the UIM case by verdict or settlement.).

Lackawanna County

(Note split of authority on the issue-see Lackawanna County cases under consolidation section above)

Mehall v. Benedetto and Erie Ins. Exchange, 09-CV-744 (Lacka. Co. 2010, Thomson, S.J.)(Creating a split of authority in this county, the court orders that third party and UIM claims should be severed into two separate lawsuits; Motion for Reconsideration denied by July 10, 2010 Court Order issued by Judge Thomson).

Lancaster County

Burton v. Burton and USAA, No CI-09-09343 (Lanc. Co. , Miller, J.)(Opinion and Order issued granting a tortfeasor's preliminary objections filed by both the tortfeasor and the first party carrier arguing a misjoinder of actions. As a result of this decision, the negligence claim asserted against the tortfeasor was severed from the breach of contract claim asserted by the Plaintiff against his own carrier related to a denial of first party medical benefits following a peer review.).

Lebanon County

Dunkelberger v. Erie Insurance Company, No. 2010-Civil-01956 (Leb. Co. Jan. 24, 2011, Charles, J.)(Motion of Erie Insurance Company for an Emergency Protective Order and Stay granted in terms of any discovery requested by the Plaintiff on the bad faith claim. Judge Charles also ruled that the Plaintiff’s UIM claim was to be severed from the bad faith claim.).

Mercer County

Gravatt v. Smith and Unitrin Auto and Home Ins. Co., No. 2010-Civil-2155 (Mercer County Oct. 15, 2010, Fornelli, P.J.)(Court grants UIM carrier's Preliminary Objections/Motion to Sever and grants plaintiff right to re-file against UIM carrier under a different docket number).

Monroe County

Kemp v. Mut. Benefit Ins. Co., PICS Case No. 15-0517 (C.P. Monroe Co. Jan. 14, 2015 Williamson J.)(In an Opinion, the court granted a defendant carrier's motion to sever bad faith

claims from the contractual claims in the early stages of the matter, but denied the motion for a stay on any bad faith discovery requests, noting that any issues in that regard could be brought to the court on further motion.).

Comrie v. Atlantic State Ins. Co., PICS Case No. 14-096 (C.P. Monroe Co. May 29, 2014 Zulick, J.), (Judge Arthur Zulick of the Monroe County Court of Common Pleas granted a UIM carrier's Motion to Sever and Stay the bad faith portion of the claims asserted in a post-Koken matter.)

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Montgomery County

Dunne v. Closs, Progressive, et al., No. 09-38446 (Montg. Co. June 29, 2010, Moore, J.)(Court upholds forum selection clause of UIM carrier and severs UIM claim with allowance for Plaintiff to re-file in appropriate county).

Philadelphia County

(Note split of authority on the issue-see Philadelphia County cases in consolidation section above)

Silver v. Wood, April Term, 2013 No. 00276 (C.P. Phila. Sept. 20, 2013 Lachman, J.)(Following *Sehl v. Neff* decision by Judge Tereshko, trial court denied plaintiff's Petition to Amend Complaint to Add Additional Defendant, holding that negligence claim against defendant driver is wholly separate from UIM claim; court also cites failure of plaintiff to allege joint and several liability; court also cites potential confusion of issues and prejudice if joinder allowed.).

Parsons v. Hinton and State Farm Insurance Company, No. 02137, August Term, 2010 (C.P. Phila. Co. Dec. 1, 2011, Tereshko, J.) (By Order only, Court grants tortfeasor Defendants' Motion to Sever actions filed by Plaintiff against third party tortfeasor and UIM carrier).

Burke v. Burke and State Farm Insurance Company, No. 1875, August Term, 2011 (C.P. Phila. Co. Jan. 27, 2012) (By Order only, Court denies Motion to Consolidate filed by UIM carrier).

Antrim v. Bullard and State Farm Mutual Automobile Insurance Company, No. 294, June Term, 2011 (C.P. Phila. Co. Oct. 11, 2011, Manfredi, J.) (By Order only, Court grants tortfeasor Defendants' Preliminary Objections and severs the claims against the tortfeasor against the claims against the UIM carrier; court also transfers claims against the tortfeasor Defendants to Delaware County as the Plaintiff did not allege any basis for venue in Philadelphia as to the tortfeasor Defendants).

Lewis v. Fischer and Donegal Mutual Ins. Co., Nos. 11-081103, 11-080580 (C.P. Phila. Co. Oct. 12, 2001 Manfredi, J.)(By Order, court granted the Defendants' Preliminary Objections and ordered that the breach of contract claims against the UIM carrier and the negligence claims against the third party tortfeasor be severed.)

Dangler v. Robinson and AIU Insurance Company, March Term 2009, No. 4027, Control No. 09-092828 (Phila. Co. 2010, DiVito, J.)(Court issued an Order only granting the tortfeasor's preliminary objections, alleging a misjoinder of actions, in a post-Koken case. The Court, by Order only and without any Opinion, severed the UIM claim and ordered that it be tried separately from the third party claim.).

Astillero v. Harris and State Farm, August Term 2009, No. 1580 (Phila. Co. Dec. 11, 2009, Fox, J.)(Without Opinion, court orders claims are severed "for purposes of trial only" presumably meaning claims may proceed together in discovery phase).

Morawski v. Dunleavy and State Farm, October Term 2009, No. 03493 (Phila. Co. April 26, 2010,

Overton, J.)(third party claims and UIM claims severed for all purposes, not just for trial purposes).

Schramm v. McComb and Penn National Insurance and State Auto Insurance, No. 1002 03394 (Phila. Co. May 10, 2010, Tereshko, J.) (Court granted the preliminary objections of the tortfeasor defendants and severed the third party claims from the UIM claims and ordered separate trials).

Thomas v. Titan Auto Ins., Nationwide Ins, Jones, and Briel, March Term 2010, No. 03050 (Phila. Co. May 10, 2010, Tereshko, J)(Court severed the third party liability claim filed against an owner and operator of a vehicle, which vehicle was reported stolen after the accident, from

the uninsured (UM) motorist claim against one of the carrier defendants; Judge Tereshko not only severed the matters from each other but also transferred both claims to Montgomery County.)(Update: In court's Rule 1925 Opinion, trial court clarified that it was only sending the negligence claim to Montgomery County and was keeping the UIM claim in Philadelphia County).

Carter v. Gillespie and Travelers Insurance Company, April 2010 Term No. 0564 (Phila Co. May 27, 2010, Tereshko, J.) (Court granted the third party tortfeasors' Preliminary Objections asserting a Misjoinder of Actions; Judge Tereshko ordered the actions severed and also mandated that the matters were to be tried separately.).

Levin v. Grandinetti and Progressive Direct Ins. Co., March Term, 2010 No. 0080 (Phila. Co. June 14, 2010, Tereshko, J.)(Without Opinion, preliminary objections of UIM carriers to joinder of claims with negligence claims granted.).

Saltzburg v. Haynes and State Farm, November Term, 2010, No. 03227 (Phila. Co. Jan. 14, 2011 Tereshko, J.)(Preliminary Objections of tortfeasor defendant on basis of improper venue and improper joinder of third party negligence case with UIM case; claim against tortfeasor dismissed without prejudice to Plaintiff's right to re-file in Montgomery county).

Pascal v. Nalbondian, et al., July Term, 2010, No. 2118, Control No. 10121229 (Phila. Co. Jan. 14, 2011, Fox, J.)(Tortfeasor's motion to sever negligence claims from claims filed against UIM carrier granted).

Gollinge-Motroni v. Machado and Allstate Ins. Co., October Term 2010 No. 002528 (Phila. Co. Jan. 14, 2011, Tereshko, J.)(negligence and UIM claims severed and cases transferred for improper venue).

Levin v. Grandinetti and Progressive, March Term 2010, No.: 0080 (C.P. Phila. June 14, 2010 Tereshko, J.). (Without Opinion, court granted Preliminary Objections of the UIM carrier based upon improper joinder of causes of action and improper venue. The court severed Plaintiff's claims against the third party Defendant and the UIM carriers without prejudice to the Plaintiff's right to file their UIM claims in Montgomery County or the US District Court for the Eastern District of Pennsylvania).

Matteo v. Andeno and Progressive, February Term, 2012 No.: 0193 (C.P. Phila. Aug. 2, 2012, Aug. 30, 2012 Tereshko, J.). (By Order without Opinion on August 12, 2012, the trial court sustained the UIM carrier's Preliminary Objection based upon improper joinder and severed Plaintiff's negligence and UIM claim. By subsequent Order dated August 30, 2012, the trial court further ordered that the Plaintiffs' negligence and UIM claims be severed in their entirety for purposes of discovery and trial).

Saltzburg v. Hayes and State Farm, November Term, 2010 No.: 03227 (C.P. Phila. Jan. 19, 2011 Tereshko, J.) (Without Opinion, a trial court sustained the Preliminary Objections of the third party Defendant seeking severance of the Plaintiff's third party and UIM claims. The court dismissed Plaintiff's claims against the third party Defendant without prejudice to the Plaintiff's right to refile those claims in Montgomery County).

Skrocki v. Erie Insurance and Row, February Term, 2012, No.: 03826 (C.P. Phila. Feb. 12, 2013 Tereshko, J.) (Following an automobile accident in Berks County, Plaintiff filed a combined negligence/UIM action against the third party Defendant, a resident of Berks County, and the Plaintiff's UIM carrier. The UIM carrier filed Preliminary Objections seeking severance of the Plaintiff's negligence in UIM claims and also filed a Motion to Transfer Venue in the basis of forum known conveniens. The trial court granted the carrier's Preliminary Objections and severed the actions but denied the UIM carrier's Motion to Transfer Venue. The trial court also ordered that the Plaintiff's claims against the third party Defendant will be tried first followed by a trial of the Plaintiff's claims against the UIM carrier and that both trials would be held before different juries. In this matter, the third party Defendant had also filed Preliminary Objections to improper venue, seeking a transfer of the matter from Berks County. The trial court sustained the third party Defendant's Preliminary Objections and ordered the entire matter transfer to Berks County. The trial court held that because the UIM claim had been severed from the negligence claim, the accident occurred in Berks County, and that the third party Defendant was served with process in Berks County, there is simply no connection with this case to support proper venue in Philadelphia County.

Nelson Rios v Andy Parker, Phila. Ct. Com. Pl., November Term, 2011, No. 01208, Control No. 11123460 (March 1, 2012, Lachman, J.) (negligence claim against other driver and UIM claim against own insurer; PO filed by the other driver granted to sever tort and contract claims).

Tuan Ahn Ly v. Shawn Murray, Phila. Ct. Com. Pl., June Term, 2013, No. 02575, Control No. 3071025 (August 6, 2013, Lachman, J.) (granting insurance company's preliminary objection and severing UM and UIM claims from tort claims plaintiffs had against the other driver; order adopts all of the other opinions as the opinion in this motion).

Jamal Giddings v. Traci Poe, Phila. Ct. Com. Pl., October Term 2011, No. 02393, Control No. 12013528 (April 30, 2012, Lachman, J.) (negligence claim against other driver and UM claim against own insurer; Motion filed by UM carrier is granted to sever tort and contract claim).

Kevin Nguyen v Anvel Dorvil, Phila. Ct. Com. Pl., October Term, 2011, No. 03880, Control No. 12020163 (May 10, 2012, Lachman, J.) (negligence claim against other driver and UIM claim against own insurer; Motion filed by UIM carrier is granted to sever tort and contract claim).

Schuylkill County

[SPLIT OF AUTHORITY: Note above Schuylkill County decision in favor of consolidation.]

Barrett v. Pennsylvania Nat'l Mut. Cas. Ins. Co., No. S-1861-2012 (C.P. Schuylkill Co. March 18, 2013 Domalakes, J.)(Judge John E. Domalakes granted an insurance carrier defendant's motion to sever a bad faith claim from a UIM claim but refused to stay the bad faith discovery.).

Corridoni v. Temple and MetLife Auto & Home et.al., No. S-1470-2010 (Schuylkill Co. Nov. 5, 2010, Russell, J.)(Order entered severing the claims against the tortfeasor from the claims asserted against the insurance company Defendants for UIM benefits.).

Susquehanna County

Zembrzicki v. Allstate Fire & Cas. Ins. Co., 2013 - 475CP(C.P. Susq. Co. 2013 Seamans, J.)(By Order only court granted a UIM carrier's request to sever the UIM claim from a bad faith claim.)

Venango County

Boughner v. Erie Ins. Exchange, No. 1875 - Civil - 2010 (C.P. Venango Co. April 16, 2012 Boyer, J.)(Court granted the UIM carrier's Motion to Sever the Bad Faith Count from the UIM contractual claim and also the Motion to Stay any discovery under the bad faith claim.).

Washington County

Barcus v. Mannino and Allstate Ins. Co., 2009 - Civil - 10171 (Wash. Co. June 15, 2010, Loughran, S.J.)(Court rules in favor of UIM carrier's preliminary objections and severs third party liability claims from the companion UIM claims.).

York County

Forry v. Erie Insurance Exchange, No. 2013-SU-1162-89 (C.P. York Co. July 15, 2013 Linebaugh, P.J.)(President Judge Stephen P. Linebaugh of the York County Court of Common Pleas granted a Motion to Sever and Stay the bad faith claim filed Defendant, Erie Insurance Exchange in a combined UIM/bad faith litigation. The Court further ordered that all further pleadings, discovery, and trial of the bad faith claim was severed and stayed until after the Plaintiff's claims for UIM benefits have been concluded by settlement or final verdict.).

Grove v. Uffelman and Progressive Ins. Co., 2009 WL 3815756, No. 2009-SU-2878-01 (York Co., Nov. 9, 2009, Chronister, J.)(Court orders UIM claim and third party claim severed).

Winkler v. Argabright and Allstate Insurance Company, No. 2009 -SU -001244 -01 (York Co. May 20, 2010 Chronister, Thompson, Linebaugh) (Court issued an en banc decision, by Order only, granting a tortfeasor's Preliminary Objections and request for severance of the third party claims from the UIM claims).

POST-KOKEN TRIAL COURT DECISION ON CONSOLIDATION vs. SEVERANCE OF CLAIMS WHERE BAD FAITH IS ALLEGED

TRIAL COURT DECISIONS IN FAVOR OF CONSOLIDATION OF BAD FAITH CLAIM

(Decisions from across 5 Counties, the Federal Middle District Court, and Federal Western District Court)

United States Federal Middle District Court

Griffiths v. Allstate, No. 3:13 - CV - 02674 (M.D. Pa. Feb. 21, 2014 Mannion, J.), Middle District of Pennsylvania Federal Court Judge Malachy E. Mannion issued a detailed Opinion outlining his rationale for following the majority rule in the Middle District in favor of denying Motions to Sever bad faith claims from the breach of contract claim for UIM benefits.

Calestini v. Progressive Cas. Ins. Co., 3:09-CV-1679 (M.D.Pa. Dec. 16,2009, Caputo, J.)(Court ruled against the Defendant insurance carrier's Motion to Bifurcate and Stay Discovery in a post-Koken case in which a UIM breach of contract action was joined with the bad faith action.).

United States Federal Western District Court

Cooper v. MetLife Auto and Home, No. 687-2013 (W.D.Pa. Aug. 6, 2013 Conti, J.)(Court denied UIM carrier's motion to sever and stay bad faith claim for failure to establish that bifurcation was appropriate. Court found that the issues in the UIM and bad faith claims were not significantly different, many of the witnesses would be the same in both trials, and any minor prejudice that might exist was outweighed by the court's obligation to promote the expeditious resolution of a case.).

Craker v. State Farm, No. 2011 – Civil – 0225 (W.D.Pa. Sept. 29, 2011 Lancaster, C.J.)(Carrier's request to sever Bad Faith and UIM claim denied).

Allegheny County

Gunn v. Auto. Ins. Co. of Hartford, Conn., 2008 WL 6653070, GD07-Civil-002888 (Alleg. Co. July 25, 2008, Wettick, J.)(Bad faith claim and UIM claim allowed to proceed together; Court also rules that Plaintiff's efforts to discover UIM carrier's evaluation information denied as such information is protected from discovery by the privilege against the disclosure of mental impressions, conclusions, or opinions of a representative of a party regarding value. Court notes that such discovery would be allowed once UIM claim is concluded by jury verdict or otherwise.).

Vernon v. Erie Insurance, No. GD 08-10406 (Allegheny Co. 2009, Wettick, J.)(court issued an Order without Opinion denying Erie's motion to stay discovery and bifurcate the UIM Claim from the Bad Faith claim; the bad faith claim was scheduled to be tried immediately upon the UIM case being sent to the jury. Also, the tort action was consolidated for trial with the UIM action. Ultimately, the case settled before jury selection).

Clinton County

Wentzel v. Swinehart and State Farm, No. 375-10 CV (June 3, 2010, Williamson, P.J.)(Court denied both the UIM carrier's Motion to Sever the Plaintiff's bad faith claim and the request that the bad faith claim be stayed pending the resolution of the underinsured motorist action.).

Lackawanna County

Decker v. Nationwide Ins. Co., 2008 WL 6653069, 2005-Civil-1863//2006-Civil 2119 (Lacka. Co. March 4, 2008, Minora, J.)(consolidation permitted of bad faith action against UIM carrier and declaratory judgment action regarding coverage).

See also Decker v. Nationwide, 2007 WL 6853118 (Lacka. Co. 2007, Minora, J.).

But see Lackawanna County trial court decisions below in favor of severance of bad faith claims.

Luzerne County

Pelton v. Allstate Fire and Cas. Ins. Co., No. 1507-CV-2015 (C.P. Luz. Co. June 3, 2015 Pierantoni, J.)(In an Order only, the court denied the UIM carrier's motion to stay bad faith discovery in a case where the parties had previously agreed to a severance of the bad faith claims from the UIM claims).

Schuckers v. Penn National Mut. Cas. Ins. Co., No. 9080 of 2011 (C.P. Luz. Co. Nov. 6, 2012 Amesbury, J.)(Court denied motion to sever and stay bad faith claims pending resolution of UIM claims by noting there would be a "severance of the case by application of law" in that the UIM case would be tried first followed by a bench trial on the bad faith claim. Court also denied the UIM carrier's motion to stay bad faith discovery, noting that UIM carrier had the right to protect non-discoverable information and that the UIM carrier's conclusions or opinions regarding the strengths and weaknesses of the Plaintiff's case would be protected from disclosure until the completion of the UIM claim; cites Judge Wettick's decision in *Gunn v. Auto. Ins. Co. of Hartford*.).

Borthwick v. Webb and GEICO, No. 2735-Civil-2010 (Luz. Co. Sept. 21, 2010, Cosgrove, J.)(Court denied the Preliminary Objections of Defendant GEICO, the UIM carrier, seeking a severance of the first party claims against it(breach of contract (UIM) and Bad Faith) from the third party liability claims, and, in the alternative a severance of the UIM claims and Bad Faith claims filed against GEICO. In a footnote in his Opinion, Judge Cosgrove cited to *Pennsylvania*

Law Weekly article by Daniel E. Cummins, Esquire outlining decisions in this regard around the state. Case was allowed to proceed in a consolidated fashion).

Monroe County

Kemp v. Mut. Benefit Ins. Co., PICS Case No. 15-0517 (C.P. Monroe Co. Jan. 14, 2015 Williamson J.)(In an Opinion, the court granted a defendant carrier's motion to sever bad faith claims from the contractual claims in the early stages of the matter, but denied the motion for a stay on any bad faith discovery requests, noting that any issues in that regard could be brought to the court on further motion.).

Comrie v. Atlantic State Ins. Co., PICS Case No. 14-096 (C.P. Monroe Co. May 29, 2014 Zulick, J.), (Judge Arthur Zulick of the Monroe County Court of Common Pleas granted a UIM carrier's Motion to Sever and Stay the bad faith portion of the claims asserted in a post-Koken matter.)

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Montgomery County

Dininni v. Encompass Insurance Company, No. 2010 - Civil - 04615 (Montg. Co. June 16, 2010, Tilson, J.)(Court stayed discovery as to claims of bad faith and unfair trade practices until underlying UIM claims were tried or otherwise resolved. While ruling in favor of the defense in that regard, the court did also deny the defense request that the Bad Faith Claim and Unfair Trade Practices Claim be severed from the UIM claim.).

TRIAL COURT DECISIONS IN FAVOR OF SEVERANCE OF BAD FAITH CLAIM

(Decisions from across 16 Counties and Federal Eastern District Court)

Eastern District Federal Court

Morninghoff v. Tilet and Allstate Insurance Company, No. 11-Civil-7406 (E.D. Pa. June 27, 2012 McLaughlin, J.),(In Opinion, Federal Eastern District Court Judge Mary A. McLaughlin granted the Defendant, Allstate Insurance Company's Motion to Stay Plaintiffs' bad faith claims in a post-Koken litigation.)

Allegheny County

Wutz v. Smith and State Farm, GD07-021766 (Allegh. Co. March 2, 2010, Strassburger, J.)(Court ordered the severing of a third party claim from a UIM claim and Bad Faith claim against the UIM carrier. In this case, the UIM carrier paid the third party defendant's settlement offer under Daley-Sand and thereby stepped into the Plaintiff's shoes against the third party tortfeasor. Since there was no longer any "live dispute" against a tortfeasor in this matter, Judge Strassburger thought it appropriate to sever the cases and to allow the Plaintiff to proceed on the UIM and bad faith claims first.).

Jenkins v. State Farm, G.D. 07-020234 (Alleg. Co. Sept. 9, 2009, Wettick, J.)(Motion to stay and sever granted in UIM/Bad Faith case.

Beaver County

Muller v. Erie Insurance Exchange et al., No. 11362-2011 (C.P. Beaver Co., February 1, 2012, Kunselman, J.)(Court granted the preliminary objections of Erie Insurance Exchange and ordered the contractual and statutory bad faith counts to be severed from the underinsured motorist breach of contract count. The Court also issued a stay order on the bad faith action.).

Bucks County

Hartman v. Schofield and Progressive Insurance, 2009 - Civil - 11956 (Bucks Co. Feb. 16, 2010, Waite, J.)(Court granted Preliminary Objections of the UIM carrier requesting that the bad faith claim be severed from the third party claims and the UIM claim all filed under one caption).

Butler County

Marburger v. Erie Ins. Exchange, 2009-Civil-10927 (Butler Co. June 19, 2009, Horan, J.)(Motion to Sever and Stay on behalf of Erie granted; court precluded plaintiffs from conducting any bad faith discovery until further Order of court and permitted severance and stay of plaintiff's bad faith action pending resolution of UIM claim).

Crawford County

Rucci v. Erie Insurance Exchange, No. A.D. 2014 - 803 (C.P. Crawford Co. February 5, 2015 Stevens, J.)(In an Opinion, the court ruled in favor of the UIM carrier's severance of and stay of bad faith claims in the combined UIM Breach of Contract and Bad Faith cause of action in the case).

Delaware County

Bryant v. Graham and Allstate, No. 09-11736 (Del. Co. May 26, 2010, Pagano, J.)(Order only)(Court grants Motion to Sever and severs breach of contract and bad faith claims asserted against UM carrier from the UM claim and the negligence claim; no motion to sever negligence claim from UM claim filed).

Erie County

Santos v. Erie Insurance Exchange, No. 12835-Civil-2011 (C.P. Erie Co. Feb. 22, 2012 Connelly, J.), (Court granted the carrier’s Motion to Sever the Plaintiffs’ UIM breach of contract claim and bad faith claim in a post-Koken matter. The Court also sustained the Defendant’s Motion to Strike claims for punitive damages and attorney’s fees asserted under the breach of contract portion of the claim.)

Brown v. Haas and State Farm, No. 11658 - 2011 (C.P. Erie Oct. 31, 2011 Connelly, J.)(In an Opinion, court struck bad faith claim filed against UIM carrier as sufficient facts not pled in support of that claim.).

Forest/Warren Counties (37 Judicial District combined)

Burr v. Erie Ins. Exchange, No. 008-Civil-2011/Forest County Branch (Warren and Forest Co., April 6, 2011, Hammond, J.)(Court ruled in an Order only that a combined UIM and Bad Faith lawsuit would be severed and that the discovery and trial in the Bad Faith aspect of the case could only occur after the resolution of the UIM case by verdict or settlement.).

Lackawanna County

Golin v. Baggetta and The Travelers Home and Marine Ins. Co., 2014 CV 1839 (C.P. Lacka. Co. Dec. 3, 2014 Braxton, S.J.)(Motion to Sever Bad Faith claim and Stay Bad Faith Discovery denied).

Augustine v. Erie Ins. Exchange, 2006-Civil-416 (Lacka. Co. August 1, 2008, Mazzoni, J.)(Court allowed discovery in a UIM/bad faith case to proceed in a consolidated fashion but grants motion to sever for trial purposes).

Smith v. GEICO, No. 10-CIV-2024 (Lacka. Co. Aug, 18, 2010, Thomson, S.J.) (Court sustained GEICO's Preliminary Objections to the extent that the bad faith claim contained in the Plaintiff's Complaint would be severed from the action and the parties would proceed with the claims bifurcated. Although defense counsel also requested a stay of any bad faith discovery, that part of the Defendant's request was not addressed in the Court Order.).

Lebanon County

Dunkelberger v. Erie Insurance Company, No. 2010-Civil-01956 (Leb. Co. Jan. 24, 2011 Charles, J.)(Motion of Erie Insurance Company for an Emergency Protective Order and Stay in terms of any discovery requested by the Plaintiff on the bad faith claim. Judge Charles also ruled that the Plaintiff's UIM claim was to be severed from the bad faith claim.).

Monroe County

Kemp v. Mut. Benefit Ins. Co., PICS Case No. 15-0517 (C.P. Monroe Co. Jan. 14, 2015 Williamson J.)(Judge David J. Williamson granted a defendant carrier's motion to sever bad faith claims from the contractual claims in the early stages of the matter but denied the request a stay on any bad faith discovery.).

Comrie v. Atlantic State Ins. Co., PICS Case No. 14-096 (C.P. Monroe Co. May 29, 2014 Zulick, J.), (Judge Arthur Zulick of the Monroe County Court of Common Pleas granted a UIM carrier’s Motion to Sever and Stay the bad faith portion of the claims asserted in a post-Koken matter.).

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Schuylkill County

Barrett v. Pennsylvania Nat'l Mut. Cas. Ins. Co., No. S-1861-2012 (C.P. Schuylkill Co. March 18, 2013 Domalakes, J.)(Judge John E. Domalakes granted an insurance carrier defendant's motion to sever a bad faith claim from a UIM claim but refused to stay the bad faith discovery.).

Susquehanna County

Zembrzicki v. Allstate Fire & Cas. Ins. Co., 2013 - 475CP(C.P. Susq. Co. 2013 Seamans, J.)(Court granted a UIM carrier's request to sever the UIM claim from a bad faith claim.).

Venango County

Boughner v. Erie Ins. Exchange, No. 1875 - Civil - 2010 (C.P. Venango Co. April 16, 2012 Boyer, J.)(Court granted the UIM carrier's Motion to Sever the Bad Faith Count from the UIM contractual claim and also the Motion to Stay any discovery under the bad faith claim.).

York County

Forry v. Erie Insurance Exchange, No. 2013-SU-1162-89 (C.P. York Co. July 15, 2013 Linebaugh, P.J.)(President Judge Stephen P. Linebaugh of the York County Court of Common Pleas granted a Motion to Sever and Stay the bad faith claim filed Defendant, Erie Insurance Exchange in a combined UIM/bad faith litigation. The Court further ordered that all further pleadings, discovery, and trial of the bad faith claim was severed and stayed until after the Plaintiff's claims for UIM benefits have been concluded by settlement or final verdict.).

SUPERIOR COURT DECISIONS IN POST-KOKEN CASE ON CONSOLIDATION vs. SEVERANCE OF CLAIMS

None to date.

But see Richner v. McCance and Erie Insurance Group, 2011 WL 32499, 2011 Pa.Super. 4, No. 2045 WDA 2009 (Pa.Super. Jan. 6, 2011, Stevens, Donohue, and Ott, JJ.).(The Superior Court applied Pa.R.C.P. 2229(b), pertaining to the joinder of actions, and found that the requirements of that rule were not met to allow for a joinder of a tort claim with a declaratory judgment action on a coverage question. More specifically, the court found that, although the tort allegations and the coverage question essentially both arise out of the same accident, the liabilities of the respective defendants arise from different circumstances, i.e. one in tort and the other in contract law.

The court also found that the questions of law at issue were not common to both actions.

In so ruling the Superior Court rejected the trial court's reliance on post-Koken cases ruling in favor of the consolidation of tort claims and claims for UIM benefits under Pa.R.C.P. 2229(b), as the analysis in those types of cases was "inapposite" to the issue in this case involving the separate and different question of the combination of a tort claim with a request for a declaratory judgment in response to a coverage question. Id. at p. 17, n. 4.

In that same footnote, the Superior Court also stated, "We emphasize that we are not here deciding the propriety of the joinder of third party liability claims with post-Koken UIM benefit claims.").

COORDINATION OF ACTIONS FILED IN SEPARATE COUNTIES

Luzerne County

Orsulak v. Penn National Mutual Cas. Ins. Co. and Penn National Ins., No. 12255-Civil-2010 (Luz. Co., April 12, 2011, Van Jura, J.)(Court addresses Motion for Coordination of in Post-Koken case involving claims filed in different counties; applies Rule 213.1 and rules that cases should be coordinated because they arise out of same transaction or occurrence.) *affirmed Orsulak v. Penn National Mutual Cas. Ins. Co*., No. 957 M.D.A. 2011 (Pa. Super. Feb. 23, 2012 Gantman, Alan and Mundy, JJ., (Memorandum Opinion by Mundy, J.),

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POST-KOKEN CASES ON VENUE

PENNSYLVANIA SUPERIOR COURT DECISIONS

O'Hara v. The First Liberty Ins. Corp. d/b/a Liberty Mut. Ins. Group, 984 A.2d 938, 2009 WL 3720649 (November 9, 2009, Judges Freedberg, Cleland and Kelly)(Consolidation vs. severance issue not implicated as plaintiff settled with tortfeasor and only sued UIM carrier in post-Koken case; Superior Court upholds UIM carrier's forum selection clause requiring UIM lawsuit to be brought in the county of the insured's legal domicile at the time of the accident)(As of November 30, 2009, the Plaintiff had filed for re-argument en banc before the Superior Court, which request was denied by way of a December 30, 2009 Order of Court.). [appeal denied, 2010 WL 1752268, 39 EAL 2010 (May 4, 2010)].

Sehl v. Neff and State Farm, No. 3438 EDA 2009 (Pa.Super. July 25, 2011 Olson, Freedburg, Colville, JJ.)(opinion by Freedburg) (Accident and tortfeasor defendant from Montgomery County; UIM carrier's policy did not have forum selection clause; Plaintiff filed in Philadelphia County on grounds that UIM carrier conducted business in that County; Tortfeasor defendant argued, under Pa.R.C.P. 1006, that since tortfeasor and UIM carrier are not joint tortfeasors, tortfeasor defendant cannot be compelled to litigate where it might be appropriate based upon proper venue for UIM carrier. Tortfeasor defendant's preliminary objections based upon improper venue granted at trial court level and affirmed here by Superior Court. Accordingly, where there is no venue selection clause, it appears that venue in a post-Koken case is proper where the accident occurred, where the tortfeasor defendant resides, or where the tortfeasor

defendant can be served as that is proper venue for the tortfeasor defendant under Pa.R.C.P. 1006 and also proper venue for the UIM carrier defendant as the UIM carrier defendant, as a corporate entity that conducts business in all counties of Pennsylvania.

CASES WHERE UIM CARRIER HAS FORUM SELECTION CLAUSE

Federal Eastern District Court of Pennsylvania

Otto v. Erie Ins. Exch., No. 13-CV-06722 (E.D.Pa. March 31, 2014 Brody, J.)(Plaintiff sued UIM carrier in Eastern District. Erie forum selection clause provides that "[s]uit must be brought in a court of competent jurisdiction in the county and state of [plaintiff's] legal domicile at the time of the accident." Plaintiff resided in Montgomery County and sued in Eastern District Federal Court. UIM carrier's motion to dismiss pursuant to *forum non conveniens* doctrine arguing that only the Montgomery Court of Common Pleas was the proper venue was rejected as the Eastern District Federal Court was a court of competent jurisdiction that covered Montgomery County.).

Allegheny County

Lowry v. Aliquo and Erie Insurance Exchange, 159 PLJ 35 (Alleg. Co. 2010, Strassburger, J.)(Court enforced the carrier's forum selection clause for a UIM claim which required venue against UIM carrier in Butler County under facts presented. Court then severed the cases under Butler County and transferred only the UIM portion of the action to Butler County.).

Erie County

Werner v. Jamison and Erie Ins., 2011 CV-3221 (March 7, 2012 Evans, J.)(Court issues Order only denying preliminary objections filed by Erie Insurance asserting improper venue.).

Lackawanna County

Kichline v. Erie Ins. Exchange, 2009 CIV 3052 (Lacka. Co. Feb. 16, 2010, Thomson, S.J)(Venue/forum selection clause of UIM policy upheld and case transferred to proper county).

Luzerne County

Walls v. Erie Ins. Co. and Muneshwar, No. 15095 of 2009 (Luz. Co. Feb. 24, 2010, Amesbury, J.)(court transferred a post-Koken case to its proper venue of Columbia County. Plaintiff resided in Columbia County and was involved in a Luzerne County car accident. Plaintiff filed a lawsuit in Luzerne County against the tortfeasor and the UIM carrier. The policy of the UIM carrier, Erie Insurance, provided that all UIM claims must be filed in the county of the Plaintiff's residence which, as noted, was Columbia county in this case; court transferred case to Columbia County).

Montgomery County

Dunne v. Closs, Progressive, et al., No. 09-38446 (Montg. Co. June 3, 2010, Moore, J.)(Court upholds forum selection clause dismisses case with allowance for Plaintiff to re-file in appropriate county.).

Philadelphia County

Motta v. Allstate Ins. Co., March Term 2013, NO. 0839 (C.P. Phila. Co. April 22, 2013)(Court issued Order only upholding Allstate's Preliminary Objections based upon forum selection clause and transferred the case to Berks County.).

Fish v. Erie Insurance Company, No. 003411 Jan. Term, 2013 (Phila. Co. 2013 New, J.)(Court issues Order only granting Erie Insurance Company's preliminary objections and transferring venue of a UIM case from Philadelphia to Franklin County. Relies on Erie's forum selection clause. UPDATE: Trial court subsequently issued a Rule 1925 Opinion providing rationale in support of its Order. That Opinion can be viewed HERE).

Lewis v. Fischer and Donegal Mutual Ins. Co., Nos. 11-081103, 11-080580 (C.P. Phila. Co. Oct. 12, 2001 Manfredi, J.)(In this case, by way of Order only with an explanatory footnote, Judge William J. Manfredi granted the Defendants' Preliminary Objections and ordered that the breach of contract claims against the UIM carrier and the negligence claims against the third party tortfeasor be severed. Judge Manfredi also noted that venue as to any non-insurance Defendant would be transferred to Delaware County given that there was no basis for venue against those Defendants in Philadelphia under Pa. R.C.P. 1006(c)(1). Judge Manfredi also shipped off the claims against the insurance company Defendant to Chester County based upon the insurance contract form selection clause. As such, the ultimate result of this order was that the post-Koken case filed in the Philadelphia County Court of Common Pleas was severed and sent elsewhere.).

Sehl v. Neff and State Farm, May Term 2009 No. 2487 (Phila. Co. Oct. 22, 2009, Allen, J.)(Accident and tortfeasor defendant from Montgomery County; UIM carrier's policy did not have forum selection clause; Plaintiff filed in Philadelphia County on grounds that UIM carrier conducted business in that County; Tortfeasor defendant argued, under Pa.R.C.P. 1006, that since tortfeasor and UIM carrier are not joint tortfeasors, tortfeasor defendant cannot be compelled to litigate where it might be appropriate based upon proper venue for UIM carrier. Tortfeasor defendant's preliminary objections based upon improper venue granted. [See above synopsis of Superior Court Affirmance.].

Campbell v. Kelly and State Farm, December Term 2009 No. 208 (Phila. Co. March 10, 2010, Overton, J.)(Accident and tortfeasor defendant from Bucks County; UIM carrier's policy did not have forum selection clause; Plaintiff filed in Philadelphia County on grounds that UIM carrier conducted business in that County; Tortfeasor defendant argued, under Pa.R.C.P. 1006, that since tortfeasor and UIM carrier are not joint tortfeasors, tortfeasor defendant cannot be compelled to litigate where it might be appropriate based upon proper venue for UIM carrier. Tortfeasor defendant 's preliminary objections based upon improper venue denied.).

Pippett v. Radu and State Farm, March Term 2010, No. 3305 (Phila. Co. July 14, 2010, Tereshko, J.)(Court considered a motion for reconsideration of the court's prior overruling of the tortfeasor's preliminary objections on the issue of improper venue. Case arose out of a Delaware County motor vehicle accident and all of the individuals involved resided in Delaware County as well. The Plaintiff joined State Farm in the litigation on a UIM claim (State Farm's policy language requires that the UIM lawsuit be pursued in the same suit as the claim against the tortfeasor). The Plaintiff filed in Philadelphia County presumably due to State Farm's presence in that county. Although Judge Tereshko originally denied the tortfeasor defendant's Preliminary Objections, upon revisiting the matter via the motion for reconsideration, the Judge issued this July 14, 2010 Order granting the Preliminary Objections and ordered the matter transferred to Delaware County).

Kochergina v. Liberty Mutual Ins. Co., et al., August Term 2010, No. 2880 (Phila. Co. October 1, 2010 Moss, J.)(Court granted the tortfeasor's defendant's Preliminary Objections based upon an allegation of improper venue. The parties resided in Bucks County and the accident happened in Bucks County. Plaintiff filed in Philadelphia on the grounds that the UIM carrier did business there. The Court ruled in favor of the tortfeasor defendant's improper venue Preliminary Objections and transferred the case to Bucks County with all costs to be borne by plaintiff. UIM carrier had also filed Preliminary Objections based upon forum selection clause. Judge Moss also ruled that the decision on the remainder of the Defendants' Preliminary Objections were deferred and left to be decided by the Bucks County Court of Common Pleas.).

Miscannon v. State Farm, GEICO, and Norris, Term June 2010, No. 003302 (Phila. Co. Nov. 30, 2010, J. Rau)(UIM carrier's transfer of venue request denied. No rationale is stated in the Order. It is noted that UIM carrier's preliminary objections were filed late--denied on procedural basis?).

Gollinge-Motroni v. Machado and Allstate Ins. Co., October Term 2010 No. 002528 (Phila. Co. Jan. 14, 2011, Tereshko, J.)(negligence and UIM cases severed and cases transferred for improper venue).

Johns v. Jones and Erie Insurance Exchange, January Term, 2011, No.: 1395 (C.P. Phila. Mar. 17, 2011 Moss, J.) (A Delaware County resident Plaintiff was injured in a motor vehicle accident in Philadelphia County, which accident was allegedly caused by a tortfeasor who resided in Philadelphia County who was operating a vehicle owned by a third party Defendant owner who resided in Delaware County. At the time of the accident, the Plaintiff maintained a UIM policy with Erie, which contained a venue clause that required all suits against Erie for UIM benefits to be filed in the insured's legal domicile at the time of the accident. The Plaintiff filed suit in Philadelphia County against third party tortfeasors and the UIM carrier. Erie filed Preliminary Objections to improper venue citing the venue clause. Without Opinion, the trial court entered an Order transferring the entire matter to the Court of Common Pleas of Delaware County).

Levin v. Grandinetti and Progressive, March, Term 2010, No.: 0080 (C.P. Phila. June 14, 2010 Tereshko, J.) (Montgomery resident Plaintiffs were involved in an accident in Philadelphia County. Two of the third party Defendants resided in New Jersey and a third was resident of Montgomery County. Without Opinion, the trial court granted the Preliminary Objections of the UIM carrier and severed the Plaintiff's claims against the third party Defendants and the UIM carriers, without prejudice to the Plaintiffs' right to file their UIM claims in Montgomery County or in the U.S. District Court for the Eastern District of Preliminary Objections.

Morroney v. Allstate, November Term, 2011, No.: 0931 (C.P. Phila. Dec. 28, 2011 Moss, J.) (Montgomery County resident Plaintiff was injured in a motor vehicle accident. The Plaintiff maintained a UIM policy with Allstate that contained a venue clause requiring all lawsuits against Allstate for UIM benefits to "be brought, heard, and decided in the county in which your [the insureds] address shown on the policy declarations is located." Following the accident, the Plaintiff filed suit in Philadelphia County given that Allstate regularly conducted business in that county. Allstate filed Preliminary Objections to improper venue, citing the venue clause. Without Opinion, the trial court sustained Allstate's Preliminary Objections and transferred the entire matter to the Court of Common Pleas in Montgomery County).

CASES WHERE UIM CARRIER DOES NOT HAVE FORUM SELECTION CLAUSE

Lancaster County

Burton v. Burton and USAA, No CI-09-09343 (Lanc. Co. , Miller, J.) (Court issued Order granting a tortfeasor's preliminary objections filed by both the tortfeasor and the first party carrier arguing a misjoinder of actions. As a result of this decision, the negligence claim asserted against the tortfeasor was severed from the breach of contract claim asserted by the Plaintiff against his own carrier related to a denial of first party medical benefits following a peer review. As part of the rationale of her decision, Judge Miller also noted that allowing the cases to remain together may have brought the issue of "insurance" in front of the jury during the trial of the negligence claim of the tortfeasor in violation of Pennsylvania Rule of Evidence 411.)

Luzerne County

Wissinger v. Brady, Laubach, and State Farm, No. 3792-Civil-2010 (Luz. Co. Aug. 16, 2010, Van Jura, J.)(Court granted the Preliminary Objections of a third party defendant asserting improper venue under Pa. R.C.P. 1006. The plaintiff involved in this matter was from Northumberland County. The accident occurred in Northumberland County. The tortfeasor defendants were from Montour County. Plaintiff sued in Luzerne County on grounds that State Farm did business there. Court rejected argument as tortfeasors and State Farm were not joint tortfeasors. Case transferred to Northumberland County.)(Appealed but then appealed discontinued due to partial settlement of case)

Philadelphia County

Levin v. Grandinetti and Progressive Direct Ins. Co., March Term, 2010 No. 0080 (Phila. Co. June 14, 2010, Tereshko, J.)(Plaintiff resident of Montgomery County injured in Philadelphia County Defendant. Two of third party defendants were New Jersey residents and the third tortfeasor was a resident of Montgomery County. Without Opinion, court granted preliminary objections of UIM carriers and severed the third party negligence claims from the UIM claims without prejudice to the Plaintiff's right to file their UIM claims in Montgomery County or in the U.S. District Court for the Eastern District.).

Kochergina v. Liberty Mutual Ins. Co., et al., August Term 2010, No. 2880 (Phila. Co. October 1, 2010 Moss, J.)(Court granted the tortfeasor's defendant's Preliminary Objections based upon an allegation of improper venue. The plaintiff and the tortfeasor defendant resided in Bucks County and the accident happened in Bucks County. Also, the UIM carrier had a forum selection clause the application of which called for the case to go to Bucks County. The court ordered case transferred to Bucks County with all cost to be borne by Plaintiff. Judge Moss also ruled that the decision on the remainder of the Defendants' Preliminary Objections were deferred and left to be decided by the Bucks County Court of Common Pleas.).

Johns v. Jones and Erie Ins. Exchange, Jan. Term, 2011, No. 1395 (Phila. Co. March 17, 2011, Moss, J.)(Delaware Plaintiff injured in Philadelphia accident by Philadelphia resident Defendant. Plaintiff covered by Erie Insurance policy which has venue selection clause (insured's "legal domicile at time of accident"). Plaintiff files suit against third party tortfeasor and Erie in Philadelphia County. Without Opinion, court grants Erie Insurance preliminary objections on improper venue and transfers the entire case to Delaware County.).

Spano v. Carney and Nationwide, March Term, 2008, No.: 5707 (C.P. Phila. July 3, 2008 New, J.) (Bucks County resident Plaintiff was injured in a car accident in Bucks County caused by a third party Defendant who resided in Bucks County. Plaintiff filed suit against the third party Defendant and the UIM carrier in Philadelphia County on the basis that Nationwide conducted business in Philadelphia. The third party Defendant filed Preliminary Objections to improper joinder and improper venue. Without Opinion, the trial court denied both Preliminary Objections).

Taylor v. Nationwide and Natale, August Term, 2008, No.: 3204 (C.P. Phila. Dec. 14, 2009 Abramson, J.) (Plaintiff and third party Defendants were residents of Chester County and were involved in a motor vehicle accident in Chester County. Plaintiff filed a lawsuit against the third party Defendants and the UIM carrier of Philadelphia County. Without Opinion, the trial court denied third party Defendant’s Motion to Transfer Venue from Chester County on grounds of forum known conveniens).

PRELIMINARY OBJECTIONS TO CROSS-CLAIM FILED BY UIM CARRIER AGAINST THIRD PARTY TORTFEASOR

Luzerne County

Emery v. Culver and Nationwide, No. 6764 – CIVIL – 2010 (C.P. Luz. Co. Sept. 28, 2011 Burke, J.)(By Order only, Court sustained the tortfeasor Defendant's Preliminary Objections and struck the Co-Defendant UIM carrier's cross-claim for contribution or indemnification; defense relied upon Monroe County decision in Bridgeman noted below).

Monroe County

Bridgeman v. Cruz, PICS Case No. 11-0238 (Monroe Co., Jan. 7, 2011, Wallach, Miller, J.)(Court sustained the tortfeasor Defendant's Preliminary Objections and struck the Co-Defendant UIM carrier's cross-claim for contribution or indemnification after finding that such claim was not yet ripe for judicial review.).

TRIAL COURT DECISIONS IN POST-KOKEN CASES ON DISCOVERY AND EVIDENTIARY ISSUES

DISCOVERY TIMETABLE IN UIM/BAD FAITH POST-KOKEN CASE

United States Federal Western District Court

Craker v. State Farm, No. 2011 – Civil – 0225 (W.D.Pa. Sept. 29, 2011 Lancaster, C.J.)(Court rejects carrier's request for stay of any bad faith discovery until UIM claim completed).

Allegheny County

Wutz v. Smith and State Farm Ins. Co., No. GD07-21766 (Allegheny Co., Sept. 9, 2009, Wettick, J.)(Judge sets up discovery time table in case where UIM breach of contract claim consolidated with bad faith claim--no discovery on bad faith until UIM claim concluded).

Vernon v. Erie Insurance, No. GD 08-10406 (Allegheny Co. 2009, Wettick, J.)(court issued an Order without Opinion denying Erie's motion to stay discovery and bifurcate the UIM Claim from the Bad Faith claim; the bad faith claim was scheduled to be tried immediately upon the UIM case being sent to the jury. Also, the tort action was consolidated for trial with the UIM action. Ultimately, the case settled before jury selection).

Butler County

Marburger v. Erie Ins. Exchange, 2009-Civil-10927 (Butler Co. June 19, 2009, Horan, J.)(Motion to Sever and Stay on behalf of Erie granted; court precluded plaintiffs from conducting any bad faith discovery until further Order of court and permitted severance and stay of plaintiff's bad faith action pending resolution of UIM claim).

Lebanon County

Dunkelberger v. Erie Insurance Company, No. 2010-Civil-01956 (Leb. Co. Jan. 24, 2011 Charles, J.)(Motion of Erie Insurance Company for an Emergency Protective Order and Stay in terms of any discovery requested by the Plaintiff on the bad faith claim until resolution of UIM claim. Judge Charles also ruled that the Plaintiff's UIM claim was to be severed from the bad faith claim.).

Monroe County

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Montgomery County

Dininni v. Encompass Insurance Company, No. 2010 - Civil - 04615 (Montg. Co. June 16, 2010, Tilson, J.)(Court stayed discovery as to claims of bad faith and unfair trade practices until underlying UIM claims were tried or otherwise resolved. While ruling in favor of the defense in that regard, the court did also deny the defense request that the Bad Faith Claim and Unfair Trade Practices Claim be severed from the UIM claim.).

DISCOVERY DEPOSITION OF A UIM CLAIMS REPRESENTATIVE IN POST-KOKEN CASE

Eastern District of Pennsylvania Federal Court

Wagner v. State Farm Mut. Automobile Ins. Co., No. 5:13 - CV - 06645 (E.D. Pa. Feb. 20, 2014 Sitarski, M.J.)(Magistrate Judge Lynne A. Sitarski of the Eastern District Federal Court of Pennsylvania denied the Plaintiff's Motion to Compel and granted State Farm's Motion for a Protective Order to prevent the deposition of a State Farm claims representative and claims manager as requested by the Plaintiff in this Post-Koken UIM case.)

Dauphin County

Welcomer v. Donegal Mut. Ins. Co., No. 2011-CV-474 (Dauphin Co. June 24, 2011, Lewis, J.)(In Order only, court grants Plaintiff's motion to compel discovery of UIM carrier's settlement evaluation and reserves information; also allows for deposition of claims rep without limitations).

Erie County

Engel v. State Farm Mut. Auto. Ins. Co., No. 13083 - Civil - 2011 (C.P. Erie Co. Dec. 11, 2012 Connelly, J.)(Court issued an Order only granting State Farm's Motion for a Protective Order for Corporate Designee Deposition and quashing a Notice of Deposition sent to a UIM carrier's claims representative. Court emphasized that many of the questions posed in the Notice of Corporate Designee Deposition were previously answered in written discovery responses submitted to State Farm and that the Plaintiff did not object to any such responses. Court noted that the remainder of the questions noted in the Deposition Notice were either irrelevant or impermissibly inquired into the corporate designee's (i.e. claims representative's) mental

impressions, conclusions, or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics in violation of Pa.R.C.P. 4003.3.).

Luzerne County

Griffin and Erie Ins. Exchange, No. 17274 of 2012 (C.P. Luz. Co. Oct. 4, 2013 Burke, J.)(By Order only, Court grants the Motion of Erie Insurance Company for a Protective Order against the Plaintiff's request for a deposition of that UIM carrier's claims representative in a Post-Koken automobile accident case.).

Krznefski v. Bish and State Farm, No. 16643 of 2012 (C.P. Luz. Co. Oct. 4, 2013 Burke, J.)(By Order only the Court grants the Motion of State Farm Mutual Automobile Insurance Company for a Protective Order against the Plaintiff's request for a deposition of that UIM carrier's claims representative in a Post-Koken automobile accident case.).

Paulewicz v. Fronczkewicz and State Farm, No. 10655 of 2009 Civil (Luz. Co. Feb. 1, 2010, Amesbury, J.)(In Order only, Court allows deposition of claims representative but precludes questions regarding mental impressions, conclusions or opinions regarding value of claim).

Pike County

Liszka v. Ferro and GEICO, No. 109 - 2010 - Civil (Pike Co. March 20, 2011 Chelak, J.)(In an Opinion, Court denies motion for protective order by GEICO seeking to stop Plaintiff's deposition of claims representative; however, court cautions that deposition may only cover those areas allowed by Rules of Civil Procedure pertaining to discovery).

DISCOVERY OF RESERVES AND CARRIER'S SETTLEMENT EVALUATION INFORMATION

Discovery Precluded

Allegheny County

Gunn v. Auto. Ins. Co. of Hartford, Conn., 2008 WL 6653070, GD07-Civil-002888 (Alleg. Co. July 25, 2008, Wettick, J.)(Bad faith claim and UIM claim allowed to proceed together; Court also rules that Plaintiff's efforts to discover UIM carrier's evaluation information denied as such information is protected from discovery by the privilege against the disclosure of mental impressions, conclusions, or opinions of a representative of a party regarding value. Court notes that such discovery would be allowed once UIM claim is concluded by jury verdict or otherwise.).

Wutz v. Smith and State Farm, 2009 WL 2920956, No. GD07-021766 (Alleg. Co. Sept. 9, 2009, Wettick, J.)(Plaintiff's motion to compel discovery of State Farm's UIM evaluation information denied as such information is protected from discovery by the privilege against the disclosure of mental impressions, conclusions, or opinions of a representative of a party regarding value.).

Butler County

Weichey v. Marten and Allstate, 2009 WL 4395727, A.D. No. 09-10116 (Butler Co., June 11, 2009, Yeager, J.)(Court orders severance of UIM and third party claims under the general rationale that insurance is not admissible in third party negligence actions).

Luzerne County

Migatulski v. Nationwide, Eberts, et al., No. 7269 - Civil - 2006 (Luz. Co. Sept. 7, 2010, Wetzel, J.) (UIM carrier's objection to discovery of reserves information sustained).

Discovery Allowed

Eastern District of PA Federal Court

Borgia v. State Farm Mut. Auto. Ins. Co., No. 14-3149 (E.D.Pa. Sept 3, 2014 Sanchez, J.)(Eastern District of Pennsylvania Federal Court addressed a discovery dispute in a UIM breach of contract/bad faith lawsuit arising out of the handling of an underinsured motorist claim. The court recognized that the work product doctrine protected from discovery those documents,

among others, that were produced in anticipation of litigation. The UIM carrier was deemed to have reasonably anticipated litigation regarding the Plaintiff's UIM claim when the company first retained outside counsel to assist in handling the claim. According to the court in *Borgia*, this date essentially becomes the dividing line for when materials needed to be produced. Thus, since the UIM carrier was not deemed to reasonably anticipate litigation until it assigned defense counsel, the UIM carrier was required by the court to produce unredacted documents, including reserves information contained therein, with respect to those documents produced in the claims file prior to the time defense counsel was assigned by the carrier.

Dauphin County

Welcomer v. Donegal Mut. Ins. Co., No. 2011-CV-474 (Dauphin Co. June 24, 2011, Lewis, J.)(In Order only, court grants Plaintiff's motion to compel discovery of UIM carrier's settlement evaluation and reserves information; also allows for deposition of claims rep without limitations; case was settled shortly after Order was entered).

EVIDENCE OF INSURANCE NOT ADMISSIBLE AT TRIAL

Allegheny County (Split of Authority)

Zubeck v. Yogan and State Farm, No. GD 09-014254, 1380 WDA 2012 (C.P. Alleg. Co. Nov. 16, 2012 McCarthy, J.)(Court ruled that it was permissible to hold a Post-Koken trial without identifying the UIM carrier particularly where it appears from the Opinion that the Plaintiff was in agreement with that scenario going into the trial)(But see *Stepanovich* decision below from Allegheny County).

Crawford County

Pelc v. Burkell & State Farm, No. A.D. 2009 483 (C.P. Crawford Sept. 23, 2013)(Plaintiff filed suit against third party tortfeasor and UIM carrier. Plaintiff settled with tortfeasor prior to trial and proceeded to trial against UIM carrier. On the basis of Pa.R.E. 411, UIM carrier filed motion in limine to preclude Plaintiff from identifying UIM carrier by name at trial and to preclude evidence pertaining to the details of the Plaintiff's auto insurance coverage, the UIM policy limits, and the Plaintiff's settlement with the third party defendant. Motion in Limine denied with respect to request that UIM carrier not be identified at trial. However, the Motion in

Limine as to the remaining issues was granted as the court found that the relevancy of that more specific insurance information was outweighed by the risk of unfair prejudice and the increased potential of confusing the issues and misleading the jury.).

Mercer County

Gravatt v. Smith and Unitrin Auto and Home Ins. Co., 2010-Civil-2155 (Mercer Co. Oct. 15, 2010, Fornelli, P.J.)(Claims severed at Preliminary Objections stage under primary rationale that evidence of insurance is not admissible in negligence actions).

Monroe County

Orsulak v. Windish, No. 55-Civil-2011 (C.P. Monroe Co. Jan. 14, 2013 Williamson, J.)(Court granted motion for severance of UIM claims and bad faith claim. Court refused to issued blanket order freezing bad faith discovery efforts but noted that the carrier could bring issues to the court by way of motion if necessary. Court also separately allowed for consolidation of UIM and third party claims and ordered that any mentioning of insurance would be precluded in that portion of the trial of the matter).

Northampton County

Firoozifard v. Krome and State Farm, No. C-48-Civil-2009-14369 (Northampton Co. June 21, 2010 Beltrami, J.)(Court denied a third party tortfeasor defendant's motion to sever the third party liability claims from the UIM and UM claims; court also notes that insurance issues can be kept from jury and the task of applying third party credit to determine UIM award can be kept away from jury and handled by the court only after the verdict)

INSURANCE EVIDENCE ADMISSIBLE IN POST-KOKEN CASES

PENNSYLVANIA SUPERIOR COURT

Stepanovich v. McGraw and State Farm, 78 A.3d 1147 (Pa.Super. Oct. 15, 2013 Ford Elliott, P.J.E., Ott, J., Musmanno, J.)(Opinion by Ott, J.)(Concurring and Dissenting Op. by Ford Elliott, P.J.E.), *appeal denied* 11 WAL 2014 (Pa. 2014)(Superior Court found no due process violation by the trial court's decision to allow the Post-Koken trial involving a tortfeasor defendant and a UIM carrier defendant to proceed in front of a jury without mention of the UIM carrier as a party Defendant. Yet, the Court did rule that Pa.R.E. 411, pertaining to preclusion of mention of liability insurance at trial, does not apply in context of references to UIM insurance at trial. However, open issue remains on whether common law prohibition of mentioning other forms of insurance at trial serves to preclude evidence of insurance in this context.)

Allegheny County (Split of authority)

Stepanovich v. McGraw and State Farm, No. GD 10-16523 (C.P. Allegh. Co. Dec. 10, 2012)(Trial court initially allowed trial to proceed without mention of insurance company UIM defendant; but, in post-trial motions, trial court reversed itself and held that to not identify UIM insurance company defendant while allowing UIM carrier's defense attorney to participate at trial, violates Plaintiff's due process rights; as noted directly above, this decision was overturned on appeal(But see *Zubeck* decision above from Allegheny County)).

Beaver County

Six v. Phillips and Nationwide Ins. Co., 12227-Civil-2008, 2009 WL 2418861 (Beaver Co. June 30, 2009, Kwidis, J.)(dicta)(Preliminary objection by tortfeasor to joinder of third party claim and UIM claim under one caption rejected; court also rules that evidence of insurance may come into evidence at trial for limited purposes.).

Bradish-Klein v. Kennedy and State Farm, PICS Case No. 09-2059 (C.P. Beaver Dec. 3, 2009, Kwidis, J.)(dicta)(State Farm was not only UIM carrier, but also provided the liability coverage to the third party tortfeasor; Plaintiff initially filed suit against the third party tortfeasor only and then moved to amend the Complaint to add the UIM claim against the UIM carrier, State Farm. Third party tortfeasor opposed the motion to amend on the grounds that "insurance" would then come into play during the trial; Judge Kwidis relied on his prior decision in Six v. Phillips and Nationwide Ins. Co. to allow the amendment and allow the joinder of the third party claim and

UIM claim under one caption; court again notes that fact that evidence of insurance may come in at trial does not preclude joinder).

Centre County

Fennessey v. Sweeney and State Farm Mut. Automobile Ins. Co., No. 2012-2865 (Centre Co. Dec. 11, 2012 Ruest, J.)(dicta)(In Opinion, court denied Defendants' preliminary objections asserting misjoinder of actions and also denied companion motion to sever to allow case to proceed in consolidated fashion. Court states that Pa.R.E. 411 does not warrant severance.).

Lackawanna County

Bingham v. Poswistilo, Ritz, and Erie Ins., No. 10 - CV - 6020 (Lacka. Co., April 8, 2011, Nealon, J.)(In the most thorough Opinion anywhere on the issue, Judge Nealon ruled in favor of consolidation of third party claims and UIM claims for discovery purposes but left door open for parties to revisit severance issue at time of trial; However, court did end up severing claims based upon venue issue, with UIM claim being kept in Lackawanna County pursuant to forum selection clause in policy and with tortfeasor claims being sent to Lehigh County where venue was proper for that part of case. In dicta, the court also noted various avenues to handle evidence of "insurance" at trial).

Pike County

Jannone v. McCooey and State Farm, 2009 WL 2418862, 2320-2008-Civil (Pike Co. April 1, 2009, Chelak, J.)(dicta)(Preliminary objection by tortfeasor to joinder of third party claim and UIM claim under one caption rejected; court also rules that evidence of insurance may come into evidence at trial for limited purposes).

____

AGREEMENT TO ADR (PRIVATE ARBITRATION)

Monroe County

Campbell v. SafeCo Ins. Co. of Ill., PICS Case No. 13-2525 (C.P. Monroe Co. July 10, 2013 Williamson, J.) (Monroe County trial court a Plaintiff's Petition to Set Aside an Arbitration Award in an uninsured (UM) motor vehicle accident case where the parties had privately agreed to arbitrate the matter where there was no agreement to arbitrate under the policy, i.e. it was a Post-Koken policy with no arbitration clause. After the arbitrator granted the Defendant UM carrier's motion to dismiss, the Plaintiff filed a Petition to Vacate the Arbitrator's Decision as contrary to law. Judge Williamson concluded that, in the absence of a formal arbitration agreement, the case should be considered as if the parties submitted the matter to common law arbitration under 42 Pa. C.S.A. §7341.)

MOTION TO BIFURCATE TRIAL

FEDERAL COURT DECISIONS (Split of Authority)

SEPARATE TRIALS ALLOWED

Eastern District Federal Court

Moninghoff v. Tilet and Allstate Insurance Company, No. 11-Civil-7406 (E.D. Pa. June 27, 2012 McLaughlin, J.),(Federal Eastern District Court Judge Mary A. McLaughlin granted the Defendant, Allstate Insurance Company's Motion to Stay Plaintiffs' bad faith claims in a post-Koken litigation).

REQUEST FOR BIFURCATED TRIAL DENIED

Western District Federal Court

Cracker v. State Farm Mut. Auto. Ins. Co., No. 11-0225, 2012 U.S. Dist. Lexis 109357 (W.D. Pa. Aug. 3, 2012 Lancaster, C.J.)(United States District Court for the Western District of Pennsylvania denied State Farm's Motion In Limine to bifurcate a breach of contract and bad faith post-Koken lawsuit.)

STATE COURT DECISIONS ON BIFURCATION

State Appellate Court Decision

Stepanovich v. McGraw and State Farm, 78 A.3d 1147 (Pa.Super. Oct. 15, 2013 Ford Elliott, P.J.E., Ott, J., Musmanno, J.)(Opinion by Ott, J.)(Concurring and Dissenting Op. by Ford Elliott, P.J.E.)*, appeal denied* 11 WAL 2014 (Pa. April 22, 2014) (Superior Court found no due process violation by the trial court's decision to allow the Post-Koken trial involving a tortfeasor defendant and a UIM carrier defendant to proceed in front of a jury without mention of the UIM carrier as a party Defendant. Yet, the Court did rule that Pa.R.E. 411, pertaining to preclusion of mention of liability insurance at trial, does not apply in context of references to UIM insurance at trial. However, open issue remains on whether common law prohibition of mentioning other forms of insurance at trial serves to preclude evidence of insurance in this context; Pennsylvania Supreme Court denied Petition to Appeal.).

(Split of Authority at trial court level)

SEPARATE TRIALS ALLOWED

Allegheny County

Vecchio v. Tunison and Erie Insurance Exchange, No.: GD11-009690 (C.P. Allegheny Oct. 9, 2012 Folino, J.) (In Order without Opinion, trial court granted Motion to Bifurcate filed by UIM carrier in the combined negligence/UIM action, which motion was filed less than two (2) months before this scheduled date of the trial listing. The trial court ordered that the Plaintiffs' third party negligence claim would be tried before the jury first, with the UIM claim tried separately thereafter.)

Dauphin County

Oaks v. Erie Insurance Exchange and Austin, No. 2012 - CV - 3741 - CV (C.P. Dauphin Co. May 8, 2015 Bratton, J.)(In a decision handed down after a mistrial in a matter, Judge Bruce F.

Bratton of the Dauphin County Court of Common Pleas granted the tortfeasor Defendant's Motion for Reconsideration of the court's prior denial of the tortfeasor's Motion to Sever the negligence claims asserted against him by the Plaintiff from the Plaintiff's UIM claims against the carrier for purposes of the retrial of the matter.).

Lehigh County

Purta v. Blower and Erie Ins. Exch., No. 2010-C-2515 (C.P. Lehigh Co. Sept. 20, 2011 Reibman, J.)(Court addressed the seemingly novel issue presented by a Motion to Severance filed by the UIM carrier Defendant to bifurcate jointly filed third party and underinsured motorist (UIM) claims into separate trials. In a detailed Order, Judge Reibman granted the UIM carrier's Motion for Severance and ordered that the case proceed to trial with only the Plaintiffs and Defendant tortfeasor being involved in the first trial.).

REQUEST FOR BIFURCATED TRIAL DENIED

Lackawanna County

Kujawski v. Fogmeg and Allstate, No. 2012-CV-3395 (C.P. Lacka. Co. April 15, 2015, Nealon, J.)(In an Order, Court denies tortfeasor Defendant's motion for bifurcation; court also outlines appropriate jury instructions for a Post-Koken trial involving both a third party tortfeasor and UIM carrier defendants).

Luzerne County

Loefflad v Nauks &Allstate Fire & Casualty Ins. Co., No. 8673 of 2010 (C.P. Luz. Co. June 20, 2012) (By Order only, Judge Gelb denies request to bifurcate Post-Koken case for trial).

Price v Price, Auto Glass Unlimited & State Farm, No. 13625 of 2010(C.P. Luz. Co. June 20, 2012)(By Order only, Judge Gelb denies request to bifurcate Post-Koken case for trial).

Borthwick v. Webb, No. 2735-Civil-2010 (C.P. Luz. Co. Sept. 7, 2012 Vough, J.)(Court ruled at consolidated Post-Koken trial that "Plaintiff is limited to informing the jury that he had an underinsured policy with Defendant, GEICO Insurance Company. There shall be no other evidence presented to the jury regarding insurance.").

Schuylkill County

Post v. Schnerring and Liberty Mut. Ins. Co., No. S-1887-12 (C.P. Schuylkill Co. Oct. 22, 2013 Dolbin, J.)(Judge Cyrus Palmer Dolbin of the Schuylkill County Court of Common Please denied Motions to Bifurcate the trial filed by both the UIM carrier, Liberty Mutual Insurance Company and the third party Defendant.).

FORM MOTION TO BIFURCATE: In February of 2012, I had an opportunity to draft a Motion to Bifurcate Trial and Supporting Brief in favor of a tortfeasor defendant in a Lackawanna County Post-Koken case. Anyone desiring a copy of the same may contact me at dancummins@comcast.net.

JURY INSTRUCTIONS IN POST-KOKEN CASE

[To view Links to sample Jury Instructions, as well as Voir Dire Questions, for a Post-Koken case, click this LINK.

Lackawanna County

Lackawanna County

Kujawski v. Fogmeg and Allstate, No. 2012-CV-3395 (C.P. Lacka. Co. April 15, 2015, Nealon, J.)(In an Order, Court denies tortfeasor Defendant's motion for bifurcation; court also outlines appropriate jury instructions for a Post-Koken trial involving both a third party tortfeasor and UIM carrier defendants).

Moritz v. Horace Mann Insurance, 2014 WL 5817681, No. 2013-CV-544 (C.P. Lacka. Co. Nov. 10, 2014 Nealon, J.)(Judge Terrence R. Nealon addressed important issues with respect to a post-Koken automobile accident matter that is headed towards trial. Jury instructions utilized by Judge Nealon are outlined in detail in Opinion. Instructions noted to be appropriate for a case where Plaintiff previously settled third party claim against tortfeasor and was proceeding at trial against UIM carrier only. *See Kujawski v. Fogmeg and Allstate*, No. 2012-CV-3395 (C.P. Lacka. Co. April 15, 2015, Nealon, J.).

DELAY DAMAGES

United States Eastern District Federal Court

Heebner v. Nationwide Ins. Enterprise, No. 10-2381 (E.D. Pa. Sept. 28, 2011)(Court holds that delay damages are to be included as a component of the compensatory damages to be paid under a UIM insurance policy.).

Pennsylvania Superior Court

Grossi v. Travelers Personal Insurance Company, 2013 Pa. Super. 284, No. 769 WDA 2012 (Pa. Super. Nov. 1, 2013 Bowes, Donohue, and Mundy, JJ) (Opinion by Mundy, J.)(Superior Court follows Pennsylvania Supreme Court's decision in *Marlette v. State Farm* limiting calculation of delay damages to molded amount downward to available policy limits as opposed to applying calculation of interest to excess verdict amount. Court does suggest that, in context of a Section 8371 bad faith action it may be within discretion of trial court to base calculation on verdict amount as opposed to policy limits amount in appropriate case).

Pennsylvania Supreme Court

Marlette v. State Farm, 2012 WL 6720916 (Pa. Dec. 28, 2012)(Opinion by Todd, J.)(McCaffery, J., dissenting),(Orie Melvin, J., not participating)(The Pennsylvania Supreme Court squarely addressed that very issue of whether, after a jury trial in an uninsured (UM) matter, a plaintiff is entitled to delay damages on the full amount of the jury's verdict or only on the reduced verdict after it has been molded down to the amount of the available uninsured motorists limits allowed by the automobile insurance policy at issue. After reviewing the law surrounding Pa.R.C.P. 238 delay damages, the Court ruled that a plaintiff may only recover delay damages as calculated on the amount of legally-recoverable damages to which the plaintiff is entitled pursuant to the verdict as molded downward to the amount of the available UM limits under the policy. The Court remanded the case back to the trial court for the correct calculation of the delay damages.).

POST-KOKEN UM/UIM CASES INVOLVING COMPANION WORKER'S COMP CLAIM

PENNSYLVANIA SUPERIOR COURT

Erie Ins. Exchange v. Conley, 29 A.3d 389, No. 1143 WDA 2010 (Pa.Super. June 9, 2011)(Superior Court affirms trial court's granting of a motion for judgment on the pleadings in favor of the carrier in a post-Koken lawsuit for UIM benefits on the basis that the exclusivity provision of the Worker's Compensation Act. Initially issued as a memorandum opinion and later converted to a published, precedential opinion).

Allegheny County

Erie Ins. Exchange v. Conley, No. GD 09-21471 (Alleg. Co. Aug. 27, 2010, Hertzberg, J.), in which the court granted a motion for judgment on the pleadings in favor of the carrier in a post-Koken lawsuit for UIM benefits on the basis that the exclusivity provision of the Worker's Compensation Act. Affirmed on appeal by Pennsylvania Superior Court--see above).

Lackawanna County

Petrochko v. Nationwide, No. 07 CV 7113 (Lacka. Co. Aug. 27, 2010, Nealon, J.). In granting the motion for summary judgment in favor of the UIM carrier, Judge Nealon noted that the issue presented had not been previously addressed by any appellate court in Pennsylvania.

FORM POST-KOKEN TRIAL JURY INSTRUCTIONS

4070-501 PLEADINGS

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

ALEXANDER COMRIE III and PATRICIA COMRIE, his wife,	:	**No. 8740 CV 2013**
Plaintiffs	:	
vs.	:	
ATLANTIC STATES INSURANCE COMPANY,	:	
Defendant	:	

OPINION

Plaintiffs Alexander Comrie III and Patricia Comrie have filed a complaint against Defendant Atlantic States Insurance Company, (Atlantic States) seeking underinsured motorist benefits (UIM claim) in Count I and damages for bad faith in the handling of their UIM claim pursuant to 42 Pa.C.S.A. §8371 in Count II. Atlantic States has filed a motion to sever and stay the bad faith and breach of contract counts of the complaint. The case arises out of a motor vehicle collision which took place on August 4, 2010. Plaintiff Alexander Comrie III was driving a vehicle that was allegedly rear-ended by a vehicle driven by Alice Hendershot. Plaintiffs brought suit against Ms. Hendershot in this court at No. 6514 Civil 2011. At compulsory arbitration, Plaintiffs were awarded $17,500. Plaintiffs appealed, and eventually sought consent to settle from Atlantic States. The case was then settled for $18,500. The settlement was for less than the Hendershot $25,000 liability policy limit.

The Comries filed their complaint on October 15, 2013. Atlantic States responded with preliminary objections on January 21, 2014. Atlantic States then filed a motion to sever and stay the bad faith claim. Both parties briefed their respective positions on this question, and the matter was argued before the court on April 7, 2014.

DISCUSSION

Atlantic States has moved to sever the breach of contract/UIM claim from the bad faith claim, and to stay the proceedings in the bad faith action until the UIM claim has been concluded. Pa.R.C.P. 213(b) provides:

> The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.

Pa.R.C.P. 213(b). "The decision whether to sever or bifurcate under Rule 213(b) is entrusted to the discretion of the trial court, which is in the best position to evaluate the necessity for taking measures the rule permits. *Gallagher v. Pa. Liquor Control Bd.*, 584 Pa. 362, 883 A.2d 550, 557 (2007)," *Ball v. Bayard Pump & Tank Co., Inc.*, 67 A.3d 759, 767 (Pa.2013). The trial court's severance of a cause of action should be "aimed at assuring efficiency and convenience, and avoiding prejudice...," *Id.* at 769.

The Comries object to severance of the UIM claim from their bad faith claim, contending that allowing both cases to proceed together will save judicial resources and avoid delay and expense. Atlantic States cites numerous common pleas cases where severance has been ordered. The Comries' UIM claim and the bad faith claim both arise from the collision of the Hendershot and Comrie vehicles and the insurance coverage

available to the Comries. The elements that must be proven in the two causes of action, however, are quite different.

The purpose of uninsured/underinsured coverage is to enable the insured to recover under his policy of insurance for damages for which the negligent motorist is legally liable. *Aetna Cas. & Sur. Co. v. Ilmonen*, 360 So.2d 1271 (Fla. App. 1978); J. Appelman, *Insurance Law and Practice*, § 5071.45, p. 102–103 and cases cited therein. *State Farm Mut. Auto. Ins. Co. v. Krewson*, 764 F.Supp. 1012, 1014 (E.D.Pa. 1991). The Pennsylvania Motor Vehicle Financial Responsibility Act provides:

> **(c) Underinsured motorist coverage.-** Underinsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefore from owners or operators of underinsured motor vehicles...

75 Pa.C.S.A. §1731(c).

Underinsured motorist claims are similar to third party claims because the contract of insurance sets them up that way:

> The traditional insuring agreement contained in the Uninsured and/or Underinsured Motorist section of the policy provides that the insurer agrees to pay to the insured the amount that the insured would otherwise be legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle. Under that insuring agreement, the amount of the benefits the insured is entitled to recover from the insurer is measured by the third party tort recovery the insured would have been entitled to from the tortfeasor if that tortfeasor had his own liability coverage (for uninsured motorist claims) or had enough such coverage (for underinsured motorist claims).

Condio v. Erie Ins. Exchange, 899 A.2d 1136, 1144 (Pa. Super. 2006) appeal denied, 590 Pa. 668, 912 A.2d 838 (2006).

The UIM provision in this case provides as follows:

> **UNDERINSURED MOTORIST COVERAGE-PENNSYLVANIA (NON-STACKED)**
>
> **INSURING AGREEMENT**
>
> A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury..."

Atlantic States brief.

The right to recover under a UIM endorsement is "derivative and conditional" and, consequently, any defense available to the alleged tortfeasor is also available to the insurer. *Brace v. Strother*, 90 N.C.App. 357, 360, 368 S.E.2d 447, 449, disc. review denied, 323 N.C. 171, 373 S.E.2d 104 (1988), *overruled on other grounds, Ragan v. Hill*, 337 N.C. 667, 447 S.E.2d 371 (1994). The UIM case then is very similar to a suit by the plaintiff against the tortfeasor.

The remedy for an insurer's bad faith conduct has been codified at 42 Pa.C.S.A. § 8371, which provides:

> **§ 8371. Actions on insurance policies**
> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

The bad faith statute extends to the handling of UIM claims, despite their similarity to third party claims." *Condio,* supra at 1142.

> To prove bad faith, a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim. *Terletsky v. Prudential Property and Casualty Insurance Company,* 649 A.2d, 680, 688 (Pa. Super. 1999). Bad faith claims are fact specific and depend on the conduct of the insurer vis à vis the insured. *Williams v. Nationwide Mutual Ins. Co.*, 750 A.2d 881, 887 (Pa.Super.2000).

Id. at 1143. "[W]hen faced with a [UIM] claim, an insurance company's duty to its insured is one of good faith and fair dealing." *Id.* at 1145. *Rhodes v. USAA Cas. Ins. Co.*, 21 A.3d 1253, 1261 (Pa. Super. 2011).

While the UIM claim will be decided by a jury, the bad faith claim will be decided by the court. *See Mishoe v. Erie Ins. Co.*, 824 A.2d 1153 (Pa. 2003) (there is no right to a jury trial for a claim of bad faith arising out of 42 Pa.C.S.A. § 8371). If the cases were tried together, evidence of Atlantic State's bad faith in handling the claim would not be relevant for the jury's determination of UIM liability and damages. The handling of the claim occurred after the collision and had nothing to do with the collision itself. The Comries' evidence of the handling of their claim would be offered to reflect poorly on the insurer in the bad faith case and the UIM case if they were tried together. However, this evidence is not relevant in the UIM case. The UIM count will therefore be severed from the bad faith count and tried separately.

Atlantic States also requests a stay of discovery in the bad faith case until the UIM case has been concluded. It alleges that discovery sought in the bad faith claim will be prejudicial in defending the UIM claim, and it points to discovery requests already presented by the Comries. Those requests include requests for production of documents seeking:

-investigation reports prepared by Atlantic States' employees or investigators evaluating the Comries' claims and responding to their litigation. *Plaintiffs' Request for Production No. 5.*

-all statements, memoranda, or records made by parties to this lawsuit or their representatives. *Id., No. 9*

-insurer's activity logs reflecting any communication between the insurer, its employees or adjusters with the insured party in this case. *Id. No. 10.*

The question of whether it is appropriate to stay discovery in this situation has not been yet been decided at the appellate level. Judge Lally Green commented on the issue in her dissent in *Gunn v. Auto. Ins. Of Hartford Conn.*, 971 A.2d 505 (Pa. Super. 2009):

> Bad faith actions explore the process by which the insurer handles the underlying claim. That process may commonly include reliance on privileged and otherwise-confidential information. The trial court's discovery order carries a significant risk that such information will be disclosed prematurely, before there is even an adverse ruling on the underlying claim. In my view, there would most often be no basis for a bad faith claim if the trial court rules in the insurer's favor on the underlying claim. Yet, insurers will be routinely compelled to disclose confidential material during the underlying litigation simply because the plaintiff chooses to raise a bad faith claim along with the UIM claim. As the Wisconsin Court of Appeals explained:
>
>> In litigating a claim of bad faith, the [insured] will be entitled to discovery of [the insurer's] work product and attorney/client material containing information relevant as to how the [insured's] claim was handled. This information would include [the insurer's] internal determination to deny benefits, its evaluation as to how a jury may value the [insured's] claim and its approach to settlement. This information would not be available to the [insured] if they were proceeding solely on a claim for UIM benefits.
>> *Dahmen v. Am. Family Mut. Ins. Co.*, 2001 WI App 198, 247 Wis.2d 541, 635 N.W.2d 1, 5 (Ct.App.2001).
>
> I am also concerned that insurers will be forced into unfair settlements as a result of having to litigate and provide discovery on both claims at the same time. These concerns go beyond the individual parties before this Court. Indeed, they implicate the handling of all UIM/bad faith claims litigated concurrently in Pennsylvania.

Id. at 513.

The issue has been discussed in many trial court rulings. Judge Charles of the Lebanon County Court of Common Pleas provided the following analysis:

> There are many reasons why an insurance company may not want to disclose information relevant to a bad faith inquiry while the underlying UIM claim is pending. Among these reasons are the proprietary nature of the information and the desire to avoid being placed in a tactical disadvantage during litigation of the underlying UIM claim.
>
> Within the context of a UIM claim, if we were to allow the plaintiff's lawyer to obtain and examine the insurance company's claims file, that could give the plaintiff's attorney insight into the insurer's subjective thoughts and analysis with respect to witnesses, its own insured and the value of the claim. The advantage this would give a plaintiff in a UIM litigation cannot be understated.
>
> *Dunkelberger v. Erie Insurance Company,* 21 Pa.D&C 5th 52 (Lebanon County C.P., Charles, J., 2011).

I am persuaded to both sever and stay the bad faith litigation. A central question in the bad faith case will be the amount of damages the Comries are entitled to from the tortfeasor. This will be decided by the trial of the UIM case. If the verdict is for less than available liability coverage the bad faith question would seem to be moot. If it is for more, the parties may be in a better position to settle the case depending on the difference between the verdict and any UIM offers. In any case, as soon as the verdict is rendered, a discovery schedule and non-jury trial date will be established. The bad faith case is now assigned to the same judge as the UIM case, and I (or another judge if for some reason I do not preside in the jury trial) will be familiar with the Comries' case against the tortfeasor following the jury trial.

Discovery disputes in the bad faith case may be more complex than those in the UIM case, because of work-product and privilege questions in the claim investigation process, for instance. These disputes can be time-consuming and expensive for the

parties. To the extent they are unnecessary because of the outcome of the UIM litigation or settlement, a benefit is realized by all. The Comries' concern with a prompt disposition of their bad faith claim can be addressed through the court's control of the discovery and the trial schedule of the severed cases.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

ALEXANDER COMRIE III and PATRICIA COMRIE, his wife,	:	**No. 8740 CV 2013**
Plaintiffs	:	
vs.	:	
ATLANTIC STATES INSURANCE COMPANY,	:	
Defendant	:	

ORDER

AND NOW, this 29th day of May, 2014, upon consideration of Defendant's Motion to Sever and Stay, the motion shall be granted pursuant to P.R.C.P. 213, and **IT IS ORDERED** as follows:

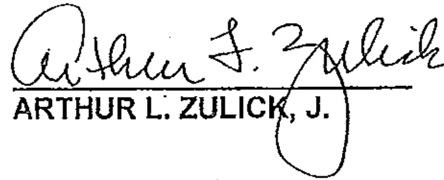
1. The UIM claim in Count I is severed from the bad faith claim in Count II.

2. Further pleadings, discovery and trial in the bad faith claim in Count II are stayed pending settlement or verdict or further order in the UIM claim in Count I.

3. A status conference is scheduled for the 14th day of July, 2014 at 9:00 o'clock a.m., in Chambers, Monroe County Courthouse, Stroudsburg, Pennsylvania to establish a discovery and trial schedule for the UIM portion of the case

or counsel may submit a stipulation providing for a discovery and trial schedule.

BY THE COURT:



ARTHUR L. ZULICK, J.

cc: Kevin M. Conaboy, Esquire
Robert E. Smith, Esquire

ALZ2014-024

PROTHONOTARY
2014 MAY 29 PM 2 32
MONROE COUNTY, PA.

Date 5-12-15 Initials VM

ELLEN OAKS,	: IN THE COURT OF COMMON PLEAS,
	: DAUPHIN COUNTY, PENNSYLVANIA
Plaintiff	:
	:
v.	: NO. 2012-CV-3741-CV
	:
	:
ERIE INSURANCE EXCHANGE,	:
and STEVEN AUSTIN,	:
	:
Defendants	: CIVIL ACTION - LAW

ORDER

AND NOW, this 8th day of May, 2015, upon consideration of Defendant Steven Austin's Motion for Reconsideration of the Order denying his Motion to Sever the Plaintiff's claims against Defendant Erie Insurance Exchange from her claims against Defendant Austin, and any responses thereto, and having heard oral argument on November 13, 2014, it is hereby ORDERED that the Motion is GRANTED, and the Plaintiff's negligence claim against Defendant Steven Austin is severed for trial from the Plaintiff's UIM claim against Defendant Erie Insurance Exchange.

BY THE COURT:

Bruce F. Bratton, J.

Distribution:

The Hon. Bruce F. Bratton
Robert F. Claraval, Esquire, 500 North Third Street, 2nd Floor, Harrisburg, PA 17101
John A. Statler, Esquire, 301 Market Street, Lemoyne, PA 17043
George H. Eager, Esquire, 1347 Fruitville Pike, Lancaster, PA 17601

CASSIE STROHL	:	IN THE COURT OF COMMON PLEAS
VS.	:	SUSQUEHANNA COUNTY, PENNA.
AMY OLMSTEAD AND	:	
STATE FARM INSURANCE	:	NO. 2013-258-CP

FOR THE PARTIES:

FOR CASSIE STROHL: LAURENCE KELLY, ESQUIRE

FOR STATE FARM INSURANCE: DANIEL CUMMINS, ESQUIRE

FOR AMY OLMSTEAD: NOT PRESENT

THE CLOSING CHARGE OF THE COURT IN THE JURY TRIAL in the above matter, heard before Senior Judge, S. Gerald Corso, 38th Judicial District, Specially Presiding, at the Susquehanna County Courthouse, Montrose, Pennsylvania, on the 4th day of February 2015 at 9:00 a.m.

COPY

AMY M. CURLEY, OFFICIAL COURT REPORTER
SUSQUEHANNA COUNTY COURTHOUSE
MONTROSE, PA 18801

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1 2:55 P.M. - JURY RETURNS TO THE COURTROOM

2 THE COURT: Please be seated.

3 Members of the jury, at this point we have arrived

4 at the stage where I deliver to you basically the law

5 and other instructions that you will utilize in your

6 deliberations to arrive at a verdict.

7 As I had advised you at the outset of this trial it

8 is a duty and responsibility for the Trial Judge to

9 superintend the conduct of the Courtroom throughout the

10 trial, to rule on reflections of the law and evidence as

11 they arise from time to time, and after all the evidence

12 and testimony has been presented and you have heard the

13 closing arguments of counsel to deliver to you what is

14 known as the charge of the Court. The purpose of the

15 Court's charge is to set forth the principles of law

16 that apply and to instruct the jury on its duties and

17 responsibilities. I now embark on the charge.

18 The briefest terms that may be said that the duty

19 of a jury is to determine what the facts are upon a

20 careful consideration of the competent evidence and

21 testimony in the case and then apply those factual

22 conclusions to the law as I shall endeavor to explain it

23 to you, and in that fashion arrive at your verdict.

24 Now, at the outset I wish to comment on the

25 competency of counsel. This matter has been ably

1 presented to you by Mr. Kelly on behalf of the Plaintiff
2 and by Mr. Cummins on behalf of the Defendant, State
3 Farm. You should bear in mind in your deliberations
4 that the arguments of counsel are an important part, an
5 essential ingredient in our legal system. You should
6 carefully consider and evaluate the opposing contentions
7 presented to you by counsel. However, neither the
8 opening statements nor closing arguments of counsel are
9 part of the evidence and they should not be considered
10 as such. In deciding the case you should carefully
11 consider the evidence in the light of the various
12 reasons and arguments presented to you. It is the right
13 and duty of each lawyer to discuss the evidence in a
14 manner which is most favorable to the side they
15 represent. You should be guided by each lawyers
16 arguments to the extent they are supported by the
17 evidence and insofar as they aid you in applying your
18 own reason and common sense, however you are not
19 required to accept the arguments of any of the lawyers.
20 It is for you, the jury, and you alone to decide the
21 case based on the evidence as it was presented from the
22 witness stand in accordance with the instructions which
23 I am now giving to you.
24 It is your sworn and solemn duty to judge this case
25 solely upon the evidence presented before you and to

1 determine from that evidence what the true facts are and
2 what reasonable inferences may be drawn from those
3 facts. You are to do this without sympathy, prejudice,
4 bias, or any other extraneous considerations.
5 In view of the fact it is your primary and
6 exclusive duty to determine the facts in this case, it
7 is your exclusive duty to determine the credibility of
8 each witness. It will be up to you to say how much, if
9 any, reliability, truth, value, and weight will be
10 placed upon the testimony of each witness who has
11 testified in this trial.
12 Now, all of us understand and appreciate that the
13 frailty of man precludes absolute accuracy in the
14 recitation of past events. The human mind does not
15 always perfectly record things seen or words spoken. It
16 sometimes happens that a witness' recollection of those
17 things which have transpired in the past is out of
18 harmony with the truth by reason of bias or prejudice.
19 Then again, it may be the witness did not have an
20 adequate opportunity or ability to observe or sufficient
21 motivation or capacity to accurately recall those things
22 about which they testified. You will take this into
23 account in determining whether the testimony of each
24 witness who appeared, whether in person or by deposition
25 or video, is truthful and accurate and is to be believed

1 or disbelieved in whole or in part. You will likewise
2 consider the interest, whether financial or otherwise,
3 which the witness has in the outcome of the litigation,
4 if any, and whether or not that has tended, either
5 consciously or unconsciously, to color the testimony of
6 the witness. Also you will consider the demeanor of
7 each witness on the stand, the manner in which that
8 person comported themself before you. In that regard
9 you will take into account those small and indefinable
10 nuances that all of us consider daily in determining the
11 honesty, the candor, the truthfulness, and the
12 reliability of those we encounter for the first time.
13 The spontaneous gestures, the lifting of the eyebrow,
14 the shrugging of the shoulder, the intonation of the
15 voice, the flash of the eye, the facial expression.
16 Members of the jury, there is barely a day that passes
17 in your life that you do not apply these measures
18 against others making an assessment of their honesty,
19 their candor, and their reliability. You will do
20 precisely the same in the jury room when you come to
21 assay the credibility of the witnesses that have
22 testified in this case.
23 To state it another way, you should consider a
24 witness' manner of testifying, how they looked,
25 conducted themselves, and spoke while on the witness

1 stand. You should consider whether the witness'
2 testimony was affected by their age, physical or mental
3 condition. You should consider the witness'
4 intelligence and ability to observe and be informed
5 about the matters to which they testified. You should
6 consider the witness' ability to remember the events
7 about which they testified. You should consider whether
8 the witness was positive and certain or hesitant and
9 doubtful. You should consider whether or not the
10 witness testified frankly and fairly or whether they
11 showed favoritism or bias in any way, and whether as
12 previously stated a witness has anything to gain or lose
13 from the outcome of the case. Does the testimony make
14 sense to you? You should consider whether and to what
15 extent a witness' testimony is supported by or
16 contradicted by other evidence in the case which you
17 believe. Where there is a conflict in the testimony the
18 jury has the duty of deciding which testimony to believe
19 but you should first try to reconcile, or fit together,
20 any conflicts in this testimony if you can fairly do so.
21 Discrepancies and conflicts between the testimony
22 of different witnesses may or may not cause you to
23 disbelieve some or all of their testimony. Remember
24 that two or more persons witnessing an incident may see
25 or hear it differently. Also, it is not uncommon for a

1 witness to innocently.- - to be innocently mistaken in
2 their recollection of how something happened. If you
3 can not reconcile a conflict in the testimony it is up
4 to you to decide which testimony, if any, to believe and
5 which to reject as untrue or inaccurate. In making this
6 decision consider whether the conflict involves a matter
7 of importance or merely some detail and whether the
8 conflict is brought about by an innocent mistake or an
9 intentional falsehood.
10 If you find that a witness deliberately testified
11 falsely on a material point if it is a matter that might
12 affect the outcome of the trial, you may for that reason
13 alone chose to disbelieve other parts or all of that
14 same witness' testimony, but you are not required to do
15 so. You should consider all of the other factors that
16 bear on credibility in determining whether to believe
17 other parts of that witness' testimony. In summary, on
18 the question of credibility, it may be said that the
19 jurors will apply their experience as men and women of
20 the world on the basis of the criteria which I have
21 mentioned and others wherein the - - wherein the truth
22 lies and the degree of truth value and weight that is to
23 be ascribed to the testimony of each of the witnesses
24 who have testified throughout this trial.
25 You will recall that several witnesses testified

1 about their special knowledge, skill, experience, or
2 training, and were qualified and permitted to testify as
3 an expert witness. As a general rule, a witness can
4 only testify about what they saw or heard. They may not
5 give an opinion or draw conclusions. An exception to
6 this rule is the so called expert witness. Such a
7 witness is one, who by training, education, or
8 experiences, has acquired a special level of skill or
9 knowledge in some art, science, profession or
10 occupation. By virtue of such qualifications, special
11 skill or knowledge, an expert is permitted to give
12 explanations and draw inferences not within the range of
13 ordinary knowledge, intelligence, and experience, and to
14 give an opinion and state their reason for this opinion.
15 In determining the weight, if any, to be given an
16 experts opinion, deciding whether or not to accept an
17 expert witnesses opinion you should consider the
18 evidence of their training, education, and experience,
19 as well as the reasons and facts on which their opinion
20 is based. In other words, you should consider the
21 qualifications and reliability of the expert and the
22 reasons given for the opinion. An expert can not base
23 their opinion on speculation, conjecture, or surmise.
24 You are not bound by an experts opinion merely because
25 the witness is qualified as an expert. You may accept

1 or reject it as in the case of other witnesses. Give it
2 the weight, if any, to which you deem it entitled. In
3 general, the opinion of an expert has value only when
4 you accept the facts upon which it is based. This is
5 true whether the facts are assumed hypothetically by an
6 expert, come from their personal knowledge, or some
7 other proper source, or from a combination of these
8 sources.
9 Questions have been asked in which an expert was
10 invited to assume that certain facts were true and to
11 give an opinion based upon that assumption. These are
12 called hypothetical questions. If you find that any
13 material fact assumed in any particular hypothetical
14 question has not been established by the evidence, you
15 should disregard the opinion of the expert given in
16 response to that question. By material fact I mean one
17 which was important to the expert in forming their
18 opinion. Also, if the expert has made it clear that
19 their opinion is based on the assumption that a
20 particular fact did not exist, and from the evidence you
21 find that it did exist and it was material, you should
22 give no weight to the opinion so expressed.
23 In resolving any conflict that may exist in the
24 testimony of expert witnesses you are entitled to weight
25 the opinion of one expert against that of another. In

1 doing this you should consider the relative
2 qualifications and reliability of the expert as well as
3 the reasons for each opinion and the facts and other
4 matters upon which it was based. Again, you may accept
5 or reject an experts opinion the same as you can accept
6 or reject any other witnesses testimony in resolving the
7 factual issues in this case.
8 Now, in this case there were two witnesses who were
9 qualified and permitted to testify as expert witnesses.
10 On behalf of the Plaintiff there was Jose Enrique Nazar,
11 MD, Orthopedic Physician, with respect to medical care
12 and treatment, especially back injuries as an Orthopedic
13 Surgeon. On behalf of the defense there was William R.
14 Prebola, Jr., MD, a physician practicing in the field of
15 Physical Medicine and Rehabilitation. His expertise was
16 stated as a Physiatrist and Rehabilitation Medicine.
17 Now basically there are two kinds or classes of
18 evidence that are presented during the course of a
19 trial. On the one had there is direct evidence, which
20 is testimony by a witness from their own personal
21 knowledge or experience, such as something that they
22 have heard, seen, or experienced themselves. The other
23 type is what is known as circumstantial evidence, which
24 is testimony about facts which point to the existence of
25 other facts which are in question. Whether or not

1 circumstantial evidence is proof of the other facts in
2 question depend in part on the application of common
3 sense and human experience. Let me give you an example.
4 If while walking outdoors you hear thunder, see
5 lightening, see water falling on the ground and on you,
6 you have direct evidence that it is raining. On the
7 other hand, if you would leave a movie theater, see that
8 the streets, sidewalks, and grass are wet, that people
9 are carrying umbrellas and wearing rain coats, even
10 though you did not see it raining you have
11 circumstantial evidence that it rained while you were at
12 the movie.
13 In deciding whether or not to accept circumstantial
14 evidence as proof of the facts in question, you must be
15 satisfied first that the testimony of the witness is
16 truthful and accurate, and second that the existence of
17 the facts a witness testified to leads to the conclusion
18 that the facts in question also happened.
19 Now, during the course of this trial there was a
20 Stipulation that was entered. As I had told you at the
21 time a Stipulation is an agreement between the opposing
22 parties, through their attorneys, that the facts may be
23 accepted as undisputed, require no further proof, and
24 the Court will permit no contradictory evidence. They
25 are to be accepted by you as binding and conclusive for

1 the purposes of the trial. The Stipulation that was
2 entered in this case at this point I am going to read
3 that to you. For the purposes of trial in this matter
4 it is hereby Stipulated between Plaintiff, Cassie
5 Strohl, and Defendant, State Farm Mutual Insurance
6 Company, as follows:
7 One, at all times relevant to the above captioned
8 matter, Plaintiff, Cassie Strohl, was insured by State
9 Farm Mutual Insurance Company on the terms of the
10 following identified insurance policies: State Farm Auto
11 Insurance Policy - - I am not going to give you the
12 number - - issued by Cassie - - issued to Cassie Strohl
13 and Amanda Lathrop. Also, State Farm Auto Insurance
14 Policy that was issued to Kirk Pullen. Each of said
15 policies provided uninsured insurance coverage. Co-
16 Defendant, Amy Olmstead, was uninsured at the time of
17 the subject accident. The policies that covered
18 Plaintiff, Cassie Strohl, contained elections of the
19 limited tort option.
20 Next I want to remind you that corporations and
21 individuals are treated equally in the eyes of the law.
22 When I use the word person in these instructions I am
23 referring both to an individual and a corporation. All
24 persons, individuals, or corporations must be treated
25 equally by you. Under our legal system both Plaintiff

1 and Defendant, whether persons, individuals, or
2 corporations, are entitled to have the case decided
3 solely upon the evidence fairly and impartially by you.
4 Now, I want to discuss just briefly with you the
5 burden of proof. In a civil case such as this one, the
6 Plaintiff has the burden of proving their contentions
7 that would entitle them to relief. When a party has a
8 burden of proof on a particular issue the parties
9 contention on that issue must be established by a fair
10 preponderance of the evidence. The evidence establishes
11 a contention by a preponderance of the evidence if you
12 are persuaded that it is more probably true than not.
13 To put it another way, as I had indicated to you
14 previously, think if you will of an ordinary balance
15 scale with a pan on each side. Onto one side of the
16 scale place all of the evidence favorable to the
17 Plaintiff, onto the other place all of the evidence
18 favorable to the Defendant. If after considering the
19 comparable weight of the evidence you feel that the
20 scales tip ever so slightly, or to the slightest degree,
21 in favor of the Plaintiff your Verdict must be for the
22 Plaintiff. If the scales tip in favor of the Defendant,
23 or if they are equally balanced your Verdict must be for
24 the Defendant.
25 Now in this case the issues that are being

1 presented to you for decision, and which Plaintiff has
2 the burden of proof, are basically as follows: One, was
3 the Defendant, Amy Olmstead, negligent in the operation
4 of her automobile; two, was the negligence a factual
5 cause of Plaintiff's injury; three, whether Plaintiff's
6 injury resulted in a non-economic damage and did
7 Plaintiff sustain serious injury, basically serious
8 impairment of body function. Plaintiff has the burden
9 of proving these claims by a preponderance of the
10 evidence.
11 Now the Defendant, State Farm, basically contends
12 that the Plaintiff was contributorily negligent. And I
13 will get into that with you a little bit more in a
14 minute.
15 At this point I want to discuss the concept of
16 negligence with you. The legal term negligence is the
17 absence of ordinary care which a reasonably prudent
18 person would exercise in the circumstance. Negligent
19 conduct may consistent either of an act or a failure to
20 act when there is a duty to do so. In other words,
21 negligence is the failure to do something which a
22 reasonably careful person would do, or the doing of
23 something a reasonably careful person would not do in
24 light of all of the surrounding circumstances. It is
25 for you to determine how a reasonably careful person

1 would act in those circumstances.

2 Ordinary care is the care a reasonably careful
3 person would use under the circumstances. It is the
4 duty of every person to use ordinary care not only for
5 their own safety and for the protection of their
6 welfare, but also to avoid injury to others. What
7 constitutes ordinary care varies according to the
8 particular circumstances and conditions existing then
9 and there. In this case you must decide whether
10 Defendant, Amy Olmstead, was negligent. Again, a person
11 must act in a reasonably careful manner to avoid injury
12 to others. The care required varies according to the
13 circumstances and the degree of danger at a particular
14 time. You must decide how a reasonably careful person
15 would act under the circumstances established by the
16 evidence in this case. A person who does something a
17 reasonably careful person would not do in the
18 circumstances is negligent. A person also can be
19 negligent by failing to act. A person who fails to do
20 something a reasonably careful person would do under the
21 circumstances is negligent.

22 Now in this case as a defense, Defendant, State
23 Farm, claims that Plaintiff, Cassie Strohl, own
24 negligence was a factual cause of her injuries,
25 therefore Defendant State Farm has the burden of proving

1 the following: That the Plaintiff was negligent; and
2 that the Plaintiff's negligence was a factual cause of
3 her injuries. Now negligence can also be established by
4 the violation of various laws. In this case negligence
5 can also be established by the violation of the motor
6 vehicle statute. The vehicle code establishes a duty of
7 care which a motorist must follow. A violation of that
8 code is a breach of the duty of care and establishes
9 negligence.
10 Plaintiff contends that Defendant, Amy Olmstead,
11 was negligent for violating section 3361 of the vehicle
12 code, which is entitled Driving Vehicle at Safe Speed.
13 The motor vehicle code provides as follows: Section
14 3361, Driving Vehicle at Safe Speed, "No person shall
15 drive a vehicle at a speed greater than is reasonable
16 and prudent under the conditions and having regard to
17 the actual and potential hazards that existed, nor at a
18 speed greater than will permit the driver to bring their
19 vehicle to a stop within the assured clear distance
20 ahead."
21 If you find Defendant Olmstead violated this law
22 you must find that she was negligent. Defendant, State
23 Farm, contends that Plaintiff, Cassie Strohl, was
24 negligent for violating section 3353 of the vehicle
25 code, which is entitled Prohibitions in Specific Places,

1 which reads in relevant parts as follows: Again, 3353,
2 Prohibitions in Specific Places, section A, general
3 rule, "Except when necessary to avoid conflict with
4 other traffic or to protect the safety of any person or
5 vehicle, or in compliance with law of the directions of
6 a police officer or official traffic control device, no
7 person shall stop, stand, or park a vehicle on the
8 roadway side of any vehicle stopped or parked at the
9 edge or curve of a street." If you find that Plaintiff
10 violated this provision of the vehicle code you must
11 find that the Plaintiff was negligent. If you do not
12 find Plaintiff or Defendant Olmstead violated this -
13 these laws, you still must decide whether either or both
14 were negligent because they failed to act as a
15 reasonably careful person would under the circumstances
16 established by the evidence in this case.
17 At this point I want to review with you factual
18 cause, causation. A Plaintiff must prove to you that
19 the Defendant's conduct caused the Plaintiff's harm and
20 damages. This is referred to as factual cause. The
21 question is, was the Defendant's negligent conduct a
22 factual cause in bringing about the Plaintiff's harm or
23 injuries. Conduct is a factual cause of harm when the
24 harm would not have occurred absent the conduct, and
25 that is a factual cause of an outcome if, im the absence

1 of the act the outcome would not have occurred. In
2 order for conduct of a party to be a factual cause the
3 conduct must not be fanciful or imaginary but must have
4 played a real role in causing the injury, therefore in
5 determining factual cause you must decide whether the
6 negligent conduct of the Defendant is more than an
7 insignificant factor in bringing about any harm to the
8 Plaintiff.
9 Under Pennsylvania law conduct can be found to be a
10 contributing factor if the action or omission alleged to
11 have caused the harm was an actual real factor not a
12 negligible, imaginary, or fanciful factor. A factor
13 having no connection or only an insignificant connection
14 with the injury or harm. However, factual cause does
15 not mean it is the only, primary, or even most important
16 factor in causing the injury or harm. A cause may be
17 found to be a factual cause as long as it contributes to
18 the injury or harm in a way that is not minimal or
19 insignificant. To be a contributing factor the
20 Defendant's conduct need not be the only factor. The
21 fact that some other cause concurs with the negligence
22 of the Defendant in producing an injury or harm does not
23 relieve a Defendant from liability as long as their own
24 negligence is a factual cause of the injury or harm.
25 There may be more than one factual cause in

1 bringing about the harm suffered by the Plaintiff. When
2 negligence - - negligent conduct of more than one person
3 contributes concurrently to an occurrence or event each
4 of these persons is fully responsible for the harm
5 suffered by the Plaintiff regardless of the relative
6 extent to which each contributed to the harm. A cause
7 is concurrent if it was operative at the moment of the
8 event and acted with another cause as a factual cause in
9 bringing about the harm.
10 I have now instructed you about what you may
11 consider in determining whether the Defendant was
12 negligent, whether such negligence, if any, was the
13 factual cause in bringing about the Plaintiff's harm.
14 If you find in accordance with these instructions that
15 the Plaintiff, Cathy - - Cassie Strohl, was also
16 negligent and such negligence was a factual cause in
17 bringing about Plaintiff's harm, it is your duty to
18 apportion the relative degree of causal negligence
19 between the Defendants - - between the Plaintiff and the
20 Defendant. In apportioning the causal negligence you
21 should use your common sense and experience to arrive at
22 a result that is fair and reasonable under the
23 circumstances in this case as you have determined from
24 the evidence.
25 Now the total of these percentages must be 100

1 percent. If you decide that Plaintiff, Cassie Strohl's,
2 negligence was greater than 50 percent then the
3 Plaintiff can not recover. If you decide that
4 Plaintiff's negligence was less than or equal to the
5 negligence of Defendant, Amy Olmstead, the Plaintiff can
6 recover for her injuries. You must then decide the
7 dollar amount of Plaintiff's damages. In determining
8 Plaintiff, Cassie Strohl's, damages do not consider the
9 percent of her negligence. The Court will reduce
10 Plaintiff's damages based upon the percent of negligence
11 that you have assigned to the parties.
12 I am not going to discuss the issue of damages with
13 you. The fact that I now charge you on the measurement
14 of damages should not be considered by you as any
15 indication that I think damages should be awarded. I am
16 providing these instructions on damages because I am
17 required to charge you on all of the possibilities and
18 all phases of the case that you may have to consider in
19 your deliberations. If you find that a Defendant is
20 liable to the Plaintiff, you must then determine an
21 amount of money damages which you believe will fairly
22 and adequately compensate the Plaintiff for all of the
23 harm sustained as a result of the Defendant's negligent
24 conduct. The amount which you award today must fairly
25 but completely compensate Plaintiff for damages

1 sustained in the past, as well as damages you find
2 Plaintiff will sustain in the future as the result of
3 Defendant's negligent conduct. You are not to allow
4 sympathy or prejudice to enter into your deliberations
5 when determining whether the Plaintiff is entitled to
6 recover damages. Moreover, if you come to a
7 consideration of this subject, you are not to guess or
8 speculate, but you must be convinced by a preponderance
9 of the evidence that the harm claimed and each and every
10 element of the item of damages claimed resulted from the
11 negligent conduct of the Defendant.
12 At this point I am going to give you the legal
13 background with regard to the damages in this case.
14 Pennsylvania Motor Vehicle Financial Responsibility law
15 provides that an insured shall have the right to choose
16 a form of insurance that limits their right to seek
17 financial compensation for injuries caused by other
18 drivers. The two alternatives are full tort insurance
19 and limited tort insurance. By Stipulation entered in
20 this case the insurance option that was chosen by
21 Plaintiff, and which therefore applies in this case, is
22 the limited tort option. Under this form of insurance
23 the insured or policy holder, the Plaintiff, may not
24 seek recovery for pain and suffering or other non-
25 monetary damages unless the injuries suffered fall

1 within the definition of serious injury. Serious injury
2 is defined as a personal injury resulting in death,
3 serious impairment of body function, or permanent
4 serious disfigurement. To consider serious impairment
5 of body function several factors must be considered to
6 determine if the claimed injury is serious. One, the
7 extent of the impairment; two, the length of time the
8 impairment lasted; three, the treatment required to
9 correct the impairment; and four, any other relevant
10 factors. An injury need not be permanent to be serious.
11 The focus of this analysis is not on the injuries but on
12 how the injuries affected a particular body function.
13 Now in this case Plaintiff seeks a non-economic
14 damages. Specifically past and future pain and
15 suffering, embarrassment and humiliation, and lost
16 enjoyment of life. The Plaintiff is making a claim for
17 damage award for past and future non-economic loss.
18 There are three items that make up a damage award for
19 non-economic loss both past and present - - or past and
20 future in this case. Again, one, pain and suffering;
21 two, embarrassment and humiliation; three, loss of
22 ability to enjoy the pleasures of life.
23 The first item to be considered in the Plaintiff's
24 claim for a damage award for past non-economic loss and
25 for future non-economic loss is pain and suffering. You

1 are instructed that the Plaintiff is entitled to be
2 fairly and adequately compensated for all physical pain,
3 mental anguish, discomfort, inconvenience and distress
4 that you find she endured from the time of the injury
5 until today and that the Plaintiff is also entitled to
6 be fairly and adequately compensated for all physical
7 pain, mental anguish, discomfort, inconvenience and
8 distress you find she will endure in the future as a
9 result of her injuries.
10 The second item that goes to make up non-economic
11 loss is embarrassment and humiliation. The Plaintiff is
12 entitled to be fairly and adequately compensated for
13 such embarrassment and humiliation as you believe she
14 has endured and will continue to endure in the future as
15 a result of her injuries.
16 The third item is loss of enjoyment of life. The
17 Plaintiff is entitled to be fairly and adequately
18 compensated for the loss of her ability to enjoy any of
19 the pleasures of life as a result of the injuries from
20 the time of the injuries until today and to be fairly
21 and adequately compensated for the loss of her ability
22 to enjoy any of the pleasures of life in the future that
23 were caused as a result of this injury.
24 In considering the Plaintiff's claims for damages -
25 - damage awards for past and future non-economic loss

1 you will consider the following factors: The age of the
2 Plaintiff; the severity of the injuries; whether the
3 injuries are temporary or permanent; the extent to which
4 the injuries affect the ability of the Plaintiff to
5 perform basic activities of daily living and other
6 activities in which the Plaintiff previously engaged;
7 the duration and nature of medical treatment; the
8 duration and extent of the physical pain and mental
9 anguish that the Plaintiff has experienced in the past
10 and will experience in the future; and the health and
11 physical condition of the Plaintiff prior to the
12 injuries.
13 Your Verdict for past non-economic damages and
14 future non-economic damages will be added together and
15 will be presented on the Verdict sheet in a single lump
16 sun - - sum. I will review that with you more when I go
17 over the Verdict sheet.
18 With regard to the allowance for pain and suffering
19 the law prescribes no definite measure of damages but
20 rather leaves such damages to be fixed by you the jury
21 as your discretion dictates in such an amount as you - -
22 as may be found by you, the jury, to be reasonable in
23 light of the evidence. It is not permitted therefore
24 that any witness or any attorney express an opinion or
25 request to you, the jurors, that you return with a

1 certain amount of damages for pain and suffering, rather
2 it is for you to make an estimate of the damages from
3 the facts and circumstances in evidence by considering
4 them in connection with your own knowledge and
5 experience. In arriving at the amount of damages to
6 fairly and adequately compensate Plaintiff in this case
7 you may not guess or speculate. Plaintiff's claims for
8 damages must be supported a by a reasonable basis for
9 calculation, however you are instructed that damages are
10 not deemed conjecture or merely speculative because they
11 are incapable of being calculated with mathematical
12 exactness. Our law only requires that a reasonable
13 quantity of information be supplied by the Plaintiff to
14 you so that you the jury can estimate the amount of
15 damages and to fairly arrive at a sum which you feel
16 satisfactory to compensate Plaintiff for her injuries.
17 If you find that the Plaintiff's injuries will
18 continue beyond today you must determine the life
19 expectancy of the Plaintiff. According to statistics
20 compiled by the United States Department of Health,
21 Education, and Welfare, the average life expectancy of
22 all persons of the Plaintiff's age at the time of the
23 accident, her sex and race, was 37.2 years. This figure
24 is offered to you only as a guide. You are not bound to
25 accept it if you believe that the Plaintiff would have

1 lived longer or less than the average individual in her
2 category. When reaching this decision you are to
3 consider the Plaintiff's health prior to the accident,
4 her manner of living, her personal habits and other
5 factors that may have affected the duration of her life.
6 I have now outlined for you the rules of law
7 applicable to this case and the need for you to weigh
8 the evidence and determine the facts. You must
9 determine the facts from all of the - - all of the
10 evidence that you have heard and the other exhibits that
11 have entered during the course of this trial. You are
12 the sole and exclusive judges of the facts, and in this
13 area neither I nor anyone else may infringe upon your
14 responsibility. On the other hand, and with equal
15 emphasis, I instruct you that you must accept the rules
16 of law as I have given them to you and apply that law to
17 the facts that you have found.
18 Upon return to the jury room your deliberations
19 should begin and proceed in an orderly fashion. Your
20 first order of business in the jury room will be to
21 select one of your members to be the Foreperson to
22 preside over your deliberations. You are free to select
23 any one of your members to be the Foreperson. Your
24 Foreperson's vote is entitled to no greater weight than
25 that of any other juror. The Foreperson will announce

1 your Verdict in open Court when you have concluded your
2 deliberations and arrived at a Verdict.
3 If in the course of your deliberations you find
4 yourselves in serious doubt concerning some portion of
5 my instructions to you on the law, or some other
6 question arises, you may transmit a note to me, through
7 the Tipstaff, signed by your Foreperson setting forth
8 your question or concern. No juror should attempt to
9 communicate with the Court by any means other than a
10 signed writing, and the Court will not communicate with
11 any juror on any subject touching the merits of the case
12 otherwise than in writing or orally be returning you to
13 the Courtroom for further instructions. You should not
14 at any time reveal, even to the Court, how the jury
15 stands numerically until you have reached a Verdict.
16 Your function to reach a fair conclusion from the
17 evidence and applicable law is an important one. As
18 jurors you have the right and duty to apply common sense
19 in considering the evidence in this case. Your Verdict
20 should be reached only after careful and thoughtful
21 deliberation in the course of which you should consult
22 with each other and thoroughly discuss the issues in
23 order to arrive at a just Verdict. It is your duty to
24 consider the issues with a view toward reaching an
25 agreement on a Verdict if you can fairly do so without

1 violating your individual judgement and conscience. You
2 must each decide the case for yourself, examine the
3 issues and the evidence with candor and frankness and
4 with proper deference to and regard for the opinions of
5 each other. Mature consideration requires that you be
6 willing to reexamine your own views and to change your
7 opinion if convinced that it lacks merit or validity.
8 While maintaining this flexibility you are not required
9 to surrender your honest belief as to the weight or
10 affect of the evidence solely because of another jurors
11 opinion or for the mere purpose for expediency of
12 arriving at a Verdict.
13 Now, you have been permitted to take notes during
14 the course of this trial. Again, your notes are merely
15 memory aides, they are not evidence nor are they
16 official record. Whether or not you took notes you
17 should rely upon your own memory of what was said and
18 took place during the course of the trial. Notes are
19 only to assist your memory. Those jurors who did not
20 take notes or who took few notes should not permit your
21 independent recollection of the evidence to be
22 influenced by the fact that other jurors have taken more
23 notes. Give no more or less weight to the view of a
24 fellow juror just because he or she did or did not take
25 notes. You have not been permitted to share your notes

1 with other jurors during the trial but you may do so
2 when you retire to the jury room to deliberate. The
3 only notes you will use during the deliberations are
4 those you took during this trial on the materials
5 provided to you. After the trial is over and you have
6 reached a Verdict that has been accepted by the Court
7 your notes will be collected by the Court staff and
8 destroyed.
9 Now, your Verdict must represent the jurors
10 considered final judgement. While it is important that
11 the views of each of the jurors be considered it is not
12 necessary under the law of this Commonwealth that your
13 Verdict be unanimous. By an act of the Pennsylvania
14 legislature a Verdict in a civil case rendered by at
15 least five-sixths of the jury shall constitute the
16 Verdict of the jury and shall have the same affect as a
17 unanimous Verdict of the jury. Consequently when after
18 your deliberations at least ten of your members have
19 agreed upon a Verdict that decision shall constitute the
20 Verdict of the jury. You will then inform the Tipstaff
21 that the jury has reached a Verdict so that you can be
22 returned to the Courtroom to announce your Verdict.
23 Keep in mind that the case at issue between the
24 parties is for each a most serious and important matter.
25 They and the Court rely upon you to give full and

1 conscientious deliberation and consideration to the
2 issues and evidence before you.
3 Again, all of the parties stand equally before the
4 Court and each is entitled to the same fair and
5 impartial consideration and treatment at your hands.
6 Now, at this point the Court is going to pass out a
7 copy of the Verdict sheet and I am going to go over that
8 with you. As I just indicated each of you at this point
9 has received a Verdict sheet which will be signed by
10 your Foreperson upon arriving at your Verdict and
11 presented to the Clerk when you return to the Courtroom
12 to announce the Verdict in open Court. The Verdict
13 sheet contains a series of questions that will lead you
14 to a proper Verdict. There are places for you record
15 your Verdict as to each question.
16 Going down the Verdict sheet the first question was
17 the Defendant, Amy Olmstead, negligent. If your answer
18 is yes proceed to question two, if your answer is no
19 then you have concluded your deliberations. If your
20 answer was yes then you proceed to question number two,
21 was the negligence, if any, of Defendant Amy Olmstead a
22 factual cause of the Plaintiff'sfor injuries. There is
23 a place for you to record either yes or no. If you
24 answer yes proceed to question two, if you answer no
25 then you have concluded your deliberations.

1 Question three, was the Plaintiff, Cassie Strohl,
2 negligent. Again, there is a place for you to record
3 your Verdict, which would be either yes or no. If you
4 answer yes proceed to question four. If you answer no
5 proceed to question six, which we will get to in a
6 minute.
7 Question four is was the negligence, if any, of
8 Plaintiff Cassie Strohl a factual cause of Plaintiff
9 injuries. Again, there is a place to put your Verdict
10 for either yes or no. If you answered yes proceed to
11 question five, if you answer no proceed to question six.
12 Question five, which would be the comparative
13 negligence. Taking the combined negligence that was a
14 factual cause in bringing about the claimed injuries
15 sustained by Plaintiff to be 100 percent, what
16 percentage of that causal negligence, if any, was
17 attributable to the Defendant, Amy Olmstead, and what
18 percentage of that causal negligence, if any, was
19 attributed to Plaintiff, Cassie Strohl. And then there
20 is a place for you to put in A, the percentage of causal
21 negligence that you attribute to the Defendant, Amy
22 Olmstead, and then subsection B, the percentage of
23 causal negligence that you would attribute to the
24 Plaintiff, Cassie Strohl. And again, the sum of A and B
25 must add up to 100 percent.

1 Question six, did the Plaintiff sustain any serious
2 injury that resulted in any substantial impairment of
3 any body function as a result of the subject motor
4 vehicle accident. Again, there is a place for you to
5 record either yes or no.
6 Question seven, if you answered yes to question six
7 then enter the amount of non-economic damages, if any,
8 that you find for the Plaintiff, Cassie Strohl.
9 If you answered no to question six, the Plaintiff
10 is not entitled to recover any non-economic damages
11 against Defendant, State Farm Insurance Company.
12 However, the Plaintiff may still recover non-economic
13 damages against Defendant, Amy Olmstead. And then there
14 is a place for you to state the amount of non-economic
15 damages that you award to the Plaintiff and there is a
16 place for that to be filled in.
17 This Verdict sheet that will become the official
18 Verdict sheet will then be signed by the Foreperson and
19 dated and that will be then brought back to the Court
20 when you announce your Verdict in open Court.
21 Your vote on each question does not need to be
22 unanimous. However, at least ten of the 12 of you must
23 agree on the answer to each question.
24 Now, counsel for Defendant has - - actually for
25 both parties, have submitted proposed jury instructions

1 or points for charge to the Court. The Court has
2 already reviewed those with counsel, however point
3 number 29 that was submitted by counsel for the
4 Defendant is approved and will be read, and it reads as
5 follows:
6 Section 3543 of the motor vehicle code, entitled
7 Pedestrians Crossing at Other than Crosswalks,
8 subsection A, general rule, reads as follows: Every
9 pedestrian crossing a roadway at any point other than
10 within a crosswalk at an intersection or any marked
11 crosswalk, shall yield the right of way to all vehicles
12 upon the roadway.
13 At this point, counsel, I ask do you have any
14 additions or corrections to the charge before the jury
15 is excused to commence their deliberations? If so, I
16 will see you outside of the Courtroom.
17 ATTORNEY CUMMINS: Not from the defense, Your
18 Honor. Thank you.
19 THE COURT: Okay.
20 ATTORNEY KELLY: Not from the Plaintiff.
21 THE COURT: Very well.
22 Alright, members of the jury I guess one last item.
23 At this point our alternate jurors, Miss Lavelle and Mr.
24 Smith, we want to thank you, at this point I am going to
25 ask you to step down, you will not - - do you have

1 anything in the jury room? Okay, when you step down I
2 want you to go up and get your items because you will
3 not then retire with the jury to deliberate. At this
4 point you are excused now.
5 Thank you very much, we appreciate your
6 participation and your service. You can give that to
7 the Clerk.
8 Members of the jury, at this point you are going to
9 be excused to do justice between the parties. We will
10 have you retire to the jury room.
11 PROTHONOTARY: Excuse me, may I swear in the
12 Tipstaff?
13 THE COURT: Okay.
14 3:50 P.M. - AT THIS TIME THE TIPSTAFF ARE SWORN IN
15 THE COURT: Alright, it is in your capable
16 hands.
17 At this point the jury will be excused.
18 3:33 P.M. - THE JURY EXITS THE COURTROOM AT THIS TIME
19 CLOSING CHARGE OF THE COURT
20 IS CONCLUDED AT THIS TIME
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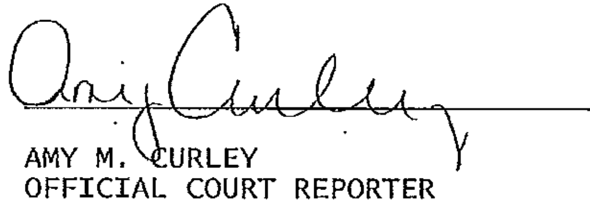
C E R T I F I C A T E

I, Amy M. Curley, Official Court Reporter, do hereby certify that the proceeding and evidence are contained fully and accurately, as transcribed by me from the audio recording in the entitled case, and later transcribed by myself to the best of my knowledge, ability and skill. I was not personally present for this hearing.



AMY M. CURLEY
OFFICIAL COURT REPORTER

FACEBOOK DISCOVERY

UPDATE 2015

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TORT TALK FACEBOOK DISCOVERY SCORECARD

by

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[UPDATED June 10, 2015]

DANIEL E. CUMMINS, ESQUIRE is an insurance defense attorney with the Scranton, Pennsylvania law firm of FOLEY, COMERFORD & CUMMINS. In addition to being a civil litigator, he also writes a regular column for the *Pennsylvania Law Weekly* on important cases and emerging trends under Pennsylvania law. He is also the author of the annual Supplement for *The Pennsylvania Trial Advocacy Handbook*.

In 2014, Attorney Cummins was selected as the "Distinguished Defense Counsel of the Year" by the Pennsylvania Defense Institute.

One trending issue in Pennsylvania civil litigation has to do with Social Media Discovery. Here is a LINK to my ONLINE VIDEO on this topic with Ben Present, a reporter with the *Pennsylvania Law Weekly*.

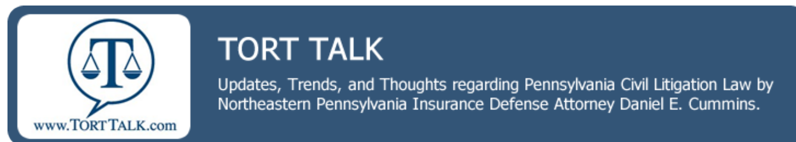
Here's an updated list of the Facebook or Social Media Discovery cases uncovered to date, broken down by county-to-county decisions.

I have created a link on the right hand column of Tort Talk (http://www.torttalk.com/) entitled "Facebook Discovery Scorecard" that will be continually updated. The Scorecard will remain up on the blog for you to click whenever you need this information. Just click on the date below "Facebook Discovery Scorecard."

The below list cases may not be exhaustive and there may be other decisions out there that I am not aware of at present. As such, it is recommended that you conduct your own additional research on the issue.

In the absence of appellate guidance, it is important that these decisions be publicized so that a consistent common law in this novel area can be developed. I would appreciate it if you could please advise me of any new cases that you may come across on this topic so that those decisions can be highlighted here.

I am in possession of a copy of most of the decisions noted below. If you desire a copy of any of the following cases, please contact me at dancummins@comcast.net. Wherever possible, I have also created a link to certain decisions below that are generally available online.



DISCOVERY ALLOWED

U.S. Federal Court for Middle District of Pennsylvania

Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D.Pa. June 22, 2011 Carlson, M.J.)(In Opinion by Federal Middle District Magistrate Judge, Court grants requests of Defendant and Plaintiff for *in camera* review of Plaintiff's private Facebook page; court picks and chooses what is to be disclosed).

Franklin County

Largent v. Reed, 2009 – Civil – 1823 (C.P. Franklin Co. Nov. 7, 2011 Walsh, J.)(In thorough Opinion, Court outlines why Facebook discovery should be allowed. Plaintiff's claim of privilege rejected. Court limits defense access to Facebook page for 21 days after which Plaintiff was permitted to change login info.). *But see* Franklin County case below where discovery not allowed.

Indiana County

Simms v. Lewis, 2012 WL 6755098, No. 11961 CD 2011 (C.P. Ind. Co. Oct. 10, 2012 Bianco, J.), Judge Thomas M. Bianco took a middle road and granted in part and denied in part a defendant's motion to compel access to a plaintiff's social networking information in a motor vehicle accident case; discovery granted where predicate showing that private pages of one site may generate relevant information, but denied as to other sites because defendant did not make predicate showing with respect to those sites.)

Jefferson County

McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285, PICS No. 10-3174 (Jefferson Co. September 9, 2010, Foradora, P.J.)(In what appears to be the first Pennsylvania decision on the issue, court holds, in a detailed decision, that Facebook postings were discoverable and ordered the Plaintiff to provide his username and password to the defense.).

Lancaster County

Perrone v. Lancaster Regional Medical Center, No. CI -11-14933 (C.P. Lanc. Co. 2013 Cullen, J.),(Judge James P. Cullen crafted a novel method of handling a Facebook Discovery dispute in a civil litigation personal injury case by ordering the parties to hire a neutral forensic computer expert to determine whether photos and video on Plaintiff's Facebook page were posted before or after subject slip and fall incident in order to determine whether or not such information was discoverable.).

Monroe County

Mazzarella v. Mount Airy Casino Resort, No. 1798 Civil 2009 (C.P. Monroe Co. Nov. 7, 2012 Williamson, J.)(Judge David J. Williamson of the Monroe County Court of Common Pleas granted a defendant's motion to compel the plaintiff to allow for social media discovery in a premises liability slip and fall case.).

Montgomery County

Gallagher v. Urbanovich, No. 2010 - 33418 (C.P. Mont. Co. Feb. 27, 2012 Carpenter, J.)(Judge William R. Carpenter of the Montgomery County Court of Common Pleas granted a Plaintiff's Motion to Compel a Defendant to produce his user name and password for the Defendant's Facebook page. The Judge's page long Order does not provide the background on the case leading up to this Motion and Order, or why such discovery was pursued by the Plaintiff. While the Court did grant the Plaintiff access to the Defendant's Facebook page and ordered the Defendant not to delete any info from the Facebook profile, the Defendant was granted permission to change his login name and password after seven (7) days following his compliance with the Court's Order.).

Northumberland County

Zimmerman v. Weis Markets, Inc., No. Civil - 2009 - 1535 (C.P. Northumberland Co. May 19, 2011 Saylor, J.)(In an Opinion, court grants defense motion to compel but, in a footnote, cautions that Facebook discovery not automatically allowed--threshold showing must first be made by party seeking discovery that private pages of opposing party's Facebook page may have information relevant to case.).

Washington County

Prescott v. Willis, No. 2012-Civil-2207 (C.P. Wash. Co. Mar. 3, 2013 O'Dell-Seneca, P.J.)(In an Opinion, court granted a Defendant's Motion to Compel a Plaintiff to produce her Facebook username and password in a motor vehicle accident case. Court found that Defendant made the requisite predicate showing from pictures from the public profile of the website. Defendant was granted 7 days access after which Plaintiff was allowed to change her username and/or password.)

DISCOVERY NOT ALLOWED (OR LIMITED)

U.S. Federal Court for the Western District of Pennsylvania

In re Milo's Kitchen Dog Treats Consolidated Cases, No. 12-1011 (W.D.Pa April 14, 2015 Kelly, M.J.).(Federal Magistrate Judge denied a Defendant's motion to compel unfettered and complete access of the Plaintiff's profile page along with a disclosure of the Plaintiff's user name and password in a case where plaintiff had already disclosed many of the private pages of her Facebook profile.).

Allegheny County

Trail v. Lesko, No. GD-10-017249 (C.P. Alleg. Co. July 3, 2012 Wettick, J)(In a detailed opinion, Judge Wettick denied both a Plaintiff's and a Defendant's motions to compel access to the opposing party's Facebook pages, finding the requests were unreasonably intrusive under Pa.R.C.P. 4011 in that, in this particular case, "the intrusions that such discovery would cause were not offset by any showing that the discovery would assist the requesting party in presenting its case.").

Bucks County

Piccolo v. Paterson,, 2009 - Civil - 04979 (C.P. Bucks Co. May 5, 2011 Cepparulo, J.)(In a one line Order, court denies defense motion to compel discovery of Plaintiff's Facebook pages in a facial scarring personal injury case. Defense had requested that the court order the Plaintiff to accept a "friend" request from defense counsel. Defense wanted to secure other photos of Plaintiff via Facebook pages; Plaintiff argued that defense had already secured numerous pre-accident and post-accident photos of Plaintiff and that this motion to compel was essentially overkill on the issue.).

Franklin County

Arcq v. Fields, No. 2008 – Civil – 2430 (C.P. Franklin Co. Dec. 7, 2011 Herman, J.)(In Opinion, court denies motion to compel access to Plaintiff's private Facebook pages where Defendant did not first offer threshold showing that Plaintiff even had a Facebook page or that the Plaintiff's private Facebook pages may reveal evidence that information relevant to the Plaintiff's claims of injury and disability would be discovered on the private pages). *See also* Franklin County case above where discovery is allowed.

Indiana County

Simms v. Lewis, No. 11961 CD 2011 (C.P. Ind. Co. Oct. 10, 2012 Bianco, J.), Judge Thomas M. Bianco took a middle road and granted in part and denied in part a defendant's motion to compel access to a plaintiff's social networking information in a motor vehicle accident case; discovery granted where predicate showing that private pages of one site may generate relevant information, but denied as to other sites because defendant did not make predicate showing with respect to those sites.)

Lackawanna County

Brogan v. Rosenn, Jenkins & Greenwald, No. 08 - CV - 6048 (C.P. Lackawanna County 2013 Nealon, J.)(In a detailed Opinion, Judge Nealon denies motion to compel disclosure of user name and password as Plaintiff had not established that relevant information would be found on private pages. Judge Nealon also ruled that a demand to produce the user name and password to a person's social media sites was not a discovery request tailored with reasonable particularity but instead represented an effort at an impermissible fishing expedition.).

Commonwealth v. Pal, No. 13-CR-2269, 2014 WL 1042276 (C.P. Lacka. Co. March 14, 2014)(Judge Nealon utilizes civil litigation Facebook Discovery decisions, at pgs. 27-34 of Opinion, to address issues raised with search warrant relative to Facebook information.)

Luzerne County

Kalinowski v. Kirschenheiter and National Indemn. Co., No. 6779 of 2010 (C.P. Luz. Co. 2011 Van Jura, J.)(In an Order, Court denied motion to compel discovery of private pages of Plaintiff's Facebook page where Plaintiff had argued that (1) defense was only seeking to embarrass Plaintiff, (2) that defense had ample access to information on public pages of sites, and (3) where Plaintiff contended that private pages related in part to Plaintiff's business and that no wage loss claim was being presented. Court denied motion "without prejudice," apparently leaving the door open for the issue to be revisited later)(For this one, I have copies of the Court's order and some of the filings by the parties).

Philadelphia County

Martin v. Allstate Fire and Cas. Ins. Co., No. 110402438 (C.P. Phila Dec. 13, 2011 Manfredi, J.)(In a one line Order, court denies motion to compel access to Plaintiff's private Facebook

pages where Defendant did not first show that the Plaintiff's deposition testimony and/or public pages of the Plaintiff's Facebook pages revealed evidence that information relevant to the Plaintiff's claims of injury and disability would be discovered on the private pages)(For this one, I have copies of the defense motion, plaintiff's response, and the court's Order).

Schuylkill County

Hoy v. Holmes, No. S-57-12, 107 Sch.L.R. 19 (C.P. Schuylkill Co. 2013 Domalakes, J.)(In an Opinion, Judge John E. Domalakes denied a Defendant's Motion to Compel access to a Plaintiff's social media sites, including Facebook, in a motor vehicle accident case where no factual predicate shown that relevant information may be discovered on private pages.).

York County

Hunter v. PRRC, Inc., No. 2010-SU-3400-71 (C.P. York Linebaugh, P.J.)(President Judge Stephen P. Linebaugh ruled that a defendant must meet a threshold showing of relevant information on a Plaintiff's public social media/Facebook pages before access to the private pages of the site would be allowed. There must be a showing of a reasonable probability that relevant information will be also found on the private pages of the site. The court also noted that a Plaintiff also retained the right to request a protective order if the allowance of the discovery would cause unreasonable annoyance, embarrassment, etc. under Pa.R.C.P. 4012. Court denies motion after finding defense did not make required threshold showing.).

To review blog posts on these cases, as well as other related Social Networking litigation issues, click here.

To review a form Motion, Brief, and proposed Order I created on a Motion to Compel a Plaintiff to Produce his Facebook login information (names have been changed in the documents to protect privacy of parties), click here.

CELLPHONE USE AND PUNITIVE DAMAGES

UPDATE 2015

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Centre County Court Decision on Cell Phone Use and Claim for Punitive Damages

Multitasking: Better to stick with steering and braking

In the Centre County Court of Common Pleas decision in the case of *Gunsallus v. Smith*, No. 2013-3765 (C.P. Centre Co. April 7, 2015 Kistler, J.), Judge Thomas K. Kistler granted summary judgment in favor of the defense and dismissed a punitive damages claim against a tortfeasor Defendant based upon cell phone use during the course of a motor vehicle accident.

The Plaintiff's claim for punitive damages was based upon allegations that the tortfeasor was speeding immediately prior to the accident on a road unfamiliar to him and allegations that the defendant was talking on a cell phone which caused him to drive with his non-dominant hand.

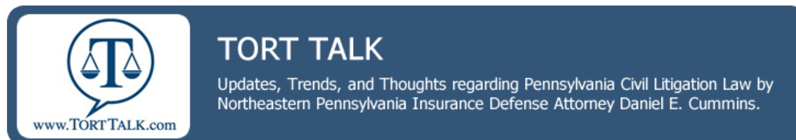
In its Opinion, the court noted that talking on a cell phone while driving is "conduct which is permitted under Pennsylvania law."

After discovery, the Defendant filed a Motion for Partial Summary Judgment seeking a dismissal of the punitive damages claims on the basis that the Plaintiff did not produce any evidence to prove that the tortfeasor's conduct was outrageous as required under the law pertaining to punitive damages.

In his Opinion, Judge Kistler set forth the law of punitive damages and note the court's role in initially determining whether or not the Plaintiff has presented sufficient evidence to take such a claim to the jury.

After noting that there still appears to be no Pennsylvania appellate court decision on the issue of cell phone use as supporting a claim for punitive damages, Judge Kistler ruled that, while the facts presented "may have created a situation that was not the most ideal, taken together, they do not rise to the level of outrageous or reckless conduct" sufficient to allow for a claim for punitive damages to proceed.

As such, Defendant's Motion for Partial Summary Judgment was granted and the Plaintiff's claim for punitive damages was dismissed with prejudice.



Request for Spoliation Sanction Due To Cell Phone Carrier's Destruction of Records Denied

In her recent decision in the case of *Barkely v. Douglas*, PICS Case No. 15-0390 (C.P. Monroe Jan. 16, 2015 Sibum, J.), Judge Jennifer Harlacher Sibum denied a Plaintiff's request for a spoliation sanction in a motor vehicle accident case relative to the Defendant's cell phone carrier having deleted certain cell phone records as part of its ordinary retention policy.

In denying the Plaintiff's request for a spoliation sanction, the court applied the factors in the case of Schroeder v. PennDOT and Schmid v. Milwaukee Elec. Tool Corp.: (1) the degree of fault of the party who destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether a lesser sanction was appropriate.

Here the court found that the Defendant was never in possession of the cell phone records; rather, the cell phone carrier was and the cell phone carrier destroyed the records in the ordinary course of its business.

Judge Jennifer Harlacher Sibum
Monroe County

Judge Sibum also rejected the Plaintiff's contention that the defendant had intentionally withheld information that delayed the Plaintiff's ability to secure the cell phone records.

Although it was indicated that the Defendant initially provided the incorrect name of the cell phone provider in his Answers to Interrogatories, the court noted that the Defendant's cell phone number was noted in the police report which was generated a short time after the accident. As such, the court found that the Plaintiff had basic information to utilize in an effort to secure the cell phone records prior to their destruction.

Pennsylvania Supreme Court Splits on Authentication of Text Messages Ruling [In Criminal Court Context]

A December 30, 2014 evenly split 3-3 decision by the Pennsylvania Supreme Court in the case of *Commonwealth v. Koch*, No. 45 MAP 2012 (Pa. 2014) means the Superior Court's decision applying the authentication law under Pa.R.E. 901 applies to electronic evidence and that circumstantial evidence can be utilized to meet the test.

While another split decision by the Commonwealth's highest court on an issue of

importance is disappointing, that decision, along with the Superior Court's decision in the same case, suggests that the same old evidentiary Rules will be held to apply to this new form of evidence. Such an analysis would likely be extended to Facebook profile evidence and other social media evidence.

Lehigh County Trial Court Dismisses Punitive Damages Claim Based Solely on Cell Phone Use During Auto Accident

In the case of *Pietrulewicz v. Gil*, No. 2014 - C - 0826 (C.P. Lehigh Co., June 6, 2014 Reichley, J.), Judge Douglas G. Reichley of the Lehigh County Court of Common Pleas sustained a defendant's preliminary objections and struck a plaintiff's claims for recklessness and punitive damages based upon a plaintiff's allegations that the defendant driver was using a cell phone at the time of the accident.

In the opinion, the court noted that there were allegations that the defendant driver was distracted by her cell phone use when she made a slow left hand turn across the Plaintiff's path of travel and an accident resulted.

The court reviewed several cases handed down to date on this issue and essentially ruled that the mere use of a cell phone while driving without more, does not amount to factual support sufficient to sustain an averment of recklessness and attendant punitive damages. Rather, such allegations only support a claim of negligence.

Judge Burke of Luzerne County Allows Punitive Damages Claims To Proceed in Cell Phone(s) Distraction Auto Accident Case

Might as well be a baby driving...

In his recent Luzerne County decision in the case of *Gugliotti v. O'Rourke*, No. 2012-CV-15133 (C.P. Luzerne Co. 2014 Burke, P.J.), President Judge Thomas F. Burke, Jr., by Order only, denied a Defendant's Preliminary Objections to Plaintiff's allegations of reckless conduct in support of compensatory and punitive damages claims in the Complaint concerning the Defendant's use of not one, but two, cell phones at the time he rear-ended the vehicles ahead.

According to the briefs filed in the matter, the police report indicated that the defendant driver allegedly admitted at the scene that "both of his cell phones began ringing and that he leaned over to answer them...[he] failed to see the stopped traffic ahead of him due to cell phone distraction and he struck the rear of Unit #2."

The defense asserted that the pleadings of the Complaint failed to conform to rule or law of court in that they included scandalous or impertinent allegations. The defense also asserted that the allegations failed to have sufficient facts plead in support of the claims presented.

The defense asserted in its brief that punitive damages were not supported where the claims did not establish that the defendant was not talking on his cell phones at the time of the accident but merely stated that they had begun to ring. The defense also noted that, in any event, use of a cell phone during the course of the accident in and of itself was insufficient to support allegations of reckless conduct or a claim for punitive damages.

The Plaintiff asserted in his brief that the conduct alleged of a defendant driver being distracted by leaning over to answer two cell phones that were simultaneously ringing and crashing into a car ahead and causing a four vehicle chain reaction accident was the type of conduct the cases to date have suggested may be sufficient to allow the claim to proceed.

As noted, Judge Burke overruled the defendant's Preliminary Objections.

Philadelphia Trial Court Judge Grants Unopposed Motion To Add Punitives Damages Claim Based Upon Cellphone Usage in Tractor Trailer Accident Case

According to a June 13, 2014 article by Zack Needles in The Legal Intelligencer entitled "Judge OKs Punitives Claim for Cellphone Use in Crash Case," Judge Mark I. Bernstein of the Philadelphia County Court of Common Pleas granted an unopposed motion to amend a Complaint filed by a plaintiff in the case of *Simmons v. Lantry* to add punitive damages claims in a case involving a tractor trailer driver who was allegedly distracted by his cell phone use at the time of an accident.

[Federal Western District Court of PA Decision Allowing Punitive Damages Claim Based Upon Alleged Cell Phone Use in Trucking Accident Case]

In his recent decision in the case of *Scott v. Burke*, 2013 U.S. Dist. Lexis 123432 (W.D. Pa. Aug. 29, 2013 Hornak, J.), Western Federal District Court Judge Mark R. Hornak granted a plaintiff's motion to amend the Complaint to add a punitive damages claim based upon a defendant tractor trailer driver's alleged cell phone use at the time of the subject accident. The court also denied the defendant's motion for judgment on the pleadings on this issue and other issues presented.

Judge Hornak declined the defendant's invitation to conclude, as a matter of law, that allegedly merely glancing down at cell phone momentarily did not constitute valid support for a punitive damages claim. The court noted that a dismissal of such a claim at this early pleadings stage of a matter was inappropriate particularly where it was alleged that the tractor trailer driver allegedly rear ended and killed the plaintiff as result. The court noted that the issue may be ripe for reconsideration at the conclusion of discovery.

The court otherwise ruled that alleged evidence showing that the defendant’s driver was talking on a cell phone at or about the time of the accident creates a reasonable

inference that the driver was willfully inattentive, thus permitting amendment of the complaint to add punitive damages.

NJ Case Opens Door (in NJ) For Liability of Text Message Sender in Distracted Driver Auto Accident Cases

Previous cases on cell phone use here in Pennsylvania have focused on the liability of a defendant driver allegedly causing an accident by being distracted from the road ahead by some form of cell phone use (dialing, answering, talking, texting, etc.).

Now comes a New Jersey Appellate Division decision in the case of *Kubert v. Best*, No. A-1128-12T4 in which the court held that the sender of a text message may be held liable in New Jersey for injuries caused by the distracted driving of the text recipient if the plaintiff can prove that the sender of the text knew or had special reason to know that the recipient would view the text while driving and would be distracted by it.

Judge Nealon of Lackawanna County Addresses Novel Issue of Viability of Punitive Damages Claim For Distraction by GPS While Driving

Judge Terrence R. Nealon has written an excellent and thoroughly researched Opinion on the novel case of first impression of whether a punitive damages claim may be pursued in an auto accident case against a defendant driver on the basis that the defendant was distracted by looking down at a GPS on a smart phone at the time of the accident.

In the case of *Rockwell v. Knott*, No. 12 CV 1114 (C.P. Lacka. Co. Aug. 13, 2013 Nealon, J.), the defendant filed a motion for partial summary judgment on this punitive damages claim.

Judge Terrence R. Nealon
Lackawanna County

In his detailed Opinion, Judge Nealon noted there were a few Pennsylvania court of common pleas decisions involving cell phone use (which does not divert the driver's eyes and attention from the roadway), but nothing involving texting while driving, or use of a cell phone GPS, which could cause far greater driver distraction.

The court also reviewed similar cases from other jurisdictions to round out the analysis on the issues presented of driver distraction by mobile devices.

While Judge Nealon noted in his Opinion that looking away from the road at a GPS on a smart phone to the point of distraction could arguably amount to reckless conduct to support a punitive damages claim, the record before the court in this particular matter failed to contain any evidence to support the claim that the defendant driver was indeed so distracted at the time of the accident.

As such, the defendant's motion for partial summary judgment on the punitive damages claim was granted by the court.

This case has settled since the issuance of the Opinion and, therefore, there will be no appellate review of this case.

Judge Zulick of Monroe County Denies Punitive Damages Based Upon Cell Phone Use in Unique Case

Segway Device

In the case of *Platukis v. Pocono Segway Tours*, LLC, PICS Case No. 13-0967 (C.P. Monroe Co. April 8, 2013 Zulick, J.), Judge Arthur Zulick of the Monroe County Court of Common Pleas ruled that allegations in a Complaint simply asserting that a Defendant was using a cell phone while operating a "motor vehicle," in this case a Segway, did not give rise to the state of mind necessary to find that the Defendant acted recklessly and, as such, Preliminary Objections to the punitive damages claims were granted.

This matter arises out of an incident that occurred when the Plaintiff was taking part in a Segway tour provided by the Defendant. While driving her Segway, the Plaintiff was involved in a collision with another Segway. The person on the other Segway was using his cell phone and allegedly operating the Segway at an excessive rate of speed. The Plaintiff filed suit against the Defendants and alleged punitive damages against the Segway operator and the tour operator.

The Defendants filed Preliminary Objections seeking to strike the punitive damages Complaint.

The trial court noted that, since the Plaintiff did not allege that the other Segway

driver had any "evil motive," the Plaintiff were required to allege that the Co-Defendants Segway driver's actions were outrageous and that such outrageous behavior was due to his reckless behavior. Reviewing the Complaint in a light most favorable to the Plaintiff, the court found that the Plaintiff did not allege facts sufficient to support the punitive damages claim.

A Cell Phone Punitive Damages Case Out of Crawford County

In his July 17, 2012 Memorandum and Order in the case of *Leonard v. Schlabach*, No. A.D. 2012-172 (C.P. Crawford Co. July 17, 2012 Vardaro, P.J.), President Judge Anthony J. Vardaro overruled in part and sustained in part a Defendant's Preliminary Objections to a Plaintiff's Complaint in a motor vehicle accident case.

The Court sustained the Preliminary Objections on the Plaintiff's claim for punitive damages in this ordinary motor vehicle accident matter. In this regard, the Plaintiff was attempting to support a punitive damages claim based upon, in part, allegations that the Defendant was using a cell phone at the time he pulled into a Sheetz parking lot under nighttime conditions and struck a pedestrian Plaintiff.

Judge Vardaro reviewed a line of cell phone as punitive damages cases, including Pennington v. King, Piester v. Hickey, Xander v. Kiss, and Kondash v. Latimer. Judge Vardaro also reviewed cases from other jurisdictions pertaining to cell phone/punitive damages issues.

After a review of the above law, the Court noted that the "proper inquiry here is

whether the allegations in Plaintiffs' complaint constitutes the type of 'additional indicators' or aggravating factors that could elevate Defendant's conduct from mere negligence to the type of willful, wanton, or reckless conduct that would justify punitive damages."

The Court noted that, in this matter, the Plaintiffs have allege that, in addition to using his cell phone at the time of the accident, the Defendant was allegedly driving too fast for the conditions (i.e., the conditions being that he was in a parking lot at night when he knew he may encounter pedestrians), had altered the height of his vehicle so that it sat higher than it did when it was manufactured, and had modified the side door windows so that they had a darker tint then they did when the vehicle was manufactured.

The Court found that these allegations were "distinguishable" from the additional indicators found in those cases that have permitted cell phone use to serve as the basis for an award of punitive damages. For example, there was no allegation in this case that the Defendant was driving while intoxicated, driving erratically across multiple lanes of traffic, or fleeing the scene of the accident.

The Court found that, under the facts alleged in this matter, the Defendant's conduct, at most, was very careless. Furthermore, the Court stated that there was no malice in the Defendant's decision to raise the profile of his vehicle or tint his windows. The Court also noted that the Defendant's decision to tint his windows or raise the profile of his vehicle were presumably made well before the subject accident and were not a part of the same chain of events so as to support a claim for punitive damages in this matter.

The Court dismissed the Plaintiff's claims for punitive damages noting that injuries caused by the alleged conduct of the Defendant driving too quickly through the Sheetz parking lot while using a cell phone do not compare to the egregious nature of the additional indicators noted in the above cases. Judge Vardaro also stated that the injuries caused by the Defendant's alleged conduct were capable of being fully addressed by compensatory damages and that punishing the Defendant with punitive damages under the facts alleged would not appropriate.

In his November 19, 2010 decision in the case of *Kondash v. Latimer*, No. 2009 - Civil - 8622 (C.P. Lacka. Co. Nov. 10, 2010 Thomson, S.J.), visiting Senior Judge Harold A. Thomson, Jr. (former President Judge in Pike County) denied a tortfeasor defendant's Preliminary Objections to a Plaintiff's Complaint containing claims of "recklessness" and wanton conduct on the part of the defendant driver related to his handheld device.

Judge Thomson noted in his Opinion that, at that time, there was no statutory or decisional law on the issue one way or the other than several municipalities across the Commonwealth having passed local laws banning the use of cell phones while driving.

The Court overruled the defendant's preliminary objections asserting that such allegations were impertinent, scandalous or insufficient in a factual or legal manner. In so ruling, Judge Thomson found that it was not free and clear from doubt whether such allegations were entirely irrelevant as asserted by the defense.