



LITIGATION UPDATE

MAY, 2009

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Margolis Edelstein is a full service law firm with eight (8) offices serving all of Delaware, New Jersey, Pennsylvania and West Virginia. The firm has earned the *Martindale-Hubbell* legal ability rating of *AV*, signifying very high to preeminent, the highest rating available. The firm members are active in many industry associations including the *Defense Research Institute* (DRI), *The Harmonie Group*, the *International Association of Defense Counsel* (IADC), the *Professional Liability Underwriting Society* (PLUS) and the partners and associates in the firm often address local chapters of the *Insurance Society* as well as local claims organizations.

Litigation Update

Margolis Edelstein

May 2009

The following litigation update is prepared annually by Michael P. McKenna, Esq. The cases (all 2008 and 2009 rulings) discussed within this document include issues impacting litigation involving insurance coverage, general liability, workers' compensation and the Pennsylvania Motor Vehicle Financial Responsibility Law.

We welcome your questions or comments regarding any of the topics addressed.

SUMMARY OF CASES

Coverage:

Ario v. Ingram Micro, Inc.: Payments of certain claims by Reliance Insurance Company prior to rehabilitation and, ultimately, insolvency, are not "preference" payments, but payments "in the regular course of business."

Brethren Mutual Ins. Co. V. McKernan: Denial of "restitution" coverage under homeowner's policy was appropriate for funeral expenses of deceased girlfriend stabbed by policyholder.

Betz v. Erie Insurance: Sinkhole collapse and "all risk policy."

State Farm v. Ware's Van Storage: Insurance carriers pursuit of policyholder's collision deductible.

American and Foreign Ins. Co. v. Jerry's Sports Center: Reservation of rights does not erode duty to defend.

Erie Insurance v. Maier: Homeowners insurer not obligated to defend absent an "occurrence" in negligent misrepresentation claim.

Nationwide v. Easley: Denial of UM coverage for "use for hire" auto.

Liability:

McMahon v. Pleasant Valley West Association: “Special relationship” required for homeowners’ association to be liable for pit bull attack.

Underwood v. Wind: PA is no longer a “one free bite” jurisdiction for animals with a propensity to bite, but landlord out-of-possession with no knowledge of danger animals presence insulated.

Hoffa v. Bimes: *Veterinary Immunity Act* insulates practitioner emergency treatment rendered in equine case.

Stumpf v. Nye: Hearsay evidence in assault and battery case was appropriately precluded re: assailant’s alleged reputation for violence.

Tayar v. Camelback Ski Corporation: Release with ski-lift ticket doesn’t protect resort in all cases.

Craig v. Amateur Softball Association: Summary judgment upheld where player struck in the head by errant softball.

Schmidt v. Boardman Co.: Fire truck manufacturer denied protection as successor to original manufacturer in products liability matter.

Haas v. Four Seasons Campground: Minimum contacts for jurisdiction not established by campground’s presence on *Internet*.

Kopytin v. Aschinger: Superior Court dicta: video surveillance evidence requires authentication testimony.

Jolaza v. PA Dept of Transportation: Pro se plaintiff’s failure to contest is not sufficient to sustain defendant’s Pos.

LJL Transportation v. Pilot Air Freight: Dishonest conduct by franchisee is an “incurable breach” excusing franchisor’s obligation to honor opportunity of franchisee to “cure” within time frame included in contract.

Johnson v. White: Attorneys obligated to comply with “Code of Civility.”

Workers’ Compensation:

Folmer v. WCAB (Swift Transportation): Termination of benefits - employer successfully demonstrated employee’s physical condition had changed subsequent to denial of the first termination petition.

Bell v Kater: Employee accidentally runs over co-worker; fails to raise WC immunity as a defense.

UPS v. Hohider: Employer’s right to subrogation for WC lien from employee’s third-party recovery.

Stout v. WCAB (Pennsbury Excavating): WC subrogation rights fall within exclusive jurisdiction of WC authorities, not Common Pleas Courts.

Gorman v. WCAB (Kirkwood Construction): Employers didn't waive subrogation rights in Compromise & Release didn't preclude recovery of benefits paid to claimant from third-party settlement.

Griffiths v. WCAB (Seven Stars Farm): WC claimant rendered quadriplegic entitled to cost for van conversion, but not cost for new van.

Motor Vehicle Financial Responsibility Law:

Williams v. Allstate: First party benefits and policy obligation vs. MVFRL provision - must insured submit to IME?

Glover v. State Farm: Uninsured pedestrian's claim for first party benefits from vehicle owner's carrier not barred by 2 year statute of limitations - MVFRL provides 4 years.

Heller v. PA League of Cities: Policeman injured in squad car denied UIM in lieu of WC benefits as priority in policy of insurance.

Burdick v. Erie Insurance: Policyholder auto operator involved in collision with uninsured "dirt bike" is entitled to UM benefits.

Toth v. Donegal Companies: UIM benefits rejection signed by spouse precludes recovery absent proof of forgery or placement of signature without permission or consent.

Nationwide v. Schneider: Alleged violation of "consent to settle" clause, without showing of prejudice, does not preclude claim for UIM benefits.

Generette v. Donegal Mutual: Guest passenger entitled to UIM benefits from personal insure; non-stacking provision does not apply to guest passengers.

GEICO v. Ayer: "Household vehicle" exclusion prohibits stacking under "narrow circumstances" where motorcyclist struck by auto and crushed after striking vehicle reverses.

COVERAGE

Ario v. Ingram Micro, Inc., Pa., -- A.2d -- (2009)

Reliance issued trade credit insurance policies to Apple Computer, H. J. Heinz Company, Ingram Micro, and Mitsui. Under the policies, Reliance insured against losses arising out of the insureds' customers' nonpayment for goods and services. The four listed insureds submitted claims totaling just under \$5,000,000, which were paid by Reliance in the regular course of business. The Insurance Commissioner thereafter placed Reliance first into rehabilitation and then into liquidation. The Commissioner sought to void the payments to Apple, Heinz, Ingram, and Mitsui as "preferences." "Preference" provisions are designed to achieve equitable apportionment of unavoidable losses. Such provisions in theory discourage creditors from racing to the courthouse to dismember a debtor during its slide into bankruptcy. If the Reliance payments to Apple, Heinz, Ingram, and Mitsui were "preferences," those insureds had to disgorge the payments back into the estate of the insolvent insurer. The PA Supreme Court considered whether payments made in the regular course of business qualify for "preference" treatment. Federal bankruptcy laws provide exceptions for regular course of business payments. The PA Insurance Act does not. The Supreme Court noted that regular course of business exceptions to general "preference" rules had not been widely legislated or litigated in the insurance context. Utah by statute permits an exception for regular course of business payments. Ohio does so by court decision. Nebraska denies an exception by court decision. The PA Supreme Court rules that allowing a regular course of business exception to the "preference" general rule advances PA public policy while honoring the legislative intent. If the PA Insurance Commissioner is permitted to treat regular policy payments as "preferences," prospective insureds will domicile shop coverage to avoid potential "preference" treatment with PA insurers.

Brethren Mutual Insurance Company v. McKernan, Pa., Super., 961 A. 2d 205 (2008)

During an argument, McKernan grabbed a knife, stabbed her boyfriend, causing his death. McKernan was convicted of reckless endangerment and simple assault. McKernan was also ordered to pay restitution to cover funeral expenses. A tort suit against McKernan by the estate was settled by Brethren Mutual (McKernan's homeowner's carrier) within policy limits. McKernan demanded that Brethren Mutual also pay the court-ordered restitution for funeral expenses. While restitution orders in criminal cases may incidentally aid victims, the true purpose of such orders is the rehabilitative goal of requiring offenders to take responsibility for and repair any loss as far as possible. Permitting insurance for such restitution obligations would undermine the public policy. Coverage was properly denied.

Betz v. Erie, Pa. Super., 957 A.2d 1244 (2008)

Betz sued Erie to recover under a Sinkhole Collapse endorsement on a homeowners' policy. The basic policy excluded coverage for loss caused by earth movement, sinkholes, or water damage where water below the surface of the ground seeps or leaks through any part of the building. Betz, however, purchased a Sinkhole Collapse endorsement which added coverage for damage caused by sudden settlement or collapse of the earth supporting the property if the settlement or collapse resulted from subterranean voids created by the action of water on limestone or similar rock formations. During a hurricane, water infiltrated the substrate under the Betz home, eroding support from beneath the basement floor and causing the cement to rupture which then allowed water to enter. When the water receded, floors had dropped throughout the house and rooms in the upper floors had cracks. The loss admittedly was not caused by the action of water on "limestone." At issue was whether the loss was caused instead by the action of water on "similar rock formations." Erie presented expert evidence that only three types of rock have solubility characteristics similar to limestone: dolomite, gypsum, and halite. None of these rocks were under the Betz home. The Superior Court concluded that the endorsement phrase "similar rock formations" was reasonably susceptible to different constructions and was capable of being understood in more than one sense. The policy language did not establish the manner in which rocks had to be similar to limestone. Because Erie issued an "all risk" policy, Betz had the burden to demonstrate that a loss had occurred but Erie thereafter had the burden to establish any restriction in the "all risk" coverage. The verdict in favor of Betz was affirmed.

State Farm v. Ware's Van Storage, Pa. Super., 953 A.2d 568 (2008)

Hay (the State Farm insured) was in an accident caused by Ware's Van Storage. State Farm paid Hay's collision loss. Hay sued Ware's Van Storage for bodily injuries, but did not include claims for property damage or for his collision loss deductible. State Farm separately sued Ware's Van Storage to recover its Hay collision loss payment. State Farm did not sue for Hay's deductible. Ware's Van Storage claimed that causes of action arising out of the accident could not be split and that the Hay suit barred the later State Farm suit. The trial court agreed and dismissed the State Farm suit. On appeal, the Superior Court reverses. While Pennsylvania in general does not permit split causes of action, there was no actual split cause of action in this case. Any unity and identity of interests ended when State Farm paid the collision loss. State Farm had no interest in Hay's personal injury action and Hay had no interest in State Farm's subrogation action. The derivative nature of a subrogation claim may establish unity and identity of interests but only up until the time the insurance carrier pays the claim. Once payment is made, the carrier may pursue its recovery independent of any other claims of its insured.

American and Foreign Ins. Co. v. Jerry's Sports Center, Pa. Super., 948 A. 2d 834 (2008)

NAACP sued several firearms distributors, seeking injunctive and monetary damages for negligence in marketing and distribution of handguns which allegedly caused injury, death, and other damages to NAACP members. Jerry's Sports, insured by Royal Insurance, was a defendant. Royal retained counsel to defend Jerry's Sports subject to a reservation of rights which purported to give Royal the right to recoup defense costs from Jerry's Sports should Royal ultimately determine it had no duty to defend or indemnify. Counsel retained by Royal extracted Jerry's Sports from the litigation via motions for summary judgment. Royal thereafter sought to recover from Jerry's Sports approximately \$320,000 in defense costs. Citing federal appellate precedent and also a PA Court of Common Pleas decision, the Superior Court concludes that, absent a policy provision allowing the carrier to obtain reimbursement of defense costs, a reservation of rights letter cannot retroactively erode the breadth of the duty to defend. Judgment in favor of Royal against Jerry's Sports was vacated.

Erie Insurance Exchange v. Maier, Pa. Super., 963 A.2d 907 (2008)

In underlying litigation, a bank claimed that Maier participated in a fraud upon the bank as creditor. Anthony owed money to the bank with the debt secured by Anthony's home. Maier purchased the home from Anthony for \$650,000, causing the bank to believe it could recover only that amount from Anthony, thus inducing it to forego its interest in the remainder of the Anthony debt. Maier, however, paid an additional \$200,000 to Anthony, allegedly for "personal property" which was, in fact, worth much less. Maier intended to induce the creditors to permit sale of the property and also intended to permit Anthony to receive cash from the transaction. The bank's suit against Maier alleged intentional misrepresentation, conspiracy, and negligent misrepresentation. Intentional misrepresentation and conspiracy claims clearly fell beyond Erie's homeowner's coverage for Maier. The trial court, however, ruled that Erie owed defense and indemnity for the negligent misrepresentation claims. The Superior Court disagrees and reverses, entering judgment in favor of Erie. Coverage is triggered by an "occurrence," defined as an "accident." An accident is something that occurs unexpectedly or unintentionally. For Maier, the purchase arrangement for the home and personal property was not "unexpected" or "unintentional." Absent an "occurrence," Erie owed no coverage. In addition, the Erie policy only protected against bodily injury or property damage. The bank's lien on the Anthony real estate was not "tangible property" covered by the homeowner's policy. A negligent misrepresentation on the value of the piece of property does not give rise to property damage or to loss of or loss of use of the property.

Nationwide v. Easley, Pa. Super., 960 A.2d 843 (2008)

Easley paid a fee to lease a taxicab for a 24 hour period. He was injured in an accident while driving the taxicab but did not have a paying customer at the time and was, in fact, driving home at the end of a shift. He intended to return the taxicab to the fleet owner the following day. After Easley recovered the tortfeasor's liability limits, he sought UIM benefits from Nationwide, his personal carrier. Nationwide, citing "regularly used vehicle" and "use for hire" policy exclusions, denied coverage. The trial court denied coverage based on the "use for hire" exclusion. The Superior Court affirms. The "use for hire" exclusion applies regardless of whether the vehicle is carrying a passenger for charge at the time of the accident. In addition, the "regularly used vehicle" exclusion also applies even though Easley rented a different vehicle from the taxicab fleet each day.

LIABILITY

McMahon v. Pleasant Valley West Association, Pa. Cmwlth., 952 A2d. 731 (2008)

McMahon lived in a private planned residential community governed and managed by a homeowners association. Conklin, McMahon's neighbor, owned two pit bull dogs whose aggressive behavior had been reported to the association. The association wrote to Conklin, requesting that he leash his dogs or confine them to his property. The association, however, sent the notice to the wrong address and Conklin never received it. McMahon was thereafter attacked and injured by the dogs, which, unleashed, ran from Conklin's property to McMahon's property. At issue on appeal were McMahon's claims that the association negligently failed to establish and enforce rules concerning dogs and also violated its duty to exercise reasonable care to prevent injury to McMahon. Absent a "special relationship" with either the tortfeasor or the victim, the association had no duty to control the acts of others. "Special relationships" include a parent's duty to control a child, a master's duty to control a servant, a landowner's duty to control a licensee, and the duty of those in charge of individuals with dangerous propensities to control those individuals. For instance, a landlord may be held liable for injuries caused by the dog of a tenant where the landlord retains control of the premises, has actual knowledge of the dog's violent propensities, and could have taken steps to eliminate the dog's presence and thus prevent any injuries. In the present case, McMahon alleged no facts giving rise to a "special relationship" recognized under PA law. McMahon, for instance, failed to allege that the association retained the right to control Conklin's property or had any authority to compel removal of Conklin's dogs. Summary judgment in favor of the association was affirmed.

Underwood v. Wind, Pa. Super., 95 A. 2d 1199 (2008)

Wind owned two pit bull dogs, kept at a home she rented from Kasprzyk. The dogs escaped from the home, attacking a child and also two good samaritan rescuers. A jury found against both Wind and Kasprzyk. Kasprzyk previously allowed Wind and the dogs to stay at another property. When Wind moved into the rented property, however, Kasprzyk included a "no pets" lease provision and further told Wind she could not keep the pit bulls at the property. Kasprzyk was unaware that the dogs were nevertheless kept at the rented property. PA is no longer a "one free bite" jurisdiction, instead holding that propensity to attack may be proven by a single incident, including the incident at issue in litigation. A landlord out of possession, may be held liable for dog bite injuries only when the landlord has knowledge of the presence of the dangerous animals and has the right to control or remove the animals by retaking possession of the premises. Actual knowledge is required. Judgment as to Wind was affirmed and as to Kasprzyk was vacated.

Hoffa v. Bimes, Pa. Super., 954 A.2d 1241 (2008)

Hoffa's horse, exhibiting signs of colic, was taken to Bimes' veterinary clinic by the horse's trainer. Before the trainer or Bimes could locate Hoffa for permission, Bimes instituted emergency care, including an abdominal tap. That procedure, unfortunately, pierced the horse's small intestine, causing an infection, and ultimately causing the horse's death. In defense to the suit filed by Hoffa, Bimes pleaded the Veterinary Immunity Act. Under the statute, Bimes, if performing "emergency care" in response to an "emergency situation," was protected for all but grossly negligent or intentional acts or omissions. Although the statute did not define "emergency," the Superior Court notes that the statute is designed to permit vets to respond to life-threatening situations necessitating immediate action. The negligence claim was accordingly barred. Likewise barred was Hoffa's claim based on breach of a bailment. Treatment-related claims against vets must be pleaded as professional negligence claims, not bailment claims.

Stumpf v. Nye, Pa. Super., 950 A. 2d 1032 (2008)

Stumpf assaulted Nye. At trial, Stumpf attempted to offer evidence of Nye's reputation for violence by presenting witnesses to testify that Nye himself admitted he had beaten up other individuals on other occasions. Under PRE 404(a)(2)(iii), evidence of a party's character trait of violence may be admitted when offered to rebut that party's claim that another was the first aggressor. Stumpf, however, had not attempted to offer evidence of Nye's character or reputation for violence, but rather only hearsay testimony from witnesses about two specific instances of conduct which the witnesses were told about but had not observed. The trial court properly refused to admit such evidence.

Tayar v. Camelback Ski Corporation, Pa. Super., 957 A.2d 281 (2008)

Prior to snow tubing at Camelback, Tayar signed a release and was then given a lift ticket containing exculpatory language. Those documents purported to release Camelback for "negligence or any other improper conduct". Tayar used the family tubing slope. On this slope, access was controlled by an attendant who was to ensure that no snow tubers started down the slope until the previous snow tubers had already reached the bottom and exited to a receiving area. The attendant nevertheless sent more snow tubers down the slope before Tayar exited into the receiving area. Tayar was struck by the snow tubers, breaking her leg. Relying upon the release and on the exculpatory language on the lift ticket, the trial court granted summary judgment to Camelback.. The Superior Court reverses. Tayar did not even receive the lift ticket until after she had already signed the release form and paid for the ride. There was no evidence that Tayar was verbally informed that she was bound by exculpatory language on the back of the lift ticket. The court could not conclude as a matter of law that the disclaimer language on the ticket itself was sufficiently conspicuous that, without any further indications from the ski facility, a purchaser would be put on notice of its contents. In addition, the form release applied to Camelback but did not specifically release Camelback employees. Since the attendant was aware he sent more snow tubers down the slope before Tayar had safely exited the area, plaintiff could state claims for reckless or intentional conduct which were beyond any release of negligence claims.

Craig v. Amatuer Softball Association, Pa. Super., 951 A. 2d 372 (2008)

Craig was struck in the head by a softball while playing in a game organized under ASA rules. Craig was not wearing a helmet nor did ASA rules require him to do so. Since the risk that Craig would be struck by an errant softball was inherent in the game, ASA owed no duty to Craig. Although the "no duty" rule allows an exception when the amusement facility deviates in some relevant respect from established custom, Craig failed to prove either the established custom or the deviation. Summary judgment in favor of ASA was affirmed.

Schmidt v. Boardman Company, Pa. Super., -- A.2d – (2008)

Schmidt sued Sinor, asserting it was liable as the successor to Boardman Company, manufacturer of the allegedly defective fire truck involved in the accident. As the fire department raced to a fire scene, a fire hose dangling from the side of the truck snagged on a parked car and then snapped free causing fatal injuries to Schmidt. The Superior Court reviews at length the product line exception to the general rule of successor non-liability. The Superior Court first cites the *Ramirez* test:

Where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

The Superior Court also incorporates the test adopted in PA in *Dawejko*:

[The three factors to be analyzed] are (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.

In the present case, plaintiffs produced sufficient evidence upon which the jury could have inferred that Sinor manufactured a fire suppression vehicle that appeared to be sufficiently similar in design to a fire truck, possessing the essential characteristics and functional purpose of a vehicle employed in the fire suppression industry. That evidence would be sufficient to support a finding that it would be fair to impose liability on Sinor as a successor to Boardman Company.

Also at issue, however, was whether Schmidt's family members who witnessed the accident could recover for negligent infliction of emotional distress. The verdict against Sinor was in strict liability, not negligence. Although the issue has not been widely litigated in the U.S. and the few reported cases are in conflict, the Superior Court allows the bystander emotional distress claims, regardless of whether the theory against defendant is negligence or strict liability.

Haas v. Four Seasons Campground, Pa. Super., 952 A.2d 688 (2008)

Haas was injured at the Four Seasons Campground in NJ when a branch fell from a tree, struck his head, and caused him to fall into a brick fireplace. Haas had leased a campsite at Four Seasons. On appeal, the issue was whether Four Seasons, a NJ corporation doing business in NJ, was subject to PA long arm jurisdiction. The Superior Court analyzed both specific personal jurisdiction (i.e., facts related to this particular incident) and general personal jurisdiction (i.e., sufficient PA contacts to justify jurisdiction). Since Four Seasons' only contact with PA was via the Internet, the Superior Court analyzed its website.

The mere presence of a website, without more, is not sufficient to subject a business to specific jurisdiction. The Internet website must target users of the forum state and must engage the plaintiff in such a way that the underlying transaction giving rise to the claim occurs as a result of using the website. The Four Seasons website, however, was passive, not even enabling a customer to purchase rights to use the campsite. Seasonal contracts had to be signed in NJ in person. Under such circumstances, the court could not conclude that Four Seasons had so purposely availed itself to PA that it should expect to have to defend itself in that forum.

With regard to general jurisdiction, the Superior Court applies a sliding scale of interpretation regarding websites. At one extreme, the defendant does all its business over the Internet. Exercise of jurisdiction is proper in that case. At the other extreme, the defendant simply posts information on the Internet, conduct which does not create jurisdiction. Between the extremes are defendants, such as Four Seasons, with interactive websites. Four Seasons customers could use the website to request reservations and provide advance credit card information, but could not actually secure reservations or make payment. Haas failed to prove that the Four Seasons website was targeted specifically to people living in PA or that the website was central to Four Seasons business in PA. Since Four Seasons had no agents or representatives in PA, was not registered to do business in PA (but only in NJ), did not pay PA taxes, did not own property in PA or have any assets in PA, the court could not find contacts sufficient to meet the minimum contacts necessary to vest PA courts with general jurisdiction.

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

Aschinger rear-ended Kopytin. At trial, Aschinger subpoenaed Kopytin's treating chiropractor to testify on cross-examination (Kopytin having elected to submit evidence by report under PRCP 1311.1) and also presented a redacted surveillance videotape. Aschinger admitted negligence and the jury verdict sheet stated that Aschinger's negligence caused injury to Kopytin. The jury, however, awarded only unreimbursed medical expenses, with no amount for pain and suffering. Since Kopytin's acknowledged injuries were of the types that normally involve pain and suffering, an award of only unreimbursed medical expenses was inadequate, requiring a new trial on damages. The Superior Court thereafter offers dicta about surveillance videotape evidence and about trial procedures when plaintiff elects to present medical evidence by report under PRCP 1311.1. As for surveillance videotape evidence, the Superior Court notes that such demonstrative evidence must be authenticated by testimony from a witness who has knowledge that the matter is what it claims to be. Only a person who had actually seen the event recorded can so authenticate surveillance videotapes. With regard to the presentation of medical evidence, Judge Klein in a concurring opinion raises dozens of questions, but no answers, as to procedures and rights when plaintiff proceeds under PRCP 1311.1.

Joloza v. Pa Dept of Transportation, Pa. Cmwlth., 958 A.2d 1152 (2008)

Joloza, acting *pro se*, sued the Department of Transportation for its alleged failure to update his driving record. The Department filed Preliminary Objections to which Joloza did not respond. The trial court sustained the Preliminary Objections as uncontested and dismissed Joloza's Complaint. Because the trial court admittedly did not address the substance of the Preliminary Objections, the case was remanded for further proceedings. Failure to contest is not an adequate reason to sustain Preliminary Objections.

LJL Transportation v. Pilot Air Freight, Pa., 962 A.2d 639 (2009)

Pilot Air is in the business of moving heavy freight shipments in an expedited fashion throughout the country. Pilot Air uses franchised freight stations located at airports. Each franchisee agrees to place all freight shipments with Pilot Air and agrees not to conduct any other business from the franchised location absent written permission from Pilot Air. LJL was such a franchisee. LJL deliberately and systematically diverted freight shipments from Pilot Air to a competing company which shared ownership with LJL. When Pilot Air discovered the franchise agreement breach, it summarily terminated the franchise contract. The franchise contract, however, allowed a franchisee an opportunity to cure any default within 90 days of notice, an opportunity Pilot Air had not afforded LJL before termination. The Supreme Court rules that dishonest conduct by a party to a contract is an incurable breach which excuses future performance by the non-breaching part. Such conduct is so fundamentally destructive that it eliminates the trust on which the contractual relationship was based. Under such circumstances, Pilot Air was not required to afford LJL an opportunity to cure any breach.

Johnson v. White, Pa. Cmwlth., 964 A.2d 42 (2009)

Following an accident, Plaintiffs sued SEPTA and received jury trial damage awards. One plaintiff appealed, challenging the verdict as “woefully inadequate.” The Commonwealth Court quickly disposes of the appeal, affirming the trial result. Of note, however, is the attention the Commonwealth Court devotes to conduct of counsel. Original counsel for plaintiffs, Allen L. Feingold, was suspended and later disbarred. Substitute counsel, Dora R. Garcia, Feingold’s wife and law partner, was then suspended for allowing Feingold to continue working on his files. A second substitute counsel, Jeffrey S. Pearson, handled the appeal. Six minutes before the scheduled start of oral argument, Pearson faxed the Prothonotary letter, not copied to opposing counsel, stating he was “not able to travel to Philadelphia today for the oral argument.” Pearson’s office is four blocks from the courthouse. The Commonwealth Court notes at length Pearson’s breach of the PA Code of Civility. The Court admonishes Pearson that his failure to comply with the Code of Civility rendered a disservice to his client, to opposing counsel, to opposing counsel’s clients, to the court, and to the general public.

WORKERS' COMPENSATION

Folmer v. WCAB (Swift Transportation), Pa. Cmwlt., 958 A.2d 1152 (2008)

At work, Folmer was hit in the face with a box of crowbars while unloading a truck. The WCJ granted Folmer's petition for WC disability benefits, finding that the accident caused Folmer to suffer positional vertigo, cervical disc syndrome, cervical myalgia, and tension headaches. The employer later filed a petition to terminate benefits which the WCJ denied, finding that Folmer was still suffering pain and residual disability. The employer thereafter filed a second termination petition which the WCJ granted. At issue on appeal was the employer's burden in a second termination proceeding to demonstrate that Folmer's physical condition had changed subsequent to denial of the first termination petition. In the second termination proceeding, the employer presented medical experts who opined that Folmer was a malingerer and was exaggerating or fabricating symptoms. The WCJ accepted that evidence and found that Folmer was free of pain. That altered fact determination (i.e., from Folmer suffering pain to being pain free), supported solely by the WCJ's credibility judgments, was sufficient to constitute the change in physical condition required to terminate benefits under the second termination petition.

Bell v. Kater., Pa. Super., 943 A.2d 293 (2008)

Kater, driving her car in her employer's lot, ran over Bell, a co-employee. Kater left work earlier in the day for treatment for an alleged work injury and had just returned to the lot to retrieve her car. Her shift had already ended. When Bell sued Kater, Kater failed to raise WC immunity as a defense. Following an adverse \$2,000,000 verdict, Kater filed an untimely appeal to the Superior Court which was quashed. Kater successfully petitioned the trial court to reinstate appellate rights *nunc pro tunc* and then filed a second appeal as well as a motion to reconsider dismissal of the first appeal. The Superior Court denied reconsideration and also quashed the second appeal. Kater's Petition for Allowance of Appeal to the Supreme Court was denied. Eleven months later, Kater, claiming WC immunity, petitioned to strike the judgment entered some 22 months previously. A defendant is immune from liability for negligence against a fellow employee if the parties are in the same employ. The act or omission, however, must occur while both employees are in the performance of their duties as employees. Whether Kater was in the course of her employment, however, was not addressed at the underlying trial and was not clear as a matter of law. Where facts are agreed upon and only one conclusion may be reached, a jurisdictional defense may be raised after judgment but before execution on the judgment. Here, however, the facts were not agreed upon.

United Parcel Service v. Hohider, Pa. Super., 954 A.2d 13 (2008)

Hohider, a UPS employee injured in the course of employment, received WC benefits and thereafter effected a third party tort recovery. A WCJ ordered Hohider to pay the third-party recovery over to the employer in partial satisfaction of its WC lien. Hohider did not appeal that order. Hohider, however, also did not pay the employer. The employer filed a Praecipe with the Court of Common Pleas to enter judgment on the WCJ order. Hohider successfully petitions the trial court to strike the judgment since Section 428 of the Pennsylvania Workers' Compensation Act permits only injured employees to enter judgments for failure to pay. The Superior Court, while conceding there is no express statutory remedy allowing the employer to enter judgment, nevertheless reverses and reinstates the judgment. Absent such a remedy, the WCJ order would be a nullity. A Court of Common Pleas is without jurisdiction to undo what the WCJ had already done and is without power to alter the employer's absolute right to subrogation. The Superior Court in effect creates an equitable procedural remedy to enforce the WCJ order.

Stout v. WCAB (Pennsbury Excavating), Pa. Cmwlt., 948 A.2d 926 (2008)

Stout was injured in the course of employment with Pennsbury Excavating. Stout brought a third-party action against Morrisville Supply which had no employees of its own but acquired workers (such as Stout) from Pennsbury Excavating. Despite the Morrisville Supply "borrowed servant" and immunity defenses, Stout obtained a damage verdict in excess of \$3,200,000. Stout, post verdict, alleged that Morrisville Supply and Pennsbury Excavating and their shared individual owners improperly frustrated his attempts to collect on the tort verdict. Pennsbury Excavating and its WC insurer then asserted a subrogation lien against any recovery. Stout contended that Pennsbury Excavating's deliberate bad-faith conduct in attempting to subvert Stout's third-party recovery required forfeiture of any WC lien. The WCJ nevertheless awarded the full subrogation claim. On appeal, the Commonwealth Court affirms, noting that the determination of whether an employer or its insurer is entitled to subrogation falls within the exclusive jurisdiction of the WC authorities. Common Pleas Courts lack jurisdiction to adjudicate WC subrogation rights. In this case, there was no evidence that the insurer, as opposed to Pennsbury Excavating or Morrisville Supply, had acted in bad faith.

Gorman v. WCAB (Kirkwood Construction), Pa. Cmwlt., 952 A.2d 748 (2008)

Gorman suffered a work injury when a nail from a nail gun hit him in the eye. After receiving WC disability benefits, he also sought recovery for disfigurement and for loss of an eye. Those claims settled with approval from a WCJ under a Compromise and Release Agreement. The C&R stated that there was no lien or potential lien for subrogation. After receiving the C&R payment, Gorman brought a products liability third-party action and received a settlement. Gorman claimed that the earlier C&R settled all WC issues, including any existing or future liens. The Commonwealth Court disagrees. Although an employer may release or waive subrogation rights against a third-party settlement recovery, the employer had not done so in this case. A third-party action was not instituted, or even contemplated, until long after the C&R, so subrogation had not been considered, much less expressly waived.

Griffiths v. WCAB (Seven Stars Farm), Pa., 943 A.2d 242 (2008)

Griffiths was rendered quadriplegic in a work-related accident. At issue on appeal was the employer's obligation, if any, to provide Griffiths with a modified van for transportation. The Workers' Compensation Act requires the employer to provide the injured employee with any necessary "orthopedic appliances." Query whether a modified van is an "orthopedic appliance" for WC? Using funds from a family friend, Griffiths purchased a van and had it modified for his use. The employer, using WC cost containment provisions, reimbursed 80% of the van conversion cost but refused to pay anything for purchase of the van itself. The Supreme Court rules that vans modified for quadriplegic use qualify as an "orthopedic appliances" and thus fall within an employer's WC obligations. Medical cost containment (under which payments to health providers are reduced to a function of Medicare allowance or to 80% of usual price) reimbursement reduced to 80%) does not apply, since auto dealers, not a "healthcare providers," provide the vans. The amount of reimbursement must be determined on a case by case basis. The WC Act, for instance, does not require that orthopedic appliances (here the van) be brand new. In addition, an injured party's prior circumstances may affect the amount of reimbursement. If claimant already owns a vehicle, for instance, he may be required to trade in on purchase of a van or be required to concede the value of any existing vehicle as a setoff.

MVFRL

Williams v. Allstate Ins. Co., -- F.Supp. -- (E.D. Pa., 2009)

Allstate paid First Party Benefits to Williams following an automobile accident. Allstate scheduled a physical examination for Williams which she refused to attend. As a result, Allstate stopped paying FPB. Williams sued for benefits and Allstate counterclaimed, citing policy provisions which required Williams to submit to a physical examination and which prohibited suit against Allstate unless policy conditions were met. Under Section 1796(a) of the MVFRL, Allstate could obtain an order requiring a physical examination only upon motion with good cause shown. Allstate, however, relied not upon the MVFRL but rather upon its own policy language which provided that “the insured shall submit to mental and physical examinations by physicians selected by Allstate when and as often as Allstate may reasonably require.” In *Fleming v. CNA*, Pa. Super., 597 A.2d 1206 (1980), the Superior Court required a physical examination under similar policy language, noting, though, that the issue of whether such policy violated public policy or the MVFRL had not been raised. In *Erie Insurance Exchange v. Dzandony*, 39 Pa. D. & C. 3d 33 (1986) and *Nationwide v. Hoch*, 36 Pa. D. & C. 4th 256 (1997), Judge Wettick of Allegheny County ruled that such policy provisions did indeed violate public policy and the MVFRL. Judge Buckwalter, however, rejects Judge Wettick’s analysis and predicts the Pennsylvania Supreme Court would enforce the terms of the contract’s physical examination provisions.

Glover v. State Farm, Pa. Super., 950 A.2d 335 (2008)

Glover, an uninsured pedestrian, was hit by a State Farm insured vehicle operated by Krzaczek. Glover sued State Farm for First Party Benefits. The trial court, citing a two year statute of limitations, granted summary judgment to State Farm. The MVFRL, however, provides a four-year statute of limitations (from the date of accident when benefits have not been paid or from date of last payment where payments have been paid). Although § 1713(a)(4) gives an uninsured pedestrian the right to collect medical benefits from any insured vehicle involved in the accident, the legislature clearly intended that such claims be brought directly against the insurer for the vehicle, as opposed to the named insured or the vehicle itself. Glover's suit against State Farm for FPB was against the proper party and was not barred by the statute of limitations.

UM/UIM

Heller v. Pennsylvania League of Cities., Pa. Cmwlt., 950 A.2d 362 (2008)

Heller, a policeman, was involved in an accident while in his squad car. The squad car was insured for UIM through the League of Cities. The policy, however, excluded UIM coverage for persons otherwise eligible for WC benefits for the same accident. The trial court, noting that the MVFRL at §1735 provides that coverages "shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury," ruled the policy exclusion void, making Heller eligible to receive UIM benefits. On appeal, the League of Cities argued that since the employer was free to reject UIM coverage entirely, it should be permitted to purchase UIM coverage subject to exclusions. Otherwise, the employer would be forced to choose between UIM coverage with no exclusions or no UIM coverage at all, clearly not the intent of the statute. The Commonwealth Court, weighing the conflicting public policy considerations, ruled the exclusion valid and denied coverage to Heller.

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

Burdick, in a car on a highway, collided with Dragone, on an unregistered, uninsured dirt bike entering the highway from a private driveway. Burdick sought UM benefits from Erie, his personal auto carrier. The Erie policy defined "uninsured motor vehicle" so as to exclude motor vehicles primarily intended for off-road use. Burdick claimed that Erie impermissibly narrowed the MVFRL definition of "uninsured motor vehicle." The MVFRL, however, does not define "motor vehicle." The Vehicle Code defines "motor vehicle" as "a vehicle which is self propelled except an electric personal assistive mobility device or a vehicle which is propelled solely by human power or by electric power obtained from overhead trolley wire, but not operated upon rails." The dirt bike clearly fell within the Vehicle Code definition of "motor vehicle." Although the MVFRL does restrict certain coverages for certain types of motor vehicles (e.g., recreational vehicles not intended for highway use are not required to have FPB coverage), the MVFRL does not so restrict the definition of "motor vehicle" with regard to UM/UIM coverage. Summary judgment for Erie was reversed.

Toth v. Donegal Companies, Pa. Super., 964 A. 2d 413 (2009)

Toth, injured in an accident, recovered the tortfeasor's liability limits and sought UIM benefits from Donegal. Donegal denied coverage, producing a UIM coverage rejection form signed by Toth's husband in both his name and Toth's name, with her permission. Toth, not her husband, was the first Named Insured on the Donegal policy. The MVFRL requires that the UIM coverage rejection form be signed by the first Named Insured. The trial court ordered Donegal to provide UIM coverage since Toth, the first Named Insured, had not signed the rejection form. The Superior Court reverses. When a carrier receives a UIM rejection form with a signature that purports to be that of the first Named Insured, the insurer has complied with the statute. As a practical matter, an insurer has little ability to verify an insured's purported signature. Toth had the burden of establishing that the signature on the UIM rejection form was a forgery, placed there without her knowledge or consent, and that she did not willingly waive UIM coverage. Absent such proof, the rejection form is valid.

Nationwide v. Schneider, Pa., 960 A. 2d 442 (2008)

Schneider, a police officer, was injured in the course of employment when his patrol car was in an accident. Schneider recovered the tortfeasor's liability limits with permission from the primary UIM carrier. Schneider then pursued benefits from the primary UIM carrier, settling that claim for \$750,000 from a \$1,000,000 policy limit. Schneider next sought excess UIM benefits from Nationwide, his personal carrier. Nationwide denied coverage, claiming Schneider had violated policy "consent to settle" and "exhaustion" provisions, the former by settling the tortfeasor claim without Nationwide's permission and the latter by settling the primary UIM claim for less than policy limits. Regarding "consent to settle," Nationwide argued that, denied a timely opportunity to consent or not, it could not now retroactively prove prejudice. The Supreme Court disagrees, holding that Nationwide, bearing the burden of establishing prejudice, had failed to create an adequate factual record of prejudice.. Regarding "exhaustion," the Supreme Court upholds the Superior Court "credit for limits" approach to UM/UIM exhaustion clauses. As long as Schneider was willing to give a credit for the full amount of coverage he could have received from the primary UIM carrier, he complied with the exhaustion clause.

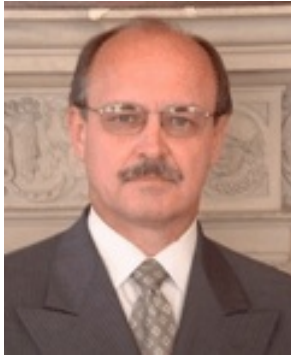
Generette v. Donegal Mutual, Pa., 957 A.2d 1180 (2008)

Generette suffered injuries as a guest passenger in a motor vehicle that collided with the tortfeasor's vehicle. Generette exhausted the tortfeasor's liability limits and then the UIM limits for the vehicle she occupied. Generette next sought excess UIM coverage from Donegal Mutual, her personal carrier. The Donegal Mutual \$35,000 excess nonstacked UIM coverage was lower than the \$50,000 primary UIM coverage Generette had already recovered. Since Generette had already received an amount equal to the highest available UIM coverage, Donegal Mutual, citing its non-stacked policy language, denied payment under its policy. The Supreme Court, however, determines that the stacking waiver applies only to coverage for "insureds" (i.e., named insureds and relatives resident in the household), but not to coverage for guest passengers. Generette's guest passenger recovery of primary UIM benefits accordingly should not have triggered any MVFRL waiver of stacking provisions. To the extent Donegal Mutual's Other Insurance clause provided to the contrary, it was void.

GEICO v. Ayer, Pa. Super., 955 A.2d 1025 (2008)

Ayers had two policies with GEICO, one insuring two pickup trucks and one insuring two motorcycles. GEICO's underwriting rules prevented insuring the motorcycles and pickup trucks on a single policy. Ayers purchased stacked UIM coverage on both policies. While driving his motorcycle, Ayers was hit by Pirota's vehicle. While lying in the street after that impact, Ayers was then crushed when the Pirota vehicle rolled backwards over him. After exhausting Pirota's liability coverage, Ayers sought stacked UIM coverage from GEICO. GEICO denied all coverage under the pickup truck policy due to a "household vehicle" exclusion. Ayers argued that application of the exclusion would in effect deny inter-policy stacking for which he had paid. The Superior Court disagrees. Although Ayers purchased stacked coverage, that coverage was subject to policy exclusions. The "household vehicle" exclusion prohibited stacking of coverage only under narrow circumstances, in this case, the circumstance that Ayers was occupying a "household vehicle" not covered under the GEICO pickup truck policy.

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