LITIGATION UPDATE

April, 2012

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LIABILITY

***Dockery v. Borough of East Stroudsburg*, Pa. Cmwlth., 24 A.3d 485 (2011)**

Dockery sued the Borough of East Stroudsburg, alleging that the Borough negligently failed to maintain its storm drains, thus causing damages to Dockery's personal and real property. The Borough filed an Answer with New Matter to which Dockery did not reply. After some preliminary exchange of discovery, there was no further docket activity for 3½ years. The Borough filed a motion for judgment of non pros which the court granted over Dockery's objection. Dockery appealed the dismissal and also thereafter filed a petition to open or strike the judgment of non pros. The trial court could not rule on the petition to open or strike due to the pending appeal. Dockery voluntarily discontinued the appeal, thereafter filing a second petition to open or strike. The trial court denied that second petition which Dockery then appealed. The Superior Court rules that Dockery's initial failure to follow proper procedures doomed his efforts to avoid dismissal. After the first order dismissing the action for failure to prosecute, proper procedure required a prompt petition to open or strike the judgment. Dockery instead filed an improper direct appeal to the Superior Court. Thereafter filing a petition to open or strike while the first appeal was pending was a second procedural error. The trial court properly refused to address that first petition. The second petition to open or strike the judgment was properly denied because the case in the trial court by then was over and could not be revived. Once Dockery took the ill-advised initial appeal to the Superior Court, Dockery waived all claims and could not be entitled to relief.

***Madrid v. Alpine Mountain Corporation*, Pa. Super., 24 A.3d 380 (2011)**

Madrid sued Alpine Mountain for injuries sustained while snow tubing. After an initial exchange of pleadings and discovery, there was no docket activity for a period of over two years. Alpine Mountain filed to dismiss for lack of prosecution, Madrid opposed the motion, and the court dismissed the case. Madrid filed an appeal to the Superior Court, which was the improper procedure. Madrid then filed a petition to open judgment of non pros (the proper procedure) which was denied as untimely. The Superior Court affirms.

***Pulli v. Ustin*, Pa. Super., 24 A.3d 421 (2011)**

Pulli was injured in an automobile accident and sued Ustin within the statute of limitations. In response to interrogatories, Ustin stated stated that the purpose of her trip at the time of the accident was to "go to the bank in Lansdale." Pulli did not take Ustin's deposition until after the statute of limitations had run. He then learned for the first time that Ustin was going to the bank to make a deposit for her employer. Pulli joined the employer into the litigation but the employer obtained summary judgment based on the statute of limitations. On appeal, Pulli argued that either the "discovery rule" or the "doctrine of fraudulent concealment" extended the statute of limitations for claims against the employer. The "discovery rule" extends the statute of limitations only in cases involving latent injuries or cases where the causal connection between an injury and tortious conduct is not apparent, and neither circumstance was present here. The "doctrine of fraudulent concealment" extends the statute of limitations only when the defendant, through fraud or concealment, causes the plaintiff to relax his vigilance or deviate from his right of inquiry. Pulli could prove no such conduct by Ustin. To avoid the bar of the statute of limitations, Pulli could have pressed for more specific answers to interrogatories or for an earlier deposition date.

***Cogley v. Duncan,* Pa. Super., 32 A.3d 1288 (2011)**

Cogley sued a reporter and a local newspaper for libel, slander, and invasion of privacy. On the final day within the statute of limitations, Cogley filed his Complaint with the Butler County Prothonotary. The Prothonotary refused to accept the Complaint because Cogley failed to include a sufficient number of copies for service on each defendant. Cogley thereafter re-filed with the appropriate copies but the defendants obtained summary judgment based on the statute of limitations. On appeal, Cogley repeatedly, and incorrectly, references the re-filing date as the date suit was filed, while continuing to seek relief based on the refusal of the Prothonotary to accept the original Complaint. The Superior Court notes that Cogley's repeated reference to the re-filing date is not binding on him as an admission since when a pleading has been filed is a question of law, not fact. As a matter of law, the Cogley Complaint was filed when it was first tendered and the Butler County Prothonotary should have accepted the Complaint on that date, thus suit was timely filed within the statute of limitations.

***Schuenemann v. Dreamz, LLC*, Pa. Super., 34 A.3d 94 (2011)**

Dreamz, a bar, allegedly served alcohol to Schuenemann when she was already visibly intoxicated. Schuenemann later suffered fatal injuries in a single vehicle accident. In the Dram Shop Action, a jury found Dreamz 51% at fault and judgment was eventually entered in excess of $1,000,000. On appeal, Dreamz complained that the trial court permitted evidence of its internal policies and procedures, evidence that on the night in question under age patrons were in the bar, and evidence of its other dealings with the Liquor Control Board. That evidence, however, was properly admitted within the discretion of the trial judge because Dreamz presented a defense that its personnel were properly trained. Dreamz further complained that evidence of blood alcohol rules for drunk driving were placed into evidence. While the trial court did advise the jury that the legal limit was .08, the trial court did not indicate that a reading at or above that level raised a presumption that the individual was under the influence of alcohol or was visibly intoxicated. Shuenemann's blood alcohol was .224. Even if reference to the drunk driving rules was error, there was still abundant evidence of record that Schuenemann was unsteady on her feet, had glassy eyes, was sluggish, was sloppy, and appeared to be visibly intoxicated. Any error in allowing the drunken driving rule was harmless.

***Price v. Leibfried*, Pa. Super., 34 A.3d 1279 (2011)**

After a night of drinking, Price (vehicle owner) allowed Leibfried (unlicensed driver) to drive with Price as a passenger. Leibfried drove the car into the rear of a tractor trailer. Price sued Leibfried and also the last bar where they had been drinking. Leibfried moved for summary judgment on the theory that Price was by statute vicariously liable for any of his negligent conduct. Section 1574 of the Vehicle Code does impose such liability when the owner or possessor of a vehicle allows an unlicensed driver to use the car. Summary judgment was properly entered against Price on any claims presented against Leibfried. The remainder of the case still had to proceed to trial to determine allocation of responsibility between Leibfried and the bar.

***Knowles v. Levan,* Pa. Super., 15 A.3d 504 (2011)**

Levan, high on drugs and alcohol, crossed the center line of the highway and struck Knowles head on. Knowles suffered injuries and Levan was killed. In the resulting suit against Levan, Levan conceded liability and tried the case only on damages. In the course of trial, Knowles presented evidence of Levan's consumption of cocaine and her blood alcohol levels. On appeal, Levan contended that admission of that evidence was not relevant and was prejudicial to Levan's defense on damages. The Superior Court agrees that admission of the evidence, even when accompanied by a limiting instruction, was error. Levan, however, failed to demonstrate that the error caused prejudice. The amount awarded was reasonable given the type of accident and the injuries suffered.

***Keystone Freight Corporation v. Stricker*, Pa. Super, 31 A.3d 967 (2011)**

Zalinski suffered fatal injuries when his vehicle collided with a tractor trailer which had backed onto the highway from a dock area. Eyewitnesses indicated that Zalinski appeared to take no evasive measures and, in fact, accelerated as he approached the stopped tractor trailer. The coroner determined that Zalinski died from natural causes and apparently had already been rendered unconscious before the accident happened. Zalinski's estate, however, obtained a report from an accident reconstruction expert placing the blame on the tractor trailer driver for backing onto the highway and interfering with other traffic. In addition, Zalinski's estate presented a medical expert who stated that any opinion on death by natural causes was pure speculation and that, instead, death was caused by blunt force injuries from the accident. At trial, the jury found for the defendant. Keystone Freight then sued for wrongful use of civil proceedings. Summary judgment was entered against Keystone Freight which failed to carry its burden of proving that the primary purpose for which the underlying proceedings were brought was not that of securing proper discovery, joinder of parties, or adjudication of the claim on which the proceedings were based. As long as the plaintiff attorney in the underlying suit believed that there was a slight chance that his client's claims would be successful, it was not the attorney's duty to prejudge the case. Lawyers can safely act upon the facts stated by their clients or by expert witnesses.

***Betts Industries v Heelan*, Pa. Super., 33 A.3d 1262 (2011)**

Allegheny Coupling sued Betts in federal court on federal trademark and trade dress violations and also on state law claims of theft of product, unjust enrichment, misappropriation of trade secrets, and breach of confidential relationship. Allegheny eventually withdrew the federal trade dress claim and then lost the federal trademark claim on summary judgment. The federal court declined to address the state claims and instead dismissed the litigation without prejudice to Allegheny's right to file a complaint in state court. When Allegheny filed in state court, Betts counterclaimed for wrongful use of civil proceedings. The trial court granted Allegheny's preliminary objections on the theory that the litigation had not yet concluded in favor of Betts, a prerequisite to a wrongful use of civil proceedings claim. On appeal, the Superior Court reverses. Because the federal litigation terminated in favor of Betts, a claim for wrongful use of civil proceedings was ripe. The Superior Court further ruled, however, that since the issues in the remaining state claims were similar to the issues in the concluded federal action, the counterclaim for wrongful use of civil proceedings, in the interest of judicial economy, would be stayed pending completion of the state court litigation.

***Sodders v. Fry*, Pa. Cmwlth., 32 A.3d 882 (2011)**

Sodders was heading East on Midland with the intent of turning left onto Ninth. Three police vehicles approached him from the opposite direction on Midland . He allowed two police vehicles to pass but then attempted his left turn, assuming he had sufficient time and distance to do so. He was struck by the third police vehicle. The police vehicle was admittedly exceeding the posted speed limit by 10 mph. The police vehicle had not activated its lights or sirens at any time. Sodders requested at trial, but did not receive, an instruction that the police officer was negligent per se for exceeding the speed limit without activating sirens or lights. Failure to give the proper instruction resulted in reversible error.

***Reeser v. NGK North American,* Pa. Super., 14 A.3d 896 (2011)**

Reeser, who lived near the NGK beryllium plant for over 50 years, developed chronic beryllium disease. In addition to suing NGK, Reeser sued SSM, a company which performed testing at the plant to measure the amount of beryllium particulate being discharged into the air. The SSM study showed emissions significantly in excess of allowable limits but SSM disclosed that information only to NGK, not to the government or to the public at large. Reeser sought recovery under Section 324A of the Restatement (Second) of Torts entitled "Liability to Third Person for Negligent Performance of Undertaking." The trial court refused to impose liability under Section 324A and the Superior Court affirms. For liability to attach, SSM must have undertaken to perform a task that it is charged with having performed negligently. SSM did not undertake a task to give test results to the government or to the public at large and thus could not be held liable for failing to do so.

***Harris v. NGK North American*, Pa. Super., 19 A.3d 1053 (2011)**

Harris briefly worked at the NGK beryllium plant and also lived near the plant for over 60 years. He developed chronic beryllium disease and sued NGK. The issue on appeal was whether Harris had properly served NGK, a company headquartered in Japan. The Complaint was sent, untranslated, by certified mail which NGK refused. The trial court then permitted alternative service by mailing a copy of the Complaint to a related NGK company in the United States. The Superior Court ruled that under the Hague Convention, NGK could be served by mail with an untranslated copy of the Complaint. When NGK refused to accept the mail, the trial court was within its rights to permit an alternate method of service. Only minimum contacts with Pennsylvania were necessary to assert in personam jurisdiction over a non-resident defendant. The related NGK entity in the United States controlled decision making on NGK major capital expenditures and actually supplied the plant with beryllium containing products. Jurisdiction was accordingly properly exercised over that entity.

***Pyeritz v. Commonwealth of Pennsylvania*, Pa., 32 A.3d 687 (2011)**

Pyeritz, hunting by himself, climbed a tree to a tree stand about 15' off the ground and latched himself to the stand with a black nylon belt. Pyeritz was later found dead at the base of the tree with half of the ripped black nylon belt around his waist and the other half still in the tree stand. The state police investigated the incident and took the ripped black nylon belt as potential evidence. Counsel for Pyeritz asked the state police to keep the nylon belt in their evidence locker since it might be needed in a civil action. Although the state police agreed, at a later time the belt was discarded as part of a routine purge of evidence in closed criminal investigations. Pyeritz sued the state police for negligent spoliation of evidence. The trial court granted summary judgment to the state police and the Commonwealth Court affirmed. The Supreme Court affirms as well, concluding that no Pennsylvania case has recognized a cause of action for negligent spoliation of evidence. Because the tort would permit the imposition of liability based on speculation, would create the potential for proliferation of litigation, and would confer a benefit already sufficiently achievable under existing law, it is in the overall public interest not to recognize the tort.

***Wayne M. Chiurazzi Law v. MRO Corporation*, Pa. Super., 27 A.3d 1272 (2011), appeal granted, Pa., – A.3d – (2012)**

Wayne M. Chiurazzi Law, a law firm, sued a document production company, claiming that it charged amounts in excess of the Medical Records Act for producing medical charts and records. The cited statute allows a health care provider or a designated agent to charge up to $15 for searching for and retrieving records, $1 per page for paper copies for the first 20 pages, $.75 per page for pages 21 through 60, and $.25 per page for pages 61 and thereafter. There is also a $1.50 charge per page for copies from microfilm plus the actual cost of postage, shipping, or delivery. No charges in excess of those listed in the statute are permitted without prior approval of the party requesting the records. The amounts in the statute are then adjusted annually starting in 2000 based on the Consumer Price Index. The law firm alleged not that the record production company charged more than the specific amounts listed in the statute, but rather that the amounts charged significantly exceeded the actual and reasonable expenses of reproducing the medical records. The law firm contended that the statutory amounts were simply the upper limit that could ever be charged and that the entity producing the records was still required to charge no more than actual and reasonable expenses where those expenses are less than the statutory maximums. The trial court denied defendant's preliminary objections. The Superior Court reverses and orders that the suit be dismissed. An entity producing records may charge up to the statutory maximums even if such exceed actual and reasonable expenses. The Supreme Court has granted allocatur.

Commonwealth Financial Systems v. Smith, **Pa. Super., 15 A.3d 492 (2011)**

Smith obtained a Citibank credit card in 1989 and used it for 13 years. By then, she was $2,000 in arrears. Citibank sold the debt to CFS which sued Smith, seeking $5,500 plus interest at 24% plus attorney's fees and costs. At arbitration, Smith won without appearing. CFS appealed and at the ensuing trial offered billing statements into evidence together with a 1996 Citibank Card Agreement which appeared to bear no direct relationship to Smith's account. As to the Citibank records, CFS relied upon PaRE 803(6) concerning business records. CFS also dserved a Notice to Attend on Smith two days before trial, although Smith, due to age and poor health, again did not appear. The trial court refused to admit the Citibank records because the CFS witness, who had little knowledge of the records, failed to establish the trustworthiness and reliability of the records. Based on what little evidence that was admitted, the trial court ruled for Smith. On appeal, the Superior Court affirms. PaRE 803(6) requires that the proponent of documentary evidence establish circumstantial trustworthiness. Here, the trial court was in the best position to determine the trustworthiness of the documentary evidence as well as the credibility and reliability of the CFS witness. Although other jurisdictions have allowed admissibility under a rule of incorporation where business records become the business records of an acquiring business, Pennsylvania has not as yet adopted that rule. With regard to Smith's failure to abide by the Notice to Attend, the Superior Court notes that CFS could have served the Notice to Attend sooner and could have asked the court to order Smith's appearance.

Blumer v. Ford Motor Company**, Pa. Super., 20 A.3d 1222 (2011)**

Blumer suffered fatal injuries when his tow truck rolled backwards down a hill, running him over. His estate alleged that a defective design of the parking brake on the truck caused the parking brake to disengage. At trial, the estate prevailed and judgment, with delay damages, was entered in excess of $10 million. On appeal, Ford argued that evidence of subsequent remedial measures was permitted at trial in contravention of PaRE 407. The remedial measures in question involved an alternative braking system that Ford, prior to the Blumer accident, had already determined to implement. The admissibility of remedial measures taken before an accident occurs was an issue of first impression in Pennsylvania. The Superior Court rules that the straightforward language of PaRE 407 permits admission of the evidence. The rule only restricts the introduction of remedial measures that are made after the occurrence of the injury or harm. Therefore, measures that are predetermined before a particular accident occurs are not "remedial measures" under the rule because the measures are not intended to address the particular accident that gave rise to the harm.

***City of Philadelphia v. David J. Lane Advertising*, Pa. Cmwlth., 33 A.3d 674 (2011)**

The City alleged that David J. Lane Advertising Inc. withheld wage taxes from its employees but then failed to remit the money to the City. Defendant was served with a Complaint in Montgomery County. When the defendant failed to answer the Complaint, the City sent a Notice of Intent to Default. When the defendant still did not respond, the City entered judgment. Ten years later, the City began collection efforts, at which time counsel entered for the defendant and moved to strike the default judgment. In the Notice of Intent to Default, the City had used the phrase "failed to take action required of you in this case," instead of the statutorily required language "failed to enter a written appearance personally or by attorney and file in writing with the court your defenses or objections to the claims set forth against you." On appeal, the Commonwealth Court determines that the City's failure to comply with the statutory language constituted a fatal defect on the record such that the default judgment had to be set aside. Regardless of whether the defendant had actual notice of the suit, the defendant did not have the type and extent of notice the law requires.

***Sigall v. Serrano*, Pa. Super., 17 A.3d 946 (2011)**

Sigall and Henry alleged injuries from an accident with another vehicle driven by Anthony Serrano and owned by Barbara Serrano. Anthony was unlicensed and Barbara denied that he had permission to use the vehicle. Barbara's carrier denied coverage, giving rise to UM claims Sigall and Henry pursued against their own UM carrier. In the interim, the suit against the Serranos was placed in a stay status. When the tort suit was reactivated, the Serranos filed a motion to dismiss on the theory that the tort claims were inconsistent with the UM claims and that, in any event, dismissal was necessary to avoid double recovery. When Sigall and Henry failed to answer the motion to dismiss, the court granted same. On appeal, Sigall and Henry claimed that they did not receive notice of the motion to dismiss. The motion had been filed through the court's new electronic filing system. Counsel for Sigall and Henry, however, had not filed any documents in this case through the electronic system nor had counsel agreed to service through the electronic mail system. Though counsel for Sigall and Henry had used the electronic filing system in other cases (and thus had an e-mail address within the system), permission to participate in electronic filing is a case by case issue. The Superior Court rejects any interpretation that electronic filing by a lawyer in one case is consent to electronic filing in all subsequent cases. The order dismissing the suit by Sigall and Henry was reversed.

IMMUNITY

***Weckel v. Carbondale Housing Authority*, Pa. Cmwlth., 20 A.3d 1245 (2011)**

Deacher lived in a seven-story public housing apartment building. Deacher, intoxicated, gained access to the roof through an unlocked hatchway, after which she fell or jumped to her death, which the coroner ruled a suicide. Deacher's estate sued the Carbondale Housing Authority, alleging negligence in allowing Deacher to get on the roof. The estate, however, failed to present evidence that the apartment building was not safe for its regular and intended use, nor did the estate cite building codes, state laws, or regulations indicating that access to the roof must be blocked. In short, the estate failed to present a cause of action in negligence. Even had it done so, however, the claim would have been barred by sovereign immunity. Despite the real estate exception to sovereign immunity, the death here was not caused by an alleged defect in real estate because an unlocked door to a roof is not a defect. Since the injury was not physically caused by the unlocked door, the real estate exception to sovereign immunity would not apply.

***Walthour v. Department of Transportation*, Pa. Cmwlth., 31 A.3d 762 (2011)**

Walthour was injured when the motorcycle on which she was a passenger hit a pothole on State Route 837. Walthour alleged that the Commonwealth Department of Transportation had received written notice of the dangerous condition. Although the Commonwealth enjoys sovereign immunity, a statutory exception exists for potholes, provided the Commonwealth agency had actual written notice of the dangerous condition on the highway. Here, a state senator had written to the Department of Transportation, broadly noting that State Route 837 had fallen into disrepair. The senator’s letter made no reference to potholes in general, much less the specific pothole causing Walthour’s accident and injuries. The trial court entered summary judgment for the Department of Transportation. The Commonwealth Court reverses. Whether the Department of Transportation had notice of a dangerous condition via the senator’s letter was a question of fact to be decided by the jury, thus precluding summary judgment.

***Nardella v. SEPTA*, Pa. Cmwlth., 34 A.3d 300 (2012)**

Nardella alleged injury when she slipped and fell on ice on a train platform. SEPTA conceded sole responsibility for the condition of the platform but sought summary judgment since ice on a train platform does not constitute a defective condition derived or originating from the real estate and thus did not fall within any exception to sovereign immunity. SEPTA is considered a Commonwealth agency for purposes of sovereign immunity. To fall within the real estate exception, Nardella had to establish injuries caused by a substance or an object on the train platform which derived, originated, or had as its source the Commonwealth realty itself. Because Nardella neither alleged nor introduced any evidence that the ice on which she slipped was derived, originated from, or had as its source a design or construction defect in the platform itself, summary judgment was properly granted to SEPTA.

***Wright v. Denny*, Pa., Cmwlth., 33 A.3d 687 (2011)**

Wright, a passenger on a SEPTA bus, alleged injury when the stopped bus was rear-ended by a hit-run vehicle. SEPTA is entitled to sovereign immunity. The motor vehicle exception to sovereign immunity applies to injuries arising out of "the operation of any motor vehicle in the possession or control of a Commonwealth party." In the present case, the SEPTA bus was not in motion and therefore was not in "operation" when the accident occurred and thus the case presented no exception to sovereign immunity. Sovereign immunity bars not only claims against SEPTA for its negligence, but claims for UM benefits against SEPTA as owner of a vehicle occupied by Wright at the time of the accident.

***Jackson v. Port Authority of Allegheny County*, Pa. Cmwlth., 17 A.3d 966 (2011)**

Jackson, a passenger on a PAT bus, stood up in anticipation of exiting as the bus approached her stop. The bus driver, however, missed the stop and slammed on the brakes, causing Jackson to be thrown forward onto her right knee, fracturing her kneecap. PAT moved for summary judgment based on the "jerk or jolt" doctrine under which Jackson had to establish a jerk or jolt so unusual or extraordinary as to be beyond a passenger's reasonable anticipation. To meet that burden, Jackson had to show either that the stop had an extraordinarily disturbing effect on other passengers or that the manner of the occurrence of the accident or its effect on Jackson inherently established the unusual character of the jolt or jerk. Jackson failed to meet that burden.

***Jones-Molina v. SEPTA*, Pa. Cmwlth., 29 A.3d 73 (2011)**

Jones-Molina was on a trip that required her to take both a SEPTA bus and then a SEPTA trolley. She disembarked from the bus, walked about 5 feet to the corner, waited for a traffic light to change, and then began crossing the street. In the intersection, she was struck by a hit-run vehicle. Jones-Molina sued SEPTA for first party and UM benefits on the theory that she remained an "occupant" of a SEPTA vehicle at the time of the accident. Citing the four-part test from ***Contrisciane***, the Commonwealth Court determined that Jones-Molina was "highway oriented," rather than "vehicle oriented" and thus was not an "occupant" of any SEPTA vehicle at the time of the accident (overruling ***Adeward-I v. Assigned Claims Plan***).

***Smolsky v. Pennsylvania General Assembly*, Pa. Cmwlth., 34 A.3d 316 (2011)**

Smolsky, an inmate, brought suit to establish that the Prisoner Litigation Reform Act was unconstitutional. The PLRA permits a court to dismiss a complaint challenging prison conditions where the prisoner has had three prior "prison conditions" complaints dismissed as frivolous or malicious or failing to state a claim upon which relief may be granted. Smolsky had already been identified as an "abusive litigator" under the PLRA three strikes analysis. The present litigation, however, did not address "prison conditions" and thus was not subject to dismissal under the PLRA. The Commonwealth Court sustains preliminary objections to Smolksy's Complaint. First, the Commonwealth had a legitimate governmental interest in deterring frivolous lawsuits and advanced that goal rationally by depriving an "abusive litigator" of the ability to proceed *in forma pauperis*. In addition, the Commonwealth Court ruled that the General Assembly was entitled to immunity when acting within the legitimate sphere of legislative activity.

DISCOVERY

***Anthony Biddle Contractors v. Preet Allied American Street,* Pa. Super., 28 A.3d 916 (2011)**

In litigation involving a commercial dispute over a condominium project, the additional defendants, after disposition of Preliminary Objections, filed Answers to the joinder Complaint one month before expiration of the discovery deadline set in an earlier Case Management Order. One additional defendant filed a Motion for Extraordinary Relief to extend the discovery by 90 days. The trial court denied the requested extension. On appeal, the Superior Court determines that the trial court abused its discretion. Strict adherence to the earlier Case Management Order served the interests of neither fairness nor justice. Denial of the Motion for Extraordinary Relief was the functional equivalent of a sanction order even though the additional defendant's violation of the discovery deadline was neither severe nor egregious. Because the additional defendant was effectively prevented from pursuing discovery, the summary judgment entered against the additional defendant was vacated.

***Papadoplos v. Schmidt Ronca & Kramer*, Pa. Super., 21 A.3d 1216 (2011)**

Papadoplos hired Schmidt Ronca & Kramer PC, a law firm, to prosecute claims related to an automobile accident as well as claims arising from the use of a rehabilitation device. The automobile accident case settled but the law firm failed to file a timely suit against the hospital or manufacturer with regard to the use of the rehabilitation device. Papadoplos retained new counsel to pursue a legal malpractice claim. In the course of discovery, Papadoplos' husband, also a named plaintiff, acknowledged that he kept detailed computer notes on all of his interactions with the original lawyers starting with when they were first retained. The lawyers repeatedly requested access to the computer and its hard drive and also obtained court orders mandating production of same. Mr. Papadoplos eventually acknowledged that he had discarded the original computer and could not produce the hard drive. Destruction or discarding of the laptop and hard drive occurred during the course of the legal malpractice litigation. The law firm moved to dismiss the legal malpractice lawsuit due to spoliation of evidence. The trial court granted that motion and the Superior Court affirms.

***Barrick v. Holy Spirit Hospital*, Pa. Super., 32 A.3d 800 (2011)**

Barrick claimed injuries when a chair on which he was sitting collapsed beneath him in the hospital cafeteria. Barrick sued the hospital and the managers of the cafeteria. Defendants served a subpoena on the treating physician requesting a "complete copy of the entire medical chart/file." The treating physician in response withheld some documents, in particular communications to and from Barrick's attorney. The defendants sought production of the attorney materials and the trial court ordered production. An en banc panel of the Superior Court reverses. First, defendants sought documents directly from an opposing party's expert witness and such discovery is beyond the bounds of PRCP 4003.5(a)(1). Under that rule, only a very narrowly defined set of interrogatories may be served regarding expert witnesses. In addition, defendants' subpoena sought information falling within the work product doctrine. Although the work product doctrine is not absolute, the privilege yields only in the face of a need for discovery when the attorney's work product itself becomes relevant to the action.

***Rhodes v. USAA*, Pa. Super., 21 A.3d 1253 (2011)**

After recovering from the tortfeasor and the primary UIM carrier, Rhodes sought excess UIM benefits from USAA, demanding $175,000 from a $200,000 policy limit. USAA initially offered only $5,000 but then increased its offers in increments over time until agreeing on the eve of arbitration to pay the $175,000 demand. After the UIM claim settled, Rhodes sued USAA for bad faith claims handling. In the course of discovery, the trial court ordered Rhodes to disclose his attorney’s entire UIM file. USAA argued that whether opposing counsel acted in good faith was relevant to determining whether USAA had acted in bad faith. On appeal, the Superior Court reverses. The only issue in the bad-faith case was whether USAA acted properly in refusing to meet Rhodes’ $175,000 settlement demand sooner. This inquiry implicates USAA’s state of mind in making offers, not the state of mind of Rhodes or his attorney in making demands.

VENUE

***Silver v. Thompson*, Pa. Super., 26 A.3d 514 (2011)**

Silver and his passenger sued Thompson for injuries resulting from an automobile accident. Silver, the passenger, and Thompson all resided in Bucks County, the accident occurred in Bucks County, yet suit was filed in Philadelphia County. The trial court transferred venue to Bucks County. The Superior Court reverses. Thompson was served with the complaint at her place of business in Philadelphia County. PRCP 1006 provides that venue may be set in a county where "the individual may be served." Regardless of her place of residence, Thompson was served in Philadelphia County, thus establishing proper venue in that county.

***Schultz v. MMI Products*, Pa. Super., 30 A.3d 1224 (2011)**

Schultz, a resident of Schuylkill County, was injured at a construction site in Lehigh County and brought suit against several defendants in Philadelphia County. One defendant filed Preliminary Objections on venue while the others just answered the Complaint. Schultz replied to the Preliminary Objections by denying the allegations as conclusions of law and by arguing that since venue was proper as to some defendants (who had waived any venue challenge), venue was proper for all. The trial court transferred venue to Lehigh County. On appeal, the Superior Court affirms the transfer of venue. Although venue in Philadelphia County properly established as to any one defendant would result in proper venue for all defendants, Schultz could not simply rely on waiver of venue objections by some defendants but rather had to prove proper venue. To hold otherwise would be to permit one defendant just by waiver to unilaterally deprive a party of a personal right to object to an improper forum.

***Sehl v. Neff*, Pa. Super., 26 A.3d 1130 (2011)**

After an automobile accident, Sehl sued both the other driver and his own UIM carrier. Although the accident occurred in and the defendant lived in Montgomery County, Sehl sued in Philadelphia County since the UIM carrier could be sued there. The defendant driver sought, and obtained, transfer of venue to Montgomery County. The Superior Court affirms. PRCP 1006(c)(1) allows venue to be set for all defendants where venue is appropriate for any one defendant but only in "an action to enforce a joint or joint and several liability against two or more defendants." The defendant driver and the UIM carrier were subject to separate and distinct liabilities and could not be jointly and severally liable to plaintiff, so proper venue for the UIM carrier did not create proper venue for the other driver.

UM/UIM

***Heller v. Pennsylvania League of Cities*, Pa., 32 A.3d 1213 (2011)**

Heller, injured in an automobile accident during the course of employment as a police officer, received workers' compensation for medical expenses and wage losses. Heller also recovered the liability limits from the tortfeasor's insurance carrier and then sought UIM benefits from the policy covering the police cruiser and from his own policy. The employer's UIM carrier denied coverage, citing a workers' compensation exclusion in the policy. That exclusion was unambiguous, did not expressly contradict the statutory language of either the MVFRL or the Workers' Compensation Act, and, if valid, would have excluded coverage for Heller's injuries. The Supreme Court declares the exclusion void as against public policy. The employer purchased optional UIM coverage yet the exclusion operated to deny UIM benefits to the very people who would occupy the covered vehicles, rendering the coverage illusory. Voiding the exclusion did not create a windfall to the injured employee since the workers' compensation carrier may subrogate against the UM/UIM recovery from the employer's auto coverage. The legislature clearly intended that the auto insurer, not the workers' compensation carrier, ultimately bear responsibility for the payment of benefits. Since the workers' compensation exclusion in the UIM policy renders the UIM coverage illusory and also runs counter to the intended compensatory scheme established by the legislature, the exclusion is void.

***Williams v. GEICO*, Pa., 32 A.3d 1195 (2011)**

Williams, a Pennsylvania State Police officer, was injured in an automobile accident while operating his police cruiser. Williams had personal auto coverage through GEICO and sought UIM benefits for the accident. GEICO denied coverage based on a "regular use" exclusion which applied when the insured was using a motor vehicle furnished for regular use which was not insured under the GEICO policy. The exclusion clearly applied to the police cruiser. On appeal, Williams argued that exclusion was void as against a public policy that favors first responders such as police officers. Williams, however, failed to establish any unanimity of opinion that insurance companies should provide coverage for unknown risks that may arise out of their insured's employment simply because of employment as a police officer. Public policies often conflict, including, for instance in this case, the MVFRL public policy of reducing the cost of insurance conflicted with Williams' proposed public policy. Denial of coverage was affirmed.

***Allstate v. Hymes*, Pa. Super., 29 A.3d 1169 (2011)**

Hymes was injured in a collision between his motorcycle and a UIM driver. Hymes did not have UIM coverage on his motorcycle, although he did have access to UIM coverage through his parents' policy with Allstate. Allstate denied UIM coverage based on a household exclusion which applied if Hymes was "in, on, getting into or out of" a household vehicle not covered under the policy. Hymes argued that he actually suffered his injuries *after* he was no longer "in, on, getting into or out of" the motorcycle, i.e., when he hit the windshield of the other car and then hit the ground. The Superior Court rejects Hymes' argument. Segmenting the accident into such discreet portions would create an absurd result. The Superior Court applies the household exclusion to deny coverage.

***Erie Insurance Exchange v. Conley*, Pa. Super., 29 A.3d 389 (2011)**

Conley was injured when struck by a dump truck owned and operated by his employer. He received workers' compensation benefits. Any tort claim by Conley was barred by workers' compensation immunity. Conley, however, sought UM/UIM benefits from Erie, his personal carrier, on the theory that Erie enjoyed no workers' compensation immunity. Erie denied coverage, noting that its UM/UIM coverage applied to damages Conley was entitled to recover from the negligent UM/UIM driver. Since Conley was not legally entitled to recover any such damages, no UM/UIM claim could be valid. The Superior Court agrees, affirming judgment on the pleadings in favor of Erie.

***Nationwide v. Catalini*, Pa. Super., 18 A.3d 1206 (2011)**

Catalini purchased coverage from Nationwide for three vehicles with $100,000/$300,000 liability limits and $15,000/$30,000 UIM limits. He replaced two cars under the policy over time but did not change any limits. Catalini thereafter asked that the liability limits be decreased to $25,000/$50,000 and that the UIM limits be increased to $25,000/$50,000. Catalini thereafter replaced a car on the policy but, due to lease obligations, increased the liability limits to $100,000/$300,000. No changes to UIM limits were made at that time. Instead, the form signed by Catalini stated "leave other coverage the same." Following an accident, Catalini challenged the lower $25,000/$50,000 UIM limit, claiming that there had been no valid reduction and that the limit should instead match the liability limit of $100,000/$300,000. The Superior Court disagrees. Nationwide was not required to have Catalini execute a new election for reduced UIM benefits when he changed the liability limits.

***Richner v. McCance*, Pa. Super., 13 A.3d 950 (2011)**

Richner sued McCance for damages following an automobile accident. In the same suit, Richner also sued Erie Insurance Company for UIM benefits. Since the Erie policy provided for arbitration of UIM claims, Erie filed Preliminary Objections to the Complaint. Erie also filed its own Declaratory Judgment Action raising its "regularly used, non-owned vehicle" exclusion. Richner thereafter filed an Amended Complaint in which he contended that the cited exclusion did not apply. Erie again filed Preliminary Objections, this time raising *lis pendens* in light of the pending Declaratory Judgment Action. The trial court dismissed the Preliminary Objections. The Superior Court reverses. Unlike post-*Koken* joinder of liability and UIM claims in a single suit where liability and damages are common issues, here Richner improperly sought to join coverage issues with a tort claim in the face of a pending Declaratory Judgment Action.

COVERAGE

***Jones v. Nationwide*, Pa., 32 A.3d 1261 (2011)**

Jones instituted a class action against Nationwide, alleging that Nationwide's practice of reimbursing, on a pro rata basis only, an insured's deductible from funds obtained in subrogation actions against tortfeasors constituted a breach of contract, bad faith, conversion, and unjust enrichment. Jones claimed that she, and other insureds similarly situated, were entitled to full reimbursement of their deductible under the "made whole doctrine" regardless of whether the amount recovered in subrogation was sufficient to cover the entire loss. The Supreme Court, affirming the trial court and the Superior Court, rules that the "made whole" doctrine does not apply with regard to collision loss deductibles. The inherent nature of such deductibles is that the insured has assumed a portion of the risk and thus, under equitable principles, also the risk of less than full recovery. While the "made whole" doctrine continues to be viable in other types of first-party insurance where the insurer has been paid to assume the full risk (e.g., UM/UIM), that is not the case with regard to collision coverage deductibles.

***Eckman v. Erie Insurance Exchange*, Pa. Super., 21 A.3d 1203 (2011)**

Eckman, sued for defamation, tendered defense of the suit to Erie, her homeowners carrier. Erie agreed to provide a defense subject to a reservation of rights for intentional act and punitive damage exclusions. Eckman contended that the reservation of rights created a conflict of interest for any defense attorney retained by Erie and according demanded to select her own counsel, paid by Erie, to defend the case. When Erie declined, Eckman filed a Declaratory Judgment Action seeking a preliminary injunction. The trial court denied the requested relief. On appeal, the Superior Court affirms. Out-of-state caselaw (e.g., ***Cumis*** from California) had no persuasive authority in Pennsylvania. Under Pennsylvania law, Erie had both the right and the obligation to retain counsel and provide a defense. Reserving rights on eventual indemnity obligations, without more, created no conflict of interest.

***Penn America Insurance Company v. Peccadillos*, Pa. Super., 27 A.3d 259 (2011)**

Following a four fatality/multiple injury automobile accident, suit was filed against Peccadillos, a bar, for serving alcohol to a visibly intoxicated driver and for ejecting that driver from the bar after a physical altercation rather than taking him in charge or summoning the police or exercising any discretion, absent police authority, to see that the intoxicated person did not drive, such as arranging for alternative transportation. Penn America, the liability carrier for Peccadillos, denied coverage based on a liquor liability exclusion. That exclusion applied to the Dram Shop allegations but did not exclude coverage for ejection-related allegations. Though Peccadillos may not be liable under Pennsylvania law to take the measures alleged in the Complaint, those allegations triggered the duty to defend.

MVFRL

***Corbin v. Khosla*, Pa., – A.3d – (2012) WL 573512 (Pa.)**

Corbin, driving her own uninsured vehicle, was injured in a collision Khosla who failed to yield the right-of-way. Khosla filed a motion for summary judgment, alleging that Corbin, as an uninsured owner/operator, was not entitled to collect either economic or non-economic damages. The federal trial judge agreed as to non-economic damages. On the economic damage claim, however, the federal court petitioned the Pennsylvania Supreme Court for certification of the issue. The Pennsylvania Supreme Court clarifies the penalty imposed on uninsured owner/operators. Such individuals may not recover first-party benefits for medical and wage losses. In addition, they are deemed to have elected "limited tort" for purposes of non-economic damages. In a tort claim, however, the uninsured owner/operator may recover economic losses from the tortfeasor.

***State Farm v. Cavoto,* Pa. Super., 34 A.3d 123 (2011)**

State Farm sued Cavoto, a chiropractor, for fraud and unjust enrichment, claiming Cavoto was paid for chiropractic services actually performed by unlicensed personnel. The challenged procedures involved applying hot and cold packs, turning on and off a mechanical, intersegmental, traction machine, assisting in therapeutic exercise, providing electrical muscle stimulation, utilizing the ultrasound machine, and administering hydrotherapy and paraffin. The Superior Court upholds that portion of the trial decision which held that chiropractors may delegate certain non-specialized aspects of performing adjunctive procedures to unlicensed support personnel. Activities such as turning a heating pad on or off or turning a traction machine on or off can be delegated by the chiropractor. The same is true of applying hot or cold packs or applying electrical muscle stimulation, ultrasound, hydrotherapy, or paraffin, as long as the chiropractor makes the diagnosis, determines the location on the patient's body where such therapies should be applied, and the intensity of the therapy. The delegated tasks must still be performed under the direct on premises supervision of the chiropractor. In the present litigation, the trial court had not determined whether certain other procedures required formal chiropractic education or training and thus should not be performed by unlicensed assistants. Finally, the Superior Court distinguished the Commonwealth Court holding in *Kleinberg v. SEPTA* since the there the issue was physical therapy. The MVFRL specifically requires that physical therapy be performed by licensed physical therapists. No such similar requirement is made for chiropractic services.

***Herd Chiropractic v. State Farm*, Pa. Super., 29 A.3d 19 (2011)**

Mitten suffered injuries in an automobile accident and sought chiropractic care at Herd Chiropractic. State Farm, Mitten's first-party benefit carrier, submitted the Herd Chiropractic bills to a PRO which determined that the chiropractic treatments were not medically necessary or reasonable. Herd filed suit against State Farm seeking payment of the bills as well as attorney's fees. The court awarded $1,380.68 in unpaid medical expenses and $27,047.50 in attorney's fees. The Superior Court affirms. State Farm's adherence to the peer review process did not preclude an award of attorney's fees if a court later determines on review that the care was medically reasonable and necessary. At Section 1797(b)(6), the MVFRL specifically provides for an award of attorney's fees in the event of a successful challenge a PRO-based denial.

***Houston v.* SEPTA, Pa. Cmwlth., 19 A.3d 6 (2011)**

Houston and Board were passengers on a SEPTA bus when it collided with a car. Both received medical treatment for accident related injuries and, because they did not have their own insurance, submitted their medical bills to SEPTA for payment. The face amount of the submitted bills for each exceeded $5,000. SEPTA paid the bills up to $5,000 each at face amount. SEPTA contended that the MVFRL cost containment provisions did not apply to self-insureds. The trial court ruled against SEPTA and the Commonwealth Court affirmed. Although the cost containment provisions make no direct reference to self insurers, the cost containment provisions of Section 1797 are indirectly encompassed in the statutory obligations of all self insureds.

WORKERS COMPENSATION

***Caputo v. WCAB*, Pa. Cmwlth., 34 A.3d 908 (2011)**

Caputo worked for the Commonwealth Department of Military and Veterans Affairs. She suffered a work injury in 2002 and started to receive workers compensation total disability benefits. In 2006, Caputo also qualified for, and started to receive, Social Security retirement benefits. The employer reduced Caputo's workers' compensation benefit by 50% of the Social Security retirement benefit. Caputo appealed that reduction, claiming that Section 204(a) of the Workers' Compensation Act, which provided for such reduction, was unconstitutional. The Commonwealth Court disagreed. Permitting an employer to offset workers' compensation disability benefits by 50% of an employee's Social Security retirement benefit is reasonably related to reducing the employer's workers' compensation costs. If the employer is self-insured, the reduction is obvious because it is direct. If the employer has workers' compensation insurance, the reduction is less direct but also present since workers' compensation premiums are based in part on payment experience. Because the reduction based on Social Security retirement benefits is reasonably related to a legitimate governmental objective of reducing workers' compensation costs, the constitutional challenge was rejected.

Pa. Liquor Control Board v. WCAB, Pa. Cmwlth., 29 A.3d 105 (2011)

Kochanowicz worked at state controlled liquor stores for over 30 years. He was the general manager of such a store, working the evening shift, when the store was robbed by a masked man brandishing two guns. The perpetrator pointed both guns at Kochanowicz and at one point prodded the back of Kochanowicz' head with a gun. The perpetrator stole money from the cash register and tied Kochanowicz to a chair with duct tape. Though Kochanowicz was not physically injured during the robbery, he thereafter suffered anxiety, depression, and flashbacks, and could not return to work. Kochanowicz had never before been the victim of a robbery nor had he ever been under psychiatric or psychological care. In addition to being disabled from his liquor store job, Kochanowicz also could not return to his part-time job as a realtor. Under Pennsylvania law, a claimant alleging psychic injury must prove that he was exposed to abnormal working conditions and that his psychological problems are not a subjective reaction to normal working conditions. The employer contended that being exposed to such robberies was normal for state store employees. The employer presented evidence as to the number of robberies in southeastern Pennsylvania, including several recent robberies in state stores near where Kochanowicz worked. The Commonwealth Court concludes that robberies of liquor stores are a normal condition of the retail liquor business and accordingly reversed the award of workers' compensation benefits.

***Penn State University v. WCAB,* Pa. Cmwlth., 15 A.3d 949 (2011)**

Smith, a cook/housekeeper at Penn State, decided, on his way to an unpaid, on-campus lunch period, to jump down a flight of 12 steps. He stated that he had considered doing this before and did it on the day of the incident on a whim. He was able to jump the 12 steps but suffered multiple lower extremity fractures upon landing. He sought workers' compensation benefits. Smith's conduct was intentional, extreme, inherently high risk, and wholly foreign to his employment. This act was not, for instance, an inconsequential departure from work activities. Since the injuries thus were suffered when Smith was not in the course of his employment, no workers' compensation benefits were payable.

***Soto v. Nabisco*, Pa. Super., 32 A.3d 787 (2011)**

Soto originally worked for Nabisco and then became an employee of Kraft when it merged with Nabisco. While operating a Ritz Cracker Cutting Machine, Soto suffered amputation of his left arm and a severe de-gloving injury to his right hand. Soto, entitled to workers' compensation benefits from Kraft, nevertheless sued Kraft directly under a "dual persona" doctrine. Under the "dual persona" doctrine, an employer can be exposed to tort liability if the employer has a distinct and separate role that could subject it to liability for injuries to an employee. The "dual persona" alleged by Soto was that Kraft was both his employer and also the successor in interest to Nabisco, the manufacturer of the defective machine that caused the injury. In the present case, however, both Kraft and Nabisco were entitled to workers' compensation immunity, so the "dual persona" doctrine afforded Soto no relief. "Dual persona" must be distinguished from "dual capacity," a similar but separate doctrine under which an employer normally shielded from tort liability by exclusive remedy may become liable in tort if the employer occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as an employer. In the only case where the Pennsylvania Supreme Court applied "dual capacity" (***Tatrai v. Presbyterian Hospital)*** an employee became ill at work and sought treatment in the general emergency room of the hospital when the foot stand on an X-ray table broke, causing plaintiff to fall. The hospital was liable in tort since the injury occurred in the emergency room where the hospital held itself out to the public as a healthcare provider.

JUDICIARY

***In re Isaac H. Stoltzfus*, 29 A.3d 151 (2011)**

Stoltzfus, a Lancaster County judge, had an office in Intercourse, PA. While walking in a nearby public park during a lunch break, Stoltzfus approached two women also walking in the park, produced a plastic sandwich bag containing acorns, and gave some of the acorns to the women. He said "they [the acorns] make a nice afternoon snack, try them. I'll be here tomorrow, let me know what you think." The women later opened the acorns to discover that the insides had been hollowed out and unwrapped condoms placed inside. After the women complained, the police interviewed Stoltzfus, who not only admitted the version given by the women, but explained that he had collected, hollowed out, and placed unwrapped condoms inside thousands of acorns during his tenure as a judge. The Court of Judicial Discipline had to determine whether this conduct brought the judicial office into disrepute such that sanctions should be applied. While the CJD found the conduct mystifying, not funny, and lacking in good judgment, it did not find the conduct so extreme so as to bring the judicial office itself into disrepute. The CJD further noted that the government regularly distributes condoms to children so the JCB could hardly sanction Stoltzfus for doing the same thing.

***Langella v. Cercone,* Pa. Super., 34 A.3d 835 (2011)**

Cercone is a judge in McKean County. Langella appeared before him on charges of simple assault, harassment, and striking her husband, a local lawyer who was a friend and colleague of Cercone. When Langella's husband later reported that she had violated conditions of her bail, Langella was rearrested and Cercone revoked her bail. Langella pleaded to go home to take care of her more than 40 "rescue animals" (which Cercone described as her cats) but Cercone kept her in jail for 42 days before holding a preliminary hearing. Langella was eventually released but found her home destroyed and many of her "rescue animals" dead. Two years later, Langella contacted Cercone to ask for a meeting. At the conclusion of the meeting, Cercone said to his support staff that he thought Langella was having another episode and needed to be committed to a psychiatric institution. Langella sued Cercone for intentional infliction of emotional distress based on his original actions at the time of her arrest and also on his comments two years later after their meeting. As to the conduct at the time of the arrest, judges are absolutely immune from liability for damages when performing judicial acts, even if their actions are in error or performed with malice, provided there is not a clear absence of all jurisdiction over the subject matter and person. For that reason, the conduct at the time of the arrest was protected and claims based on that conduct were dismissed. The conduct at the meeting two years later, however, was a personal meeting even though Langella wanted to discuss the earlier conduct. Cercone telling his staff that Langella needed psychiatric help did not arise out of a normal judicial function. These comments did not further any function required by his status as a judge. The conduct accordingly was not protected and claims based on the later incident should not have been dismissed.

***In re Thomas Carney*, 28 A.3d 253 (2011)**

Carney is an Erie County judge. The Judicial Conduct Board charged Carney with two counts of judicial misconduct. First, while arraigning a mother and son on robbery charges, Carney set $50,000 bail on the juvenile, saying "there have been a lot of robberies lately and we want to send a message that this will not be tolerated." Later, during a TV interview, he made similar comments to the effect that "if these kids don't start getting the message, they're going to find out the hard way." Next, in a different interview concerning graffiti, Carney said that "this is institutional vandalism, this is a serious crime." In a newspaper article concerning the fight against graffiti, an editorial encouraged people to donate money and to call Carney's office to make contributions, though Carney himself had no solicited contributions. With regard to all these allegations within the first count of the Disciplinary Complaint, the Courtof Judicial Discipline found no basis to reprimand or punish Carney since he was acting within his duties as a judge. The second count of the Disciplinary Complaint involved an incident when Carney, heading home from a Steelers game, got behind a car driving in the left lane at a slower speed. Carney flashed his high beams. When the car wouldn't move from the left lane, Carney passed on the right, flipping his middle finger to the occupants. The car got into the right lane behind Carney, flashing its high beams. The car then returned to the left lane and pulled up parallel to Carney, the occupants reciprocating the middle finger salute. Carney rolled down his window and displayed a handgun, without actually pointing it at anyone. Carney, charged with misdemeanor counts of terroristic threats, simple assault, recklessly endangering another person, and disorderly conduct, pleaded to two misdemeanor counts and paid a fine in return to dismissal of all other charges. On appeal, the Superior Court considered whether Carney engaged in conduct so extreme that it brings the judicial office into disrepute. The Judicial Conduct Board bears the burden of proving such conduct by clear and convincing evidence. The Court of Judicial Discipline, noting Carney's explanation that he displayed the gun only to prevent further escalation of a road rage incident, finds that the Judicial Conduct Board failed to carry its burden.

***In re Michael Thomas Joyce*, 26 A.3d 577 (2011)**

Joyce, a Superior Court judge, was convicted of two felony counts of mail fraud. He was sentenced to 46 months in jail, three years supervised release, restitution of $444,000, and forfeiture of certain cash, bank accounts, real estate, and personal property. The Court of Judicial Discipline, in addition to removing Joyce from office, ordered that he is prohibited from holding any judicial office in the Commonwealth in the future.

***In re Michael T. Toole*, 26 A.3d 581 (2011)**

Toole, a Luzerne County judge, was convicted of two felonies (false income tax returns and receipt of bribes). The Court of Judicial Discipline ruled that the convictions subjected Toole to judicial discipline (i.e., removal from office) in addition to the 30-month prison sentence.