COUNTERPOINT

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WONDERLAND IN PRODUCTS LIABILITY LAW: SOLE CAUSE OUT AT SUPERIOR COURT TEA PARTY

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The muddle that is Pennsylvania products law long ago required those of us who practice it to practice something else as well, a lesson first learned in high school English class. Time after time we have read, and adapted to, decisions that could be considered the product of a logical thought process only by calling upon the willing suspension of our disbelief.

So disarmed, we have engaged in a great deal of pretending these past thirty plus years. We have pretended to believe, for example, that "negligence concepts have no place in a strict liability action,"[1] as if the duty to supply consumer products that are not unreasonably dangerous were a fatherless child. We have pretended to believe that design defect claims do not call into question "the reasonableness of the (manufacturer's) conduct in making its design choice," but that a product's compliance with industry standards proves nothing but the manufacturer's conduct in making its design choice.[2] And we have most famously pretended to believe that the words unreasonably dangerous are "inadequate to guide a lay jury,"[3] while the words "safe for (its intended) use"[4] are not.

All of that pretending has taken its toll, particularly on our ability to assess the likelihood of a change for the better. As a result, we are now engaged in pretending that deliverance is nigh. We are convinced that the three Justice concurrence in *Phillips v. Cricket Lighters*[5] represents a major crack in the edifice of the *Azzarello*-incited blind adherence to a "negligence concepts" exclusion. And we are convinced that the crack was widened by Justice Saylor's description of *Azzarello* as "not well reasoned,"[6]

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PRIVACY RIGHTS AND TEXT MESSAGING: THE U.S. SUPREME COURT SETS GUIDELINES

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Technology and the Fourth Amendment recently collided in the U.S. Supreme Court's decision in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), with the Court declining the opportunity to make any sweeping pronouncements on an employee's privacy interests with regard to communications made using employer-issued technology. Even though this case involved a government employer, the decision provides useful guidance to private employers as well with regard to searching and reviewing an employee's use of employer-owned technology without running afoul of privacy laws.

In *Quon*, the City of Ontario audited and reviewed the text messages of a police officer, Sgt. Quon, that were sent and received using a pager issued by the City. Specifically, the search of Quon's text messages by the City was conducted for the purpose of determining whether the monthly character limit for text messages imposed by the City through its wireless provider was too low. Prior to this search, Quon and other officers had exceeded the monthly character limit on several occasions and agreed to pay for the overages. The City wanted to know whether the text messages were due to work-related messages or personal use to ensure that officers were not paying for work-related overages. After retrieving the text message transcripts, it was discovered that Officer Quon sent numerous personal messages, some of which were sexually explicit, while

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On The Inside

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demonstrating, if nothing else, that understatement is not a lost art.

The unfortunate truth of course is that the *Phillips* concurrence was written nearly seven years ago, and that Justice Saylor's assessment of *Azzarello* was written in dissent. Realistically viewed, the *Phillips* concurrence and the *Bugosh* dissent are proof only of the majority's unwillingness to revisit the basic tenets of products liability. They provide no assurance that the overhaul urged by Justice Saylor and his two brethren will occur at all, let alone that it will eliminate the effects of the not well reasoned decisions that brought us to where we sit today.[7]

But while we await deliverance from the Supreme Court's not well reasoned decisions, we need to address a set of not well reasoned decisions handed down by the Superior Court, decisions so potentially damaging to the search for truth, and so stunningly illogical, that even our willing suspension of disbelief cannot render them tolerable. Those decisions, reaffirmed by the Superior Court just last year, apply the so-called "sole cause" rule to preclude evidence offered to counter a plaintiff's allegations of proximate cause.[8]

The Sole Cause Rule

The sole cause rule works this way: If the product manufacturer's evidence suggests ordinary negligence on the part of the product user, it is admissible if and only if the product user's negligence was the sole cause of the plaintiff's injury. Negligence on the part of the product user becomes irrelevant, and therefore inadmissible, "if the product defect contributed in any way to the harm."[9]

It hardly takes a Weinstein to recognize the problem. Whether the defect contributed to the harm is a factual determination, made after all of the evidence has been presented. The sole cause rule comes into play before all of the evidence has been presented, allowing the court to preclude the manufacturer's evidence on the basis of an assumption that the jury will adopt the plaintiff's theory of causation. Application of the sole cause rule turns that assumption into a finding, by eliminating from the jury's calculus a consideration vital to its factual determination.

The Problem

Every accident that gives rise to a products liability action involves at least two potential causal agents, the product and its user. Liability attaches if the product is moved out of the realm of potential cause by having been proved a proximate cause, *i.e.*, both a cause in fact of the injury and "a substantial factor in causing the injury."[10]

Logic suggests that the substantial factor determination requires consideration of other potential causes, and here at least logic and the law are in sync. Proper application of the substantial factor test involves analysis of "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it."[11] By removing from the equation the product user's (occasionally negligent) actions, often the most significant of the other factors the jury is required to consider, the sole cause rule makes proper application of the substantial factor test an impossibility.[12]

Substantial factor and sole cause being incapable of a peaceful co-existence, one of the two will have to be cast aside. It is a battle sole cause cannot win. All available evidence confirms that substantial factor is not a candidate for the legal dustbin. Barely two months ago the Supreme Court reiterated what has been Pennsylvania law since strict liability supplanted negligence as the consumer's theory of choice. "While asbestos litigation implicates concepts of strict liability rather than negligence, the requirements of proving substantial factor causation remain the same."[13]

The same cannot be said for sole cause. It has never been iterated by the Supreme Court, let alone reiterated. Nor has the Supreme Court ever held evidence of a product user's negligence inadmissible. So whence cometh sole cause, and how best to convince trial court judges to sendeth it back? The answer to both questions lies in the same Supreme Court opinion. Sole cause is the outgrowth of a not well articulated attempt at analysis in *Berkebile*, and the sole cause of its demise will be the evidence-related holding in *Berkebile*.

The Winding Road to Wonderland

The trip back to *Berkebile* begins with a review of the Superior Court decisions that brought us sole cause. The court started down that road in *Childers v. Power Line Equipment Rentals*.[14] There for the first time the court upheld the preclusion of evidence intended to demonstrate that the user's operation of the product, not the manufacturer's design of the product, had caused the accident giving rise to the plaintiff's claim.

The court opened its discussion with the obligatory reference to keeping strict liability actions free of negligence concepts, seemingly oblivious to the difference between concepts and evidence. For that proposition, utterly meaningless in the context of the evidentiary issue under discussion, the court cited *McCown v. International Harvester Co.*[15] and *Kimco Development Corp. v. Michael D's Carpet Outlets*.[16] They were interesting choices, as in neither decision did the Supreme Court rule on the admissibility of evidence.

McCown was in every way, but name, a crashworthiness claim. It arose out

of a one vehicle accident, and Mr. McCown had been driving the vehicle with something less than due care. The Supreme Court's opinion never addressed the admissibility of that evidence, because its admissibility was not at issue. Understandably so, as McCown could hardly have presented his case without a description of his encounter with the turnpike guardrail, a description that placed blame for the accident squarely on his shoulders. The issue was whether McCown's negligence in causing the accident eliminated his right to recovery. The court said it did not.

Justice Pomeroy authored a concurring opinion. Wanting to make certain that the court's holding was understood to be a limited one, Justice Pomeroy did address the admissibility of a product user's negligence. As Justice Pomeroy explained, the court's holding prevented a manufacturer from prevailing on a contributory negligence defense, but it did not bar a manufacturer from introducing otherwise admissible evidence simply because it would support that defense if introduced at the trial of a negligence action. Rejection of the defense was not meant to convey the view "that evidence of ordinary negligence on the part of a plaintiff is never relevant in a Section 402A action; such evidence may bear directly upon the determination of whether the plaintiff has proved all the elements necessary to make out a cause of action."[17]

The *Kimco* holding did not convey that view either. That appeal followed a trial of three consolidated actions. In two of them the product user was a defendant in a negligence claim, making evidence of the product user's negligence a necessary part of the record, just as it had been in *McCown*. What the court held in *Kimco* was not that any evidence of negligence on the part of the product user is irrelevant. The court held that a finding of negligence on the part of the product user is ineffective.

The same is true of *Smith v. Weissenfels, Inc*.,[18] the other authority relied upon in *Childers*. Yet *Kimco* and *Smith*, neither having addressed the admissibility of evidence, nevertheless caused the Superior Court to conclude, and if the court's opinion is to be believed caused the manufacturer's counsel to concede, "that evidence of a plaintiff's contributory negligence is ordinarily inadmissible in a strict liability proceeding . . . ."[19]

The Superior Court's New Reality

Having in effect created a new general rule, the Superior Court felt compelled to explain away its own prior conflicting decisions, where evidence of the product user's negligence had been ruled admissible. Those decisions, the court said, represented exceptions to the general rule. Evidence of product misuse was among those exceptions, and reliance on that particular exception was said to require that the manufacturer show the misuse had been "either unforeseeable or outrageous."[20]

There was no support for that proposition. *Brandimarti*, the decision *Childers* cited in support, says nothing of the kind. The issue related to the product misuse evidence introduced in *Brandimarti* was the manner in which the jury had been instructed concerning it. The court had pointed out that while the evidence could not be used to establish a contributory negligence defense, the limitation on its use did not affect its admissibility. An "inquiry as to plaintiff's use of the product is relevant as it relates to causation."[21]

An inquiry into the court's use of *Kimco*, and of *Smith*, and of *Brandimarti*, would have been relevant too, but none was forthcoming, and the court's peculiar view of those decisions took hold. When in *Madonna v. Harley Davidson, Inc*.[22] the admissibility of a product user's conduct was next at issue, *Childers* was cited as having set down the guiding principles. Upholding the introduction of evidence that Madonna had been under the influence when he crashed his motorcycle, conduct the court characterized as beyond ordinary negligence, the court saw the need to distinguish its *Childers* decision: "In *Childers*, evidence of the user's conduct was not admitted because the defendants were only able to show carelessness, which conduct would not have caused the decedent's death absent defects in the truck. Here, in contrast, [the manufacturer's] evidence sought to prove that the driver's reckless conduct alone caused the accident regardless of the defect in the bolt. For this reason it was properly admitted."[23] And with that, the sole cause rule was born.

The birth was celebrated two years later in *Charlton v. Toyota Industrial Equipment*.[24] Citing *Kimco*, and *Childers*, and *Madonna*, the court again stated that "evidence of a plaintiff's ordinary negligence may not be admitted in a strict products liability action unless it is shown that the accident was solely the result of the user's conduct and not related in any [way] with the alleged defect in the product."[25] The court did at least recognize that its adoption of sole cause represented a bit of a change. Eleven years earlier a different Superior Court panel had held "it was erroneous for the trial court to prevent the jury from considering the inattention of the plaintiff and the driver of the forklift in determining the cause of the accident,"[26] and ordered a new trial. But once again ignoring the distinction between admissibility and legal effect, *Charlton* dismisses that holding as "inconsistent with the views expressed in *Kimco*."[27]

The Third Circuit Joins the Tea Party

To be fair, full credit for the sole cause rule is not the Superior Court's to claim. *Childers* also drew on the analysis provided by the Court of Appeals in *Dillinger v. Caterpillar, Inc*.[28] Facing the admittedly unenviable task of trying to make sense of Pennsylvania products law, the Court of Appeals came to the conclusion that "[i]n case after case, the Pennsylvania Supreme Court has made clear that evidence of a plaintiff's contributory negligence is inadmissible in a strict products liability proceeding."[29] How the Court of Appeals came to that conclusion is a mystery, because in none of the three cases the court discussed, not in *Berkebile*, not in *McCown*, and certainly not in *Azzarello*, was evidence of the plaintiff's negligent conduct found to have been improperly admitted.

Azzarello effected but one change, removing the words "unreasonably dangerous" from what was then the standard jury instruction in a strict liability action. The opinion does not even contain the word evidence, let alone discuss its admissibility. Nor does *McCown* stand for an evidentiary ban, though *Dillinger* would lead the unsuspecting reader to believe exactly the opposite. According to the Court of Appeals, "[a]lthough the entire accident would probably have been avoided if the plaintiff had not negligently crashed into the guardrail, the court excluded that evidence."[30] No, it did not.

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All of which brings us to *Berkebile*. Here again the Court of Appeals decided to ignore what really occurred, implying instead that the Supreme Court had held the evidence of Mr. Berkebile's negligence irrelevant. The jury heard evidence that Berkebile had taken off in his helicopter with insufficient fuel, and that he had failed to make the correct maneuver when the helicopter's engine stalled. While the former might fairly be characterized as something other than ordinary negligence, the latter was as ordinary as ordinary negligence can get. The manufacturer had argued that either, or both, constituted an abnormal use that had caused the fracture of one of the helicopter's rotor blades and had led to the crash.

What the Supreme Court found problematic was not the introduction of the evidence, but the legal effect of the evidence. The trial court had instructed the jury that the in-flight error, if established, would be an abnormal use of the helicopter sufficient to preclude liability. Giving that instruction was held to have been reversible error.

But precision in use of the English language has not been one of the court's strengths. As the late Chief Justice Cappy conceded, though in a slightly different context, the court had "muddied the waters at times with the careless use of negligence terms in the strict liability arena."[31] The court's attempt to express its ruling on the effect of the evidence was one of those times, muddying the waters with the careless use of evidence terms in the legal theory arena.

The Court of Appeals dove right in. Rather than look for the actual evidentiary ruling, the court opted for the theoretical sound bite. The result is the evidentiary problem that has plagued us all, directly traceable to this single sloppily worded sentence interpreted by the Court of Appeals as stating an evidentiary principle: "The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant."[32]

Short and pithy? Absolutely. Legally accurate? Not even close. Strict liability makes proof of negligence on the part of the seller unnecessary, and it makes proof of negligence on the part of the consumer far less effective, but it makes neither irrelevant. The real crucial difference between strict liability and negligence is that the lack of due care on the part of the product seller is not an element of a strict liability claim, and the lack of due care on the part of the product user does not serve to bar or reduce the value of a strict liability claim.

Words Matter, But Do Courts Read Them?

The actual evidentiary ruling made in *Berkebile* was that the evidence was far from irrelevant. It had not been error to admit the evidence, or for the jury to consider it, negligence concept and all. And on that point the Supreme Court's view could not have been more clearly stated: "In conclusion, evidence which would be admissible in a negligence case to prove 'abnormal use' is admissible in a strict liability case only for the purpose of rebutting the plaintiff's contentions of defect and proximate cause. It is not properly submitted to the jury as a separate defense."[33]

That ruling should have put the evidentiary issue to rest, and no doubt would have put the issue to rest, had the court not been so terribly imprecise in its attempt to explain the negligence/strict liability dichotomy. But that ruling still can put the evidentiary issue to rest, and with it the sole cause rule, because that ruling destroys the sole cause rule's base premise, that ordinary negligence is generally inadmissible in a strict liability case.

The truth is that the Supreme Court has never held it was error to allow the product manufacturer to introduce evidence of the product user's actions, negligent or otherwise. The court has instead given silent assent to the introduction of the product user's negligence, suggesting nothing was amiss in *McCown*, in *Kimco*, and most recently in *Summers*.

As for the number of times the court has ruled on that precise evidentiary question, that number remains one. Only in *Berkebile* has the court directly addressed the issue, and its holding there, a mere 180° removed from sole cause, ends the discussion. As the Superior Court observed in explaining away its rejection of *Foley*: "Where the Supreme Court has spoken on a particular subject, it is our obligation as an intermediate appellate court to follow the dictates of our Supreme Court, absent a legally relevant distinction."[34]

The Supreme Court has spoken on this particular subject. There is no legally relevant distinction. The evidence ruled admissible in *Berkebile* was as indicative of ordinary negligence as the evidence ruled inadmissible in *Childers* and *Charlton*. That is what must be impressed on trial courts, and if need be on the Superior Court. *Berkebile* is the law. Sole cause, and the twisted logic from whence it came, is not. The sole cause rule may, and should, be ignored, allowing us once again to engage comfortably in the willing suspension of our disbelief.

ENDNOTES

[1]*Kimco Development Corp. v. Michael D's Carpet Outlets,* 536 Pa. 1, 8, 637 A.2d 603, 606 (1993).

[2]*Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 343, 528 A.2d 590, 594 (1987).

[3]*Azzarello v. Black Bros., Co., Inc.,* 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978).

[4]*Id*. at 560, 391 A2d. at 1027 n.12.

[5]576 Pa. 644, 841 A.2d 1000 (Pa. 2003)

[6]*Bugosh v. I.U. North America, Inc.,* 601 Pa. 277, 295, 971 A.2d 1228, 1239 (Saylor, J., dissenting).

[7]*Pa. Dept. of Gen. Serv. v. United States Mineral Products Co.,* 587 Pa. 236, 254, 898 A.2d 590, 601 (2006), referencing *Phillips,* 576 Pa. at 674-75, 841 A.2d at 1018 (2003) (Saylor, J., concurring).

[8]*Gaudio v. Ford Motor Co.,* 976 A.2d 524, 541 (Pa. Super. 2009).

[9]*Id*. at 541, quoting *Madonna v. Harley Davidson, Inc.,* 708 A.2d 507, 509 (Pa. Super. 1998).

[10]*Spino v. John S. Tilley Ladder Co.,* 548 Pa. 286, 293, 696 A.2d 1169, 1172 (1997) (citing *Berkebile v. Brantly Helicopter Corp*., 462 Pa. 83, 337 A.2d 893 (1975)).

[11]*Restatement (Second) of Torts* § 433; *American Truck Leasing, Inc. v. Thorne Equipment Co*., 400 Pa. Super. 530, 532, 583 A.2d 1242, 1243 (1991).

[12]*Foley v. Clark Equipment Co.,* 361 Pa. Super. 599, 628-29, 523 A.2d 379, 394, *appeal denied*, 516 Pa. 641, 531 A.2d 712 (1987).

[13]*Summers v. Certainteed Corp.,* 997 A.2d 1152, 1164-65 (Pa. 2010).

[14]452 Pa. Super. 94, 681 A.2d 201 (1996), appeal denied, 547 Pa. 735, 690 A.2d 236 (1997)

[15]463 Pa. 13, 342 A.2d 381 (1975).

[16]536 Pa. 1, 637 A.2d 603 (1993).

[17]*McCown,* 463 Pa. at 19, 342 A.2d at 384 (Pomeroy, J., concurring).

[18]441 Pa. Super. 328, 657 A.2d 949 (1995).

[19]*Childers*, 452 Pa. Super. at 106, 681 A.2d at 207.

[20]*Id*. at 108, 681 A.2d at 208 (citing *Brandimarti v. Caterpillar Tractor Co*., 364 Pa. Super. 26, 527 A.2d 134 (1987))

[21]*Brandimarti,* 364 Pa. Super. at 33, 527 A.2d at 138.

[22]708 A.2d 507 (Pa. Super. 1998).

[23]*Madonna*, 708 A.2d at 509.

[24]714 A.2d 1043 (Pa. Super. 1998).

[25]*Charlton,* 714 A.2d at 1047 (internal citations omitted).

[26]*Foley v. Clark Equipment Co*., 361 Pa. Super. 599, 629, 523 A.2d 379, 394, *allocatur denied*, 516 Pa. 614, 531 A.2d 780 and 516 Pa. 641, 533 A.2d 712 (1987)

[27]*Charlton*, 714 A.2d at 1048 n.6.

[28]959 F.2d 430 (3d Cir. 1992).

[29]*Id*. at 443.

[30]*Id*. at 444.

[31]*Phillips*, 576 Pa. at 656, 841 A.2d at 1007 (footnote omitted).

[32]*Berkebile,* 462 Pa. at 94, 337 A.2d at 899.

[33]*Id*. at 99, 337 A.2d 901.

[34]*Charlton*, 714 A.2d at 1048 n.6 (citation omitted).

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both on and off duty. Officer Quon filed suit alleging the City's search violated his right to privacy under the Fourth Amendment of the U.S. Constitution.

Prior to reaching the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's entry of judgment in favor of the City and other defendants. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008). The district court's holding was based on the conclusion that the search was reasonable because the City ordered the audit for the purpose of determining the efficacy of the character limits, which was a legitimate, work-related objective, and there were no less intrusive means to accomplish this objection. The Ninth Circuit disagreed with the district court, holding that the search was not reasonable because it was excessive in scope. *Id.* at 908-09. The Ninth Circuit's holding was premised on the reasoning that there were a "host of simple ways" the City could have audited the text messages "without intruding on [Quon's] Fourth Amendment rights." *Id.* The Court of Appeals also concluded that Quon had a reasonable expectation of privacy in his messages. *Id.* at 907-08.

The majority opinion of the U.S. Supreme Court, authored by Justice Kennedy, first addressed whether Quon had a reasonable expectation of privacy in the text messages. The Court wisely observed that it must proceed with caution when addressing privacy expectations in electronic communications sent using equipment owned by the government. "The judiciary risks error by elaborating too fully on Fourth Amendment implications of emerging technology before its role in society has become clear." *Quon*, 130 S. Ct. at 2629. The majority worried that a broad holding regarding employee privacy expectations with regard to employer-owned technology could have a profound and troublesome effect on subsequent cases that could not be predicted at this time. For this reason, the Court intentionally decided this case on narrower grounds, choosing instead to assume Quon had a reasonable expectation of privacy in his test messages.

After side-stepping the privacy expectation issue, the Court was left to decide the crux of this case: whether the search conducted by the City was reasonable. The majority opinion, citing *O'Connor v. Ortega*, 480 U.S. 709 (1987) as precedent, explained that a warrantless search by a government employer conducted for a "noninvestigatory, work-related purpose[e]" or for the "investigation of work-related misconduct" is reasonable if it is (1) "justified at its inception" and if (2) "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive" considering the facts from which the search arose. *Quon*, 130 S. Ct. at 2630. The Court held that the City's search was reasonable under this standard.

First, the City had reasonable grounds to believe the search was necessary for a noninvestigatory, work-related purpose, which was to determine whether the City's monthly character limit was adequate to meet the work-related needs of its officers and ensure that the City was not covering the bill for excessive personal messages. *Id.* at 2631. This was a "legitimate work-related rationale," the Court declared. (The Ninth Circuit also agreed with this premise.) Second, the Court held the scope of the search was reasonable. Justice Kennedy opined that review of the text message transcripts was "an efficient and expedient" method for the City to discover "whether Quon's overages resulted from work-related messaging or personal use." *Id.* The search also satisfied the standard set forth in *O'Connor* because it was not "excessively intrusive" in the Court's opinion. *Id.* The City reviewed a limited sample of Quon's message transcripts—only two months—to determine whether the character limits were sufficient, and all off-duty messages were redacted during the internal affairs investigation, which further lessened the intrusiveness.

Although the Court assumed Quon had a reasonable expectation of privacy in his text messages, it emphasized that the "extent of an expectation is relevant to assessing whether the search was too intrusive." *Id.* The City's "Computer Policy" provided that "users should have no expectation of privacy or confidentiality when using" city computers, and a subsequent memo and statements by superiors made clear that this policy applied equally to text messages sent and received using the employer-issued pagers. *Id.* at 2625. Therefore, any reasonable expectation of privacy Quon had in his messages was limited because he was told previously that his messages were subject to auditing.

Moreover, because of the mere nature of a SWAT Team officer's job and function, Quon should have known that his messages could be subject to legal scrutiny or government auditing for performance reasons. *See id.* at 2631. From the City's perspective, therefore, Quon's limited expectation of privacy diminished the possibility that review of the message transcripts "would intrude on highly private details of Quon's life." *Id.* The Court remarked that, under such circumstances, a reasonable employer would not expect its search to reveal private details of its employee's personal life. *Id.* Thus, the limited extent of Quon's assumed expectation of privacy further supported the conclusion that the scope of the search was not excessive, and, accordingly, was permissible under the Fourth Amendment.

Of interest, the Court was sure to underscore the error of the Ninth Circuit's holding that the search was unreasonable in scope because there were other less intrusive alternatives. Justice Kennedy opined that the Ninth Circuit's approach conflicted with controlling precedent of the Court, which has consistently maintained that the government does not need to use the "least intrusive search practicable" to be reasonable under the Fourth Amendment. *Id.* at 2632. If the Ninth Circuit's analysis was the standard, no search would be reasonable

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because judges could conjure in almost any case some other alternative that, in hindsight, would be less intrusive.

In Justice Scalia's concurring opinion, he asserted that an employee's "reasonable expectations" with regard to employer-issued devices should be addressed generally by the Court so as to not limit this opinion to public employees. *Id.* at 2634. The *Quon* majority responded to this concern by suggesting that the privacy expectations of employees in the private sector are usually limited in the same fashion as government employees. As Justice Kennedy stated:

> For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice Scalia's concurrence.

Id. at 2633.

Giving due consideration to the *Quon* decision, both private and public employers alike should use it to guide their approach to monitoring employee use of employer-owned computers and communication technology. Clearly, employers would be prudent to establish a well-articulated policy that plainly sets forth the level of privacy that an employee can expect when using all technology owned or issued by the employer. When newer technology is subsequently incorporated into the employer's work or business, the employer should review its policy to ensure it is either broad enough to cover all employer-issued technology used by employees or revise the policy to specifically encompass newly acquired technology.

Further, employers should be cautious in conducting their review of employee communications and technology use to ensure any privacy intrusions are limited. The employer's search does not need to be the "least intrusive search practicable," as the *Quon* Court explained, but it should be limited in a reasonable manner to accomplishing the employer's legitimate, work-related objectives. In this same regard, *before* commencing a search of employee technology use, the employer should identify and memorialize its legitimate, work-related purpose for any search to prevent confusion, to allow it to reasonably tailor the scope of the search to the objective, and to avert allegations of improper or illegal motivations. With a clear policy in place and using due care in commencing and conducting its investigation, employers can be comfortable that a reasonable review of an employee's use of employer-owned technology will not result in liability for violating the Fourth Amendment or an employee's privacy rights.

MEDICAL MALPRACTICE CASE UPDATE

By Howard M. Levinson, Esquire and Thomas J. Campenni, Esquire, Rosenn, Jenkins & Greenwald, LLP, Wilkes-Barre, PA

Plaintiff's Petition to Open, Following the Failure to File a Timely Certificate of Merit, Passes Three Step Test for Relief According to Pa.R.C.P. 3051

In *Aranda v. Amrick*, 987 A.2d 727 (Pa. Super. 2009), the plaintiff brought a professional liability suit against Dr. Ponnathpur. The plaintiff was required to submit a certificate of merit for Dr. Ponnathpur within 60 days of the complaint. A certificate of merit was not submitted within the 60 days. Dr. Ponnathpur filed a praecipe for entry of judgment of non pros and judgment was entered. The plaintiff then filed a petition to open/strike judgment of non pros and to permit the filing of a certificate of merit for Dr. Ponnathpur. The trial court denied the petition to open.

The plaintiff appealed the trial court's denial of the petition to open, contending that the petition should have been granted because the three step test for relief from a judgment of non pros was satisfied based on Pa.R.C.P. 3051. The three step test for the petition to open the judgment includes that: (1) the petition is timely filed, (2) there is a reasonable explanation or legitimate excuse for the inactivity or delay, and (3) there is a meritorious cause of action.

There was no dispute over the first step, which was satisfied. Dr. Ponnathpur argued that the second step was not satisfied because the plaintiff did not provide a reasonable excuse for the delay in filing the certificate of merit. Dr. Ponnathpur also contended that the plaintiff did not meet the third step, establishing a meritorious cause of action, because the plaintiff failed to produce "an export report or further testimony."

The Superior Court found that the excuse for the delay in filing the certificate of merit was reasonable because it was an oversight by the plaintiff's counsel, of which the plaintiff was not aware. The Court cited an analogous case, *Sabo v. Worrall*, 959 A.2d 347 (Pa. Super. 2008), in which the Court held that a mistake by a plaintiff's counsel, when a paralegal failed to submit a timely certificate, was a reasonable excuse for the delay.

Regarding the third step in the Rule 3051 test, the Superior Court found that there was a meritorious cause of action. The court denied the contention that the plaintiff must submit export reports or testimony. The court stated that at this stage in the process, according to Rule 1042.3, the plaintiff is only required to submit "a certificate of merit, stating that a plaintiff has obtained a written statement from a licensed professional." The plaintiff had attached this certificate in the petition to open.

The plaintiff satisfied the three step test of Pa.R.C.P. 3051 and the order was vacated and the matter remanded.

Commonwealth Court Grants Two Hospitals Direct Access to Reinsurance When Hospitals Meet "Totality of Circumstances" Test

In *Ario v. Reliance Insurance Company*, 981 A.2d 950 (Pa. Commw. Ct. 2009), the court addressed motions for summary judgment by two hospitals arguing they were entitled to have their medical malpractice claims paid by American Healthcare Indemnity Company (AHIC), who reinsured the policies

issued to them by an affiliate of Reliance Insurance Company (in Liquidation). The case came to the Commonwealth Court after being remanded by the Supreme Court for discovery relating to the issue of whether the hospitals are entitled to direct access to the reinsurer, AHIC, to pay the hospitals' claims.

Palm Springs General Hospital and Baptist Health South Florida, Inc. claimed that they were entitled to direct access to the reinsurance of AHIC as an exception to the rule that reinsurance proceeds are assets of the estate of the insolvent insurer. The hospitals argue that AHIC, the reinsurer, effectively acted as the hospitals' insurer under their fronting agreement and they should fall under the exception to the general rule, citing the principles established in *Koken v. Legion Insurance Company*, 831 A.2d 1196 (Pa. Commw. 2003).

The liquidator of Reliance Insurance Company contended that the hospitals were barred from direct access to the reinsurer by Section 534 of Article V, 40 P.S. § 221.34. The liquidator contended the hospitals could not establish that they fit within the exception established in *Legion* because they could not satisfy each and every principle established in *Legion*. The *Legion* principles provide that a policyholder must pass the "totality of circumstances" test to be granted direct access. The test involves analyzing: (1) whether the ceding insurer acted solely as a fronting company; (2) whether the ceding insurer entered into the transaction to generate fees as opposed to premium revenue; (3) whether the reinsurer functioned as the direct insurer by funding and processing the claims; (4) whether the ceding insurer, or the policyholder, selected the reinsurer; and (5) whether the equities favor direct access.

The court found in favor of the hospitals and granted the motions for summary judgment. The court concluded that the hospitals should be treated as third party beneficiaries of the reinsurance agreements because "(1) Reliance acted only as a fronting company in which capacity it did not accept an underwriting risk; (2) Reliance entered the transaction to generate fee income not premium revenues; (3) AHIC functioned as the direct insurer by funding and processing claims through its affiliate, SCPIE Management; (4) the hospitals chose the Sullivan Kelly program because of AHIC's participation not because of Reliance's minimal participation as a fronting company; and (5) the equities favor the hospitals' claim for direct access." The court found that the parties always understood AHIC would fund the claims of the hospitals, not Reliance, and for the liquidator to claim compensation for claim liability, when Reliance never could or did, goes against the designed arrangement.

A Medicaid Beneficiary Has a Cause of Action Against His or Her Tortfeasor to Recover and Reimburse DPW for Medicaid Benefits Received During the Beneficiary's Minority, Pursuant to the Fraud and Abuse Control Act.

In *E.D.B. v. Clair and Centre Community Hospital*, 987 A.2d 681 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether the Department of Public Welfare (DPW) was entitled to a portion of settlement proceeds for reimbursement for Medicaid expenditures made on behalf of a disabled minor when a claim therefore by the minor's parents is barred by the statute of limitations.

E.D.B. ("Emily") was born suffering severe mental and physical disabilities. Her parents, "the Bowmasters," filed suit against the hospital where Emily was born and the attending physician. The parties reached a negotiated settlement and the settlement was approved by the court of common pleas and a special needs trust was set up for Emily. DPW, being notified by "the Bowmasters" of the suit had put a lien on any award or settlement resolving the litigation in the amount that DPW had expended for Emily's medical care. After the settlement, the Court ordered the trustee of Emily's special needs trust to reimburse DPW for the full amount of her medical expenses.

"The Bowmasters" appealed to the Superior Court, holding that DPW could only be reimbursed for medical expenses paid on Emily's behalf after she reached the age of majority. The Superior Court concluded that medical expenses incurred by a minor because of personal injury rests with the minor's parents, not with the minor herself, citing *Hathi v. Krewstown Park Apartments*, 385 Pa. Super. 613, 561 A.2d 1261, 1262 (1989). Because "the Bowmasters" were barred from seeking reimbursement for medical expenses incurred during Emily's minority because the statute of limitations had expired, and Emily could only pursue a claim for expenses after she reached the age of majority, the court concluded that the litigation could not have resulted in a award or settlement that included medical expenses Emily had incurred as a minor. The court ruled that DPW could not satisfy its lien.

DPW then appealed to the Supreme Court of Pennsylvania. The Supreme Court faced three issues in this case. The first was whether a child can sue the tortfeasor for reimbursement of medical expenses when that child's estate may be legally liable to pay medical expenses for an injury. The second was whether the Pennsylvania Legislature intended to permit a minor receiving medical assistance to sue a tortfeasor for medical expenses when it enacted the Fraud and Abuse Control Act 62 P.S. 1409(b). And lastly, the court faced the issue of whether a minor child is a "beneficiary" of medical assistance according to 62 P.S. § 1409(b)(13).

The Supreme Court concluded that Emily was a "beneficiary" according to subsection 1409(b)(13) of the Fraud and Abuse Control Act because no reading of the statutory definition of "beneficiary" can exclude Emily. The court interpreted the definition of "beneficiary" as "any person who has or will receive benefits."

The court then determined that the intent of the General Assembly in the Fraud and Abuse Control Act is clear that when any beneficiary, adult or minor, enters into a settlement with the tortfeasor, DPW has the right to recover by asserting a lien on the settlement for the reasonable value of Medicaid benefits provided to the beneficiary. The court found nothing in the statute that distinguishes a minor beneficiary from one who has reached the age of majority. The court could not conclude that the General Assembly intended 1409(b)(11) to be constrained by the common law in such a manner to bar a beneficiary from recovering from the tortfeasor the monetary value that assistance provided during his or her minority.

The Supreme Court discussed *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 164 l.Ed.2d 459 (2006),

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in which the Supreme Court of the United States held unenforceable an Arkansas statute that required satisfaction of a state agency lien for Medicaid expenditures from the entirety of a settlement, regardless of how the settlement was allocated. This case led to a modification of 1409(b)(11) of the Fraud and Abuse Control Act to include, "to the extent that Federal Law limits recovery of medical assistance reimbursement to the medical portion of a beneficiary's judgment, award, or settlement." The Supreme Court of Pennsylvania found that nothing in *Ahlborn* affects or weakens the court's interpretation of the General Assembly's intent of allowing beneficiaries to file claims for Medicaid expenditures incurred during minority.

The Supreme Court of Pennsylvania vacated the Superior Court's order and reinstated the order of the court of common pleas for reimbursement to DPW.

Supreme Court Decides that Commonwealth Court Has Original Jurisdiction over Coverage Disputes Involving MCARE Fund

In *Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Association*, 985 A.2d 678 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether the Commonwealth Court has original jurisdiction over claims against the Medical Care Availability and Reduction of Error Fund (MCARE Fund) or was claimant required to first exhaust administrative remedies by seeking relief from the Insurance Department.

Johanna Fletcher, a successful plaintiff in a medical malpractice case, brought a declaratory judgment action to resolve coverage issues relating to the MCARE Fund in the original jurisdiction of the Commonwealth Court. The MCARE Fund filed preliminary objections claiming the Commonwealth Court did not have original jurisdiction. The Commonwealth Court found that it had jurisdiction, and the Fund then appealed, claiming Fletcher must first exhaust her administrative remedies by seeking relief from the Insurance Department.

Fletcher relied primarily on *Ohio Casualty Group of Ins. Companies v. Argonaut Ins. Co.*, 514 Pa. 430, 525 A.2d 1195 (1987), in which an insurer brought an action against the CAT Fund in the Commonwealth Court's original jurisdiction. The court concluded in *Ohio Casualty* that the available administrative remedies inadequate to resolve the coverage dispute, and thus, the Commonwealth Court had original jurisdiction.

The MCARE Fund argued that with the passage of the MCARE Act, which transferred the rights and responsibilities of the CAT Fund to the MCARE Fund, the Insurance Commissioner had exclusive jurisdiction over all of the Fund's written determinations. The Fund argued that Fletcher failed to bring her claim to the Insurance Department, thus she failed to exhaust her administrative remedies.

Fletcher responded by claiming that the Commonwealth Court had original jurisdiction over disputes involving the MCARE Fund, just as it had for the CAT Fund. Flethcer argued that the MCARE Act does not contain anything pertaining to administrative appeals involving coverage determinations. She argued that the failure to include an express administrative appeal provision for coverage disputes implied that none was intended, under the principle of statutory construction *expression unius est exclusion alterius*, leaving intact the original jurisdiction of the Commonwealth Court.

The Supreme Court ruled in favor of Fletcher and remanded the matter for further proceedings, upholding original jurisdiction of the Commonwealth Court for coverage disputes involving the MCARE Fund. The court first concluded that the MCARE Fund could not point to any specific statutory procedure within the MCARE Act, where health care providers (or individuals with the health care provider's assignment of rights) can be afforded a remedy, which was the same situation in *Ohio Casualty* concerning the CAT Fund. Second, the court stated that the legislature is presumed to have acted with knowledge of the *Ohio Casualty* decision, and the silence on the resolution of coverage disputes within the Act leads the court to "conclude that the legislature did not intend a change in jurisdiction." The court found that by addressing assessment appeals in the Act, but not coverage appeals, the legislature implicitly left the original jurisdiction that came out of the *Ohio Casualty* decision intact. The court also found that the similar responsibilities between the CAT Fund and the MCARE Fund supported the conclusion that the legislature did not intend to change jurisdiction for coverage appeals.

Superior Court Extends Corporate Liability To Medical Professional Corporations When the Corporation Is (a) Responsible for the Coordination and Management of the Patients and (b) Fails to Deliver the Care It Was Contractually Obligated to Provide.

In *Hyrcza v. West Penn Allegheny Health System*, 978 A.2d 961 (Pa. Super. 2009), the Superior Court of Pennsylvania addressed an appeal from a judgment of approximately $8.6 million jury award in a medical malpractice case.

The plaintiff, Carol Hyrcza, the Executrix of the estate of Margaret Mahunik, was successful in her medical malpractice action against Yvette C. Ross Hebron, M.D. and ChoiceCare Physicians. Mahunik died on July 10th, 2001 after showing signs of gastrointestinal bleeding that went unnoticed by Dr. Hebron on July 4th, 2001. Dr. Hebron ended her employment at ChoiceCare on July 6th, 2001 and ChoiceCare failed to provide Mahunik with another physician. The plaintiff was awarded $8.6 million on a jury verdict in the court of common pleas.

The defendants, Dr. Hebron and ChoiceCare Physicians, appealed the verdict by arguing the trial court abused its discretion in six instances during the trial. The defendants first claim that the trial court erred by refusing to place the settling defendants' names on the verdict slip. Second, the court erred by overruling the defense objections to Hyrcza's expert witness on the grounds that he was unqualified to render a standard of care opinion. Third, the court erred by overruling defense objections to the jury charge on irrelevant considerations. Fourth, the trial court erred by permitting the improper use of learned treatise during the direct examination of Hyrcza's expert witness. Fifth, the court erred by denying the defense's request for cautionary instructions because comments by Hyrcza's counsel were

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inflammatory, scurrilous, and prejudicial during closing arguments. And finally, the defendants claim the court erred by failing to grant Dr. Hebron's request for remitter because the verdict was excessive.

ChoiceCare, alone, also appealed on the grounds that the trial court erred by charging the jury on its alleged corporate negligence. ChoiceCare claimed that corporate liability does not extend to medical professional corporations and that it was covered by a standard agency charge.

Regarding the defendants' first issue, that the trial court erred by excluding the "settling defendants" from the verdict slip, although there was clear evidence of their negligence, the Superior Court held that the trial court's decision was supported and upheld the decision. The Superior Court concluded that there is no absolute right to have settling co-defendants put on the verdict slip and the trial court must determine whether there is any evidence of a settling co-defendant's liability before putting them on the jury slip, citing *Herbert v. Parkview Hosp*., 854 A.2 1285 (Pa. Super. 2004). The Superior Court agreed with the trial court that there was not sufficient evidence for a *prima facie* case against the settling defendants, thus it was the correct decision to exclude them from the verdict slip.

The Superior Court also upheld the decision of the trial court regarding the defendants' second issue, that the trial court erred by admitting the expert testimony of Dr. Corboy. The defendants argued the witness was unqualified to render a standard of care opinion under Section 1303.512 of the Medical Care Availability and Reduction of Error Act. The Superior Court refused to overturn the trial court's decision to accept Dr. Corboy's testimony that he was familiar with the standard of care at issue because a significant portion of his practice was devoted to such care, citing *Smith v. Paoli Memorial Hospital*, 885 A.2d 1012, 1016 (Pa. Super. 2005).

Regarding the issue of jury instructions taken from the Pennsylvania Suggested Standard Civil Jury Instructions on "irrelevant considerations", the Superior Court found no error by the trial court, citing *Levine v. Rosen*, 532 Pa. 512, 616 A.2d 623 (1992) and *Sedlitsky v. Pareso* 425 Pa. Super. 327, 625 A.2d 71 (1993).

Regarding the issue of the use of learned treatise, in which the defendants claimed that the trial court erred by allowing the plaintiff's counsel to elicit hearsay testimony from Dr. Corboy from a learned treatise, the Superior Court upheld the trial court's decision to allow the testimony because of the limited purpose for which the learned treatise was used and the undisputed nature of the medical principle discussed.

The Superior Court upheld the decision of the trial court to refuse to give cautionary instructions following statements made by Hyrcza's counsel during closing argument, which were that "doctors help each other out when they're in a jam." This statement was in reference to the credibility of one of the defense's expert witnesses, Dr. Narla, who was not accepting payment for his testimony. The Superior Court found that, in this context, the statements were permissible argument.

The court also upheld the determination of the trial court to not grant remitter because of an excessive verdict, stating that "the jury could have reasonably awarded the amount in question."

Regarding the issue of ChoiceCare's appeal, that the trial court erred by charging the jury on its alleged corporate negligence, the Superior Court upheld the decision of the trial court, agreeing that a standard negligence charge would have been inadequate under the circumstances. The Superior Court reached this decision because ChoiceCare was responsible for the coordination and management of all patients in the rehabilitation unit in which Mahunik was located and ChoiceCare failed to deliver the comprehensive care it was contractually obligated to provide Mahunik. The court cited *Thompson v. Nason Hospital*, 527 Pa. 330, 591 A.2d 703 (1991), in which the doctrine of corporate negligence as a basis for hospital liability was established. The court decided that the case at hand was closer to that of the *Thompson* case, rather than of *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55 (Pa. Super. 2004), in which the court refused to extend the corporate liability doctrine to a physician's office. The Superior Court concluded that ChoiceCare had (a) total responsibility for the coordination of care within the hospital's rehabilitation unit, and (b) had failed to uphold its duties, thus a corporate negligence charge was warranted.

Supreme Court Holds that Parties to a Settlement Should Be Afforded Latitude to Effectuate Their Express Intentions when Plaintiff's Surrendered Vicarious Liability Only and Expressly Reserve the Rights Against the Agent

In *Maloney v. Valley Medical Facilities*, 984 A.2d 478 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether a plaintiff's release of principals that had potential vicarious liability also releases the agent from the plaintiff's claims, even when there is an express reservation of rights.

The plaintiff, Max Maloney brought a medical malpractice action against defendants Dr. Prendergast, M.D., Dr. Brennan, M.D., and a vicarious liability action against the institutional defendants ("Employers") associated with these physicians. The action claimed negligence for the failure to timely diagnose and treat osteosarcoma in his wife, Linda Maloney. Plaintiff later surrendered all claims "in any way connected with all medical professional health care services rendered by the above name Health Care Providers." A paragraph was included in the release to expressly reserve the rights against Dr. Prendergast.

Dr. Prendergast and Employers then filed motions for summary judgment, claiming that the language of the release discharged all direct and derivative claims that came from Dr. Prendergast's conduct based on the common law rule governing releases, *Mamalis v. Atlas Van Lines, Inc.*, 522 Pa. 214, 560 A.2d 1380 (1989) and *Pallante v. Harcourt Brace Jovanovich, Inc.*, 427 Pa. Super. 371, 629 A.2d 146 (1993). The *Mamalis* case held that the release of an agent operates to release the principal from vicarious liability claims. The *Pallante* case applied *Mamalis* to require that the release of an agent follows from the release of a principal. The trial court granted the motions based on the common law rules from *Mamalis* and *Pallante*.

The Superior Court found that the release surrendered all claims against

the "Employers," but disagreed with the trial court's decision concerning Dr. Prendergast, because the case involved possible multiple negligent acts, rather than a single negligent act as in *Pallante*. Accordingly, the Superior Court vacated the judgment with regard to Dr. Prendergast.

The defendants filed an appeal to the Supreme Court claiming that the Superior Court disregarded *Mamalis* in its decision, and that this decision is "irreconcilable with *Pallante*." The plaintiff countered by arguing that the present case involved multiple separate acts of negligence and multiple tortfeasors rather than the release of a single agent in a single tort case. Plaintiff also claimed that *Pallante* did not extend the *Mamalis* decision to "scenarios encompassing allegations of multiple acts of negligence," and that there is no indication that the language of the written release in *Pallante* included a reservation of rights.

The Supreme Court upheld the decision of the Superior Court. In doing so, the Supreme Court found that *Mamalis* was directed at a simple fact pattern, which included one principal and one agent, and the court did not consider the extension of the rule to complex factual scenarios as the one in the present case. The Supreme Court further stated:

> In the scenario entailing a plaintiff's surrender of vicarious liability claims only and express preservation of claims against the agent, we hold that the parties to a settlement should be afforded latitude to effectuate their express intentions. To the extent that the Superior Court's decision in *Pallante* holds to the contrary, see *Pallante*, 427 Pa. Super. At 377, 629, A.2d at 149 ("Given the supreme court's decision that principal and agent are not joint tortfeasors, we conclude that the release of the principal acts as a release of the agent"), it is disapproved.

Superior Court Concludes that "Error of Judgment" Instructions to a Jury Should Not Be Given in Medical Malpractice Actions

In *Pringle v. Rapport*, 980 A.2d159 (Pa. Super. 2009), the Superior Court of Pennsylvania addressed an appeal contending that the trial court erred in including an "error of judgment" instruction during the charge to the jury at the trial of a medical malpractice action.

The Pringles, parents of Austin Pringle, filed a medical malpractice complaint against Dr. Rapport, the defendant, after nerves in the infant's neck were torn during delivery. The jury verdict was in favor of the defendant. The Pringles then appealed contending that the trial court erred in including an "error of judgment" instruction to the jury.

The Pringles appeal included two challenges to the trial court's charge to the jury. First, did the trial court err when it instructed the jury, "to decide the issue of negligence by considering the physician's subjective judgment?" And secondly, was the trial court's instruction to the jury, "Physicians do not guarantee a cure and negligence should not be presumed from the occurrence of an unfortunate result," in inextricable conflict with the Pringle's accepted "*Res Ipsa Loquitur*" charge? The Pringles contend that the "error of judgment" instruction "improperly advises the jury on the well-established applicable standards for medical malpractice and is also likely to mislead and confuse the jury in its deliberations."

The court discussed the fact that there were conflicting decisions by panels of the court that left the state of law regarding "error of judgment" instructions "in flux." The court noted the strong disapproval of the instruction in *D'Orazio v. Parlee & Tatem Radiological Associates, Ltd*., 850 A.2d 726 9 (Pa. Super. 2004). The court noted that the same panel that decided *D'Orazio* came to the opposite conclusion in *Schaaf v. Kaufman*, 850 A.2d 655, 666 (Pa. Super. 2004), in which the use of the instruction by the court was affirmed. The court stated that these conflicting decisions provide little guidance and necessitate clarification.

The Superior Court reversed and remanded for a new trial. The court ruled that the "error of judgment" instructions should not be given in medical malpractice actions in the Commonwealth because they are inherently confusing. The court came to this decision for two major reasons. First, the "error of judgment" charge "wrongly suggests to the jury that a physician is not culpable for one type of negligence, namely the negligent exercise of his or her judgment." The second reason was that "the "error of judgment" charge wrongly injects a subjective element into the jury's deliberations. The standard of care for physicians in Pennsylvania is objective in nature, as it centers on the knowledge, skill, and care normally possessed and exercised in the medical profession." The court also noted that the "error of judgment" charge improperly focuses the jury's attention to the physician's state of mind, although the state of mind of the physician is irrelevant.

Defendant Hospital's Preliminary Objection to Complaint Sustained and Plaintiffs Ordered to Identify, by Name, Agents of Hospital Who Allegedly Were Negligent

In *Rex v. Wellspan Health*, 8 Pa. D. & C. 5th 573 (Adams County2009), the Adams County Court of Common Pleas addressed the preliminary objections of the several defendants of Gettysburg Hospital to an amended complaint by the plaintiff, Kathy Rex.

The preliminary objections challenged the plaintiff's amended complaint that alleged the hospital had respondeat superior liability for the negligence of its agents and identified the cause of action against Gettysburg Hospital as one of vicarious liability for the actions and inactions of William Schrantz M.D. and other "agents, servants and employees." The preliminary objections challenged the specificity of the complaint as it related to the agency allegations. The defendants claimed that Pa. R.C.P. 1019 (a) required that a pleading include material facts necessary to support a claim. The defendants argued the phrase "agents, servants and employees," inhibited the defendants' ability to defend the action because they were not fully apprised of the acts underlying the claim.

The plaintiff countered the preliminary objections by arguing the complaint was specific in regard to the negligent conduct of the defendants and that the defendants were familiar with the personnel who treated the plaintiff and therefore had adequate notice of the underlying factual background.

The court granted the preliminary objections, but gave the plaintiff 20 days to file a second amended complaint

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specifically identifying the agents by specific name or appropriate description. The court stated the purpose of pleadings is to place the defendants on notice of the claims they will have to defend, citing *McClellan v. HMO*, 413 Pa. Super. 128, 13, 604 A.2d 1053, 1059 (1992). The court went on to cite *Rachlin v. Edminson*, 813, A.2d 862, 870 (Pa. Super. 2002), stating the following:

> Although it is unnecessary to plead all the various details of an alleged agency relationship, a complaint must allege, as a minimum, facts which:
>
> (1) identify the agent by name or appropriate description; and (2) set forth the agent's authority and how the tortious acts of the agent either fall within the scope of authority, or if unauthorized, were ratified by the principal.

Supreme Court Restates and Applies to the Record the Standards and Conditions Appropriate for Summary Judgment

In *Stimmler v. Chestnut Hill Hospital* 981 A.2d 145 (Pa. 2009), the Supreme Court of Pennsylvania addressed whether a summary judgment was appropriate in a medical malpractice case.

The plaintiff, Ann Stimmler, underwent an echocardiogram in 1999, which showed an echogenic abnormality. This abnormality was a catheter coiled in the right atrium of the plaintiff's heart. The plaintiff filed a medical malpractice claim against Chestnut Hospital and several doctors claiming the catheter in her heart was one used in an antecubital cutdown procedure she underwent at the Hospital in 1965.

One of the defendants, Dr. Padula, filed a request for admissions in which he asked the plaintiff to admit she had intravenous "catheter devices" inserted during sixteen different times after 1965. The plaintiff failed to produce a timely response, but did produce an untimely response that denied that the catheter came from any procedure except the May 1965 cutdowns. Motions for summary judgment were then filed by the defendants and the trial court granted all of the summary judgment motions. The trial court concluded that the experts' reports failed to establish, to a degree of medical certainty that the catheter was from the May 1965 procedure. The trial court also noted that the experts' reports were based on speculative facts. The expert witnesses, Dr. Reiffel and Dr. Depace both claimed that the catheter must have come from the 1965 procedure due to the length and condition of the catheter.

The plaintiff appealed to the Superior Court, which upheld Dr. Padula's request for admissions because the response was untimely, applying rule 4014 (b) and upheld the summary judgments reasoning that if the plaintiff had catheterizations on 16 other occasions then the factual premise was impermissibly speculative.

The plaintiff appealed to the Supreme Court of Pennsylvania, which concluded that the trial and Superior Court misapplied the appropriate standards and inappropriately determined the case on "deemed admissions." The court reversed and remanded the decisions.

The Supreme Court found that even if Dr. Padula's request for admissions is deemed true, the admissions do not challenge the common conclusion of Dr. Reiffel and Dr. Depace and do not render the opinions of the expert witnesses as speculative. The court found that the substance of expert witness testimony must be examined to determine whether the expert has met the requisite standard, citing *Welsh v. Bulger*, 698 A.2d 581, 585 (pa. 1997). The Court also stated that "in establishing *prima facie* cases, the plaintiff (in a medical malpractice case) need not exclude every possible explanation for the accident; it is enough that reasonable minds are able to conclude that the preponderance of the evidence shows the defendants' conduct to have been substantial cause of the harm to the plaintiff."

Supreme Court Addresses Qualifications of Expert and Concludes the "Relatedness" of One Field to Another, under Subsection 512 (e) of MCARE Act, Can Only Be Assessed with Regard to the Specific Care at Issue

In *Vicari v. Spiegel*, 981 A.2d 145 (Pa. 2010), the Supreme Court of Pennsylvania addressed the qualifications an expert witness must possess in order to testify regarding the standard of care in a medical professional liability case, pursuant to the Medical Care Availability and Reduction of Error Act ("MCARE").

The plaintiff, Joseph Vicari, brought a medical professional liability claim for his deceased wife against the defendants, Joseph Spiegel, M.D. and Pramila Anne, M.D. The plaintiff's wife had a tumor removed from her tongue by Dr. Spiegel and was then given radiation treatment by Dr. Anne. The plaintiff's wife died from the metastatic tongue cancer on April 1, 2002. The plaintiff claimed the defendants were liable because they did not refer his wife to a medical oncologist for possible chemotherapy.

The trial court struck down the expert witness testimony of Ronald H. Blum, M.D., a medical oncologist, because Dr. Blum was not board certified in the same field as either of the defendant physicians. The plaintiff appealed to the Superior Court, arguing the trial court had abused its discretion by striking the expert witness testimony. The Superior Court reversed and remanded the decision stating that Dr. Blum was qualified to testify under the MCARE Act. The defendants then appealed to the Supreme Court of Pennsylvania challenging the decision of the Superior Court.

The question faced by the Supreme Court was whether Dr. Blum, a medical oncologist, was qualified to render standard of care opinions against an otolaryngologist and radiation oncologist under Section 512 of the MCARE Act. Section 512 requires that an expert witness in a professional medical liability case must possess sufficient education, training, knowledge and experience to provide credible competent testimony. Section 512 also requires the expert witness to be in the same specialty as the defendant physician and be certified by the same board. Section 512 (e) allows for exceptions to the same specialty and board certification requirements if the court determines the expert possess sufficient training , experience and knowledge as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five years.

The court stated;

> The "relatedness" of one field to another for purposes of subsection 512

(e) cannot be established in a broad and general sense that will henceforth be applicable to all situations and all claims. Rather, the "relatedness" of one field of medicine to another, under subsection 512 (e), can only be assessed with regard to the specific care at issue.

The court concluded the Dr. Blum did have the sufficient training, experience, and knowledge to testify as to the specific standard care at issue. The court also concluded that medical oncology, Dr. Blum's field of medicine, was a "related field of medicine" to otolaryngology and radiation oncology with regard to the specific care at issue pursuant to subsection 512 (e).

Superior Court Upholds Verdict in Medical Malpractice Case of $5.2 M Against Challenge that 1) J.N.O.V. Should Have Been Granted, 2) Admission of Expert Testimony Was in Error, and 3) Verdict Was Excessive

In *Whitaker v. Frankford Hospital of the City of Philadelphia*, 984 A.2d 512 (Pa. Super. 2009), the Superior Court addressed an appeal from a judgment entered on a jury verdict in a medical malpractice action against Diagnostic Imaging, Inc. and its agent Dr. Robert T. Smith.

The jury awarded $5,200,000 in damages, finding that Dr. Smith and Dr. Gauthier, who had previously settled, were equally responsible for the injuries to Caroline Monaghan, who suffered severe brain damage after suffering a severe stroke. The plaintiffs claim that Dr. Smith misread an MRA/MRI on June 21, 2001 which indicated Mrs. Monaghan had 70 percent blockage in two arteries (critical stenosis) but was incorrectly interpreted and that Dr. Gauthier should have admitted and treated, rather than discharged, Mrs. Monaghan on June 23, 2001.

The defendants first claim that they should have been granted summary judgment or a compulsory nonsuit because plaintiffs failed to establish that their conduct caused the injuries based on the fact that there was no evidence Dr. Gauthier relied upon Dr. Smith's incorrect interpretation of the June 21st MRA/MRI. The defendants also claimed that plaintiff's two expert witnesses, one standard care witness and one causation witness, were improperly permitted to testify in the area of expertise of the other. Next, the defendants claimed that their expert witness was improperly restricted during direct examination. And finally, the defendants requested remittitur of the verdict because it was excessive.

Concerning the first issue brought by the defendants, the court stated the defendants improperly framed their position because once the case proceeded to trial and a defense was presented, the trial court's refusal to grant them summary judgment became moot. The court, instead, addressed whether the trial court erred in failing to grant judgment nothwithstanding the verdict. The court upheld the decision of the trial court and found that it was not surprising the jury determined that Dr. Gauthier must have relied on Dr. Smith's interpretation of the MRI based on the evidence presented. This evidence included the protocol of the hospital to immediately admit and treat patients with symptomatic critical stenosis, Dr. Gauthier's statement that he would have admitted Mrs. Monoghan if he knew she had critical stenosis, and evidence that Dr. Gauthier believed the MRI indicated the stenosis was non-critical.

Regarding the issue of overlapping testimony of the plaintiff's expert witnesses, the court found that a new trial was not necessary because the cumulative nature of the testimony was not so harmful that the result at trial would have been different if testimony was restricted. The defendants had also argued that the testimony went beyond the fair scope of the reports issued by the expert witnesses. The Superior Court disagreed and found that the defendants were fully apprised of the deviation from the standard of care testimony as well as the factual premise for causation testimony. The court stated it will not find error in the admission of testimony that the opposing party had notice of or was not prejudiced by, citing *Coffey v. Minwax Company, Inc.*, 764 A.2d 616, 620-621 (Pa. Super. 2000).

The defendants also argued that the expert witness, Dr. Peyster went beyond his area of expertise during testimony. The court disagreed with the defendants, stating that the expert witness was unquestionably qualified.

The Superior Court also found that the trial court did not err by restricting the testimony of the defendants' witness, Dr. Dougherty, even though the witness was clearly testifying beyond the fair scope of his report, because the court found there was no unfair surprise.

Finally, the defendants claim that the damages awarded were excessive, the court found that the trial court did not abuse its discretion by not awarding remittitur of the verdict, finding the verdict was not grossly excessive.

DEAD OR ALIVE? THE CASE FOR RESURRECTING THE ERROR OF JUDGMENT INSTRUCTION

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In *Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. 2009) *(en banc*), *appeal denied*, 987 A.2d 162 (Pa. 2009), the Pennsylvania Superior Court addressed the propriety of the "error of judgment" jury instruction in medical malpractice cases, an instruction the Supreme Court of Pennsylvania has never directly addressed. The court found that the instruction does not inform jurors on the applicable standard of care, and tends only to confuse, rather than clarify, the issues the jury must decide. To resolve what the Superior Court found to be irreconcilable decisions by panels of that court, the court issued a broad ruling, holding that "'error of judgment' instructions should not be given in medical malpractice actions in this Commonwealth."

Rather than eliminate the instruction, the Superior Court should have provided a clear instruction, one that does not cause confusion. Physicians play an important role in our society, making complex judgments while dealing with an inexact science. As such, it is important that jurors understand that physicians cannot be held liable, retrospectively, for mere errors of judgment and should not be condemned in hindsight. Thus, where the instruction is warranted by the evidence, it should be permitted.

Supreme Court Precedent Endorses Error of Judgment Principles

The principle that physicians should not be held liable for mere errors of judgment is a well established principle in this Commonwealth that has been repeatedly endorsed by the Supreme Court. *See: Williams v. Le Bar*, 141 Pa. 149, 158-59, 21 A. 525 (1891) (*per curiam*) (holding that the trial court properly held that the defendants should not be held liable for a mistaken diagnosis absent a showing of negligence); *English v. Free*, 205 Pa. 624, 626, 55 A.2d 777, 777-78 (1903) (*per curiam*) (affirming the entry of a nonsuit in favor of the physician-defendant because although he failed to accurately diagnose a dislocated hip joint, the evidence showed that he acted with reasonable skill and diligence); *Duckworth v. Bennett*, 320 Pa. 47, 50, 181 A. 558, 559 (1935) ("Where the most that the case discloses is an error [sic] of judgment on the surgeon's part, there is no liability. . . . At most, all that could be said is that defendant made a mistake in diagnosis where the symptoms were obscure, and for this there is no liability."); *Ward v. Garvin*, 328 Pa. 395, 195 A. 885 (1938) (*per curiam*) (". . . a physician is not responsible for an error of judgment or mistake in diagnosis in the treatment of a patient."); *Hodgson v. Bigelow*, 335 Pa. 497, 504-05, 7 A.2d 338, 342 (1939) (discussing a plaintiff's *prima facie* case of medical malpractice and stating: "Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment."); *Smith v. Yohe*, 412 Pa. 94, 99, 194 A.2d 167, 170-71 (1963) (discussing "well-settled principles" related to medical malpractice, and indicating that a physician is not liable for an error of judgment); *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 264, 824 A.2d 1140, 1151 (2003) (plurality) ("Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake in judgment, failure of treatment, or an accidental occurrence."); *Toogood*, 573 Pa. at 262, 824 A.2d at 1150 ("There is no requirement that [physicians] be infallible, and making a mistake is not negligence as a matter of law.").

The need to protect physicians from being held liable, in hindsight, for mere errors of judgment was highlighted by the Supreme Court in *Toogood*, where a plurality of the court recently stated:

> Public policy reasons exist for protecting physicians. . . . First, doctors hold an important place in our society due to the role they play in the health and even survival of the peoples of this nation. For that reason, society should not allow a doctor's actions to be second-guessed at trial without a clear understanding of the standards required. Second, medicine is not an exact science. Much discretion exists in a doctor's practice of medicine that should not be condemned in hindsight. Third, the practice of medicine is a complex and experimental field. Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake in judgment, failure of treatment, or an accidental occurrence.

Consistent with these policy objectives, in order for jurors to have a "clear understanding of the standards required," they should be instructed that physicians cannot be held liable for a simple error of judgment, failure of treatment, or an accidental occurrence.

Ensuring that jurors understand that physicians are not liable for mere mistakes in judgment or unfortunate results is consistent with the public policy expressed by the legislature in the Medical Care Availability and Reduction of Error Act, which states: "[i]n the absence of a special contract in writing, a health care provider is neither a warrantor nor a guarantor of a cure." The fact that the legislature felt the need to include this provision shows that jurors have a tendency to expect more from physicians than simply the exercise of reasonable skill and knowledge. As such, jury instructions need to do more than state the standard of care in terms of reasonable skill and knowledge. In addition to referencing reasonable skill and knowledge, jury instructions need to explicitly point out that where a physician exercises ordinary care and skill, the physician is not liable for a mere error of judgment, misdiagnosis, or unfortunate result.

Superior Court Decisions Overwhelmingly Embrace Error of Judgment Principles

The Superior Court in *Pringle* found that panel decisions of the Superior Court were irreconcilable and confusing, and concluded that the only way to resolve the confusion was to preclude the use of the "error of judgment" instruction. The court's analysis overlooked the fact that most of the panel decisions at issue explicitly or implicitly approved of the use of the instruction.

As the *Pringle* court noted, the following Superior Court cases affirmed the trial court's decision to instruct the jury that physicians are not liable for a mere error

of judgment. *See Blicha v. Jacks*, 864 A.2d 1214 (Pa. Super. 2004); *King v. Stefenelli*, 862 A.2d 666 (Pa. Super. 2004); *Fragale v. Brigham*, 741 A.2d 788 (Pa. Super. 1999), *appeal denied*, 563 Pa. 629, 758 A.2d 662 (2000); *Havasy v. Resnick*, 415 Pa. Super. 480, 609 A.2d 1326 (1992), *appeal granted*, 553 Pa. 625, 620 A.2d 491 (1993), *dismissed as improvidently granted*, 537 Pa. 114, 641 A.3d 580 (1994) (*per curiam*); *Schaaf v. Kaufman*, 850 A.2d 655 (Pa. Super. 2004), *appeal denied*, 582 Pa. 719, 872 A.2d 1200 (2005); *Soda v. Baird*, 411 Pa. Super. 80, 600 A.2d 1274 (1991), *appeal denied*, 532 Pa. 665, 616 A.2d 986 (1992). Additional Superior Court cases, not cited in *Pringle*, also approved of the use of an "error of judgment" instruction. Those cases are: *Carrozza v. Greenbaum*, 866 A.2d 369 (Pa. Super. 2004) (explaining the instruction in *dicta*), *appeal granted in part on other grds.*, 584 Pa. 154, 882 A.2d 1000 (2005), *appeal denied*, 584 Pa. 698, 882 A.2d 1004 (2005), *aff'd in part on other grds*.; *Carrozza v. Greenbaum*, 591 Pa. 196, 916 A.2d 553 (2007), and, most notably, the en banc decision of the Superior Court in *McAvenue v. Bryn Mawr Hosp.*, 245 Pa. Super. 507, 369 A.2d 743 (Pa. Super. 1976). Each of these decisions endorses the principle that if a physician employs the skill, knowledge and care customarily exercised in his profession to make a judgment, he will not be liable for an error of judgment or mistake in diagnosis in treating a patient.

The *Pringle* court identified the following cases as panel decisions rejecting the use of the "error of judgment" instruction: *D'Orazio v. Parlee & Tatem Radiologic Assoc., Ltd.*, 850 A.2d 726 (Pa. Super. 2004), *appeal denied*, 582 Pa. 699, 871 A.2d 191 (2005); *Tindall v. Friedman*, 970 A.2d 1159 (Pa. Super. 2009); *Vallone v. Creech*, 820 A.2d 760 (Pa. Super. 2003), *appeal denied*, 574 Pa. 755, 830 A.2d 976 (2003); and *Gunn v. Grossman*, 748 A.2d 1235 (Pa. Super. 2000), *appeal denied*, 564 Pa. 711, 764 A.2d 1070 (2000). The Superior Court's analysis read the import of these decisions too broadly.

Rather than reject the use of an error of judgment instruction as improper in all circumstances, the decisions in *Tindall* and *Vallone* held that the instruction was not warranted by the evidence in those cases and, thus, the trial court did not err when it either refused to give an "error of judgment" instruction or concluded, in response to a post trial motion, that the instruction should not have been given. Moreover, *Tindall* and *Vallone* acknowledged that physicians cannot be held liable for a mere error of judgment. The *Tindall* court acknowledged the principle when it found that the trial court's decision not to give an "error of judgment" instruction was proper because the instructions given were "sufficient to cover the concepts that a doctor is not liable for a mere error in judgment, he is not a guarantor of treatment, and that a poor outcome does not establish malpractice." The *Vallone* court acknowledged the principle when it indicated that it agreed with the trial judge's post-trial decision, wherein the judge acknowledged that physicians may not be held liable for a mere error of judgment. While the *Gunn* court did not directly endorse the error of judgment principle, it held that the proposed error of judgment charge was sufficiently covered by the trial court's instructions to the jury defining medical negligence and causation. Thus, the *Gunn* decision implicitly acknowledges that error of judgment principles are properly considered in medical malpractice cases. It does not stand for the proposition that error of judgment instructions are improper in all instances.

Before *Pringle*, the lone Superior Court case unequivocally stating that "error of judgment" instructions are improper because they are more confusing than helpful was *D'Orazio*. In that case, the Superior Court affirmed the trial court's decision not to give an "error of judgment" instruction, finding that although the standard charge on a physician's duty of care could itself be simplified, that instruction "is far less confusing than first telling the jury that a doctor is not responsible for an error in judgment and then providing an exception if the judgment was below the standard of care." The requested instruction in *D'Orazio* attempted to differentiate between making an error in judgment, and not having sufficient data on which to make a judgment in the first place. Even if the requested instruction in *D'Orazio* was confusing, that holding should not have been the springboard for the *Pringle* court's total ban on the use of the instruction. *D'Orazio*, a panel decision, is inconsistent with the great weight of authority from both the Superior Court and the Supreme Court that approves of the principle that physicians cannot be held liable for a mere error of judgment.

Of particular importance to the analysis is the *en banc* Superior Court decision in *McAvenue*. In that case, the plaintiff challenged a jury instruction that instructed the jury to decide whether the defendant, a physical therapist, employed such reasonable skill and diligence as is ordinarily exercised. In addition, the trial court instructed the jury that: "Where a physician or hospital exercises ordinary care and skill, that hospital is not liable for the result of a mere mistake of judgment. There is no responsibility for error of judgment unless it is so gross as to be inconsistent with the degree of skill which it is the duty, in this case of a physical therapist, to possess." The Superior Court held that the trial court's charge to the jury, including the error of judgment charge taken from the Supreme Court's decision in *Hodgson*, properly articulated the appropriate standard of care.

In light of *McAvenue* and the overwhelming case law supporting the error in judgment principle in both the Supreme Court and the Superior Court, the *D'Orazio* panel decision should have been limited to the facts of that case and the confusion associated with the instruction given in that case. The *D'Orazio* decision should not have been relied on by the Superior Court as the basis for a broad-based ban on "error of judgment" instructions. Moreover, the *Pringle* court should have acknowledged, and distinguished or overruled, the *McAvenue* decision when it issued its broad-based ban on "error of judgment" instructions. That the *Pringle* court should have addressed the *McAvenue* decision is highlighted by the fact that the instruction at issue in *McAvenue* was based on the Supreme Court's decision in *Hodgson*.

In *Hodgson*, the Supreme Court unambiguously stated: "Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake in judgment." Giving this simple instruction is neither confusing, nor an erroneous statement of the law. As a plurality of the Supreme Court noted in *Toogood*, physicians, who deal in an inexact, complex science,

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hold an important place in our society and, thus, should not be second-guessed at trial without a clear understanding of the standards required. Based on these policy considerations, the Supreme Court's unambiguous and long-standing support for error of judgment principles, and the conflict between the en banc decisions of the Superior Court in *McAvenue* and *Pringle*, the Supreme Court should, given the opportunity, review the propriety of the Superior Court's holding in *Pringle*. Moreover, when the opportunity presents itself, the Supreme Court should reaffirm its prior holdings endorsing error of judgment principles and craft an instruction that eliminates any confusion created by prior decisions of the Superior Court. In particular, jurors should be expressly told that physicians who act with reasonable skill and knowledge cannot be held liable, retrospectively, for a mere error of judgment, mistake in diagnosis, or unfortunate result. Absent this instruction, jurors lack a *clear* understanding of the proper standard of care and may impose liability on physicians based solely on the outcome, rather than on whether the physician acted reasonably in making the decision at issue in the first instance.

EMPTY YOUR POCKETS WITHOUT RECOURSE: THE PENNSYLVANIA SUPREME COURT'S DECISION IN *AMERICAN AND FOREIGN INSURANCE COMPANY V. JERRY'S SPORT CENTER, INC.* LEAVES INSURERS UNABLE TO RECOVER DEFENSE COSTS EXPENDED FOR NON-COVERED CLAIMS

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I. INTRODUCTION AND BACKGROUND

The Pennsylvania Supreme Court's recent decision in *American and Foreign Insurance Company et al. v. Jerry's Sport Center, Inc. et al.* -- A.2d --, 2010 WL 3222404 (Pa.) (August 17, 2010) answers a much pondered question regarding an insurer's right to reimbursement of costs expended in defending an underlying suit when a determination is later made that a duty to defend all or a potion of the suit did not exist. After analyzing decisions from courts throughout the nation, the court, in a unanimous opinion, adopted the "minority view" holding that insurers have no right to reimbursement absent an express provision in the policy allowing for reimbursement under such circumstances.

It is well known that in this Commonwealth, an insurer's duty to defend is broad; in fact, it is broader than its duty to indemnify. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888* (Pa. 2006). Whether an insurer's duty to defend is triggered has always been answered by comparing the four corners of the insurance policy with the four corners of the complaint. *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A2.d 286, 290 (Pa. 2007). If the allegations in the complaint set forth facts that would support recovery covered by a policy, then a duty to defend is triggered. Otherwise, it is not.

In the past few decades, however, courts have imposed on insurers the obligation to defend suits against their insureds where there may be "potential coverage" although the four corners of most, if not all, insurance policies do not provide such a duty. The rationale, grounded in what seems to be a public policy argument, is as follows:

> [an] insurer agrees to defend the insured against any suit arising under the policy even if such suit is groundless, false, or fraudulent. Since the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.

Britamco Underwriters, Inc. v. Grzeskiewicz, 433 Pa.Super. 55, 639 A.2d 1208, 1210 (1994) (citations and quotation marks omitted). Therefore, the duty to defend "potential" covered claims has been imposed on insurance companies by courts -- not by the contracts these insurers have entered into with their insureds.

Moreover, under Pennsylvania law, when an insured tenders to an insurer for defense multiple claims, some of which are covered and some of which are not or are only potentially covered, the insurer is obligated to undertake defense of the entire suit as long as at least one claim is potentially covered by the policy. *American Contract Bridge League v. Nationwide Mut. Fire Ins. Co.,* 752 F.2d 71, 75 (3d Cir.1985) (applying Pennsylvania law). The rationale is the same here as it was with regard to defending potential claims, i.e., if an insurer has a duty to defend frivolous lawsuits, it has the duty to protect its insured where both covered claims and non-covered claims exist. *Gedeon v. State Farm Mutual Automobile Ins. Co.,* 410 Pa. 55, 58, 188 A.2d 320 (1963).

Pennsylvania courts have provided an incentive for insurance companies to take on the aforementioned duties by threatening that "where a claim potentially may become one which is within the scope of the policy, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril." *Cadwallader v. New Amsterdam Cas. Co.*, 152 A.2d 484, 488 (Pa. 1959). In addition, courts have made clear that bad faith damages will be imposed in cases where it is proven that an insurer, for no good reason, refused to provide a defense in a matter where there was the potential for coverage under the policy. *42 Pa.C.S. §8371; Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.,* 193 F.3d 742 (3d Cir.1999).

While the courts have imposed the aforementioned duties on insurance companies, they have also recognized that insurers have every right to and should file declaratory judgment actions to determine whether a duty to defend indeed exists. During the period of uncertainty when the court is considering the declaratory judgment action, the insurer is obligated to continue to provide the insured with a defense. However, once a determination is made that a duty to defend does not exist, the insurer is relieved of its obligation to do so. *Erie Ins. Exch. v. Claypoole,* 449 Pa.Super. 142, 673 A.2d 348 (Pa.Super.1996).

Until recently, however, it was unclear in Pennsylvania what recourse, if any, an insurer had in obtaining reimbursement from its insured for the costs expended on the defense up to the point a determination is made that a duty to defend did not exist. Prior to the court's analysis of the issue, numerous courts throughout the country had examined the issue and joined either a "majority view" or "minority view" with their holdings.

The seminal case on the matter, rendered thirteen years prior, setting forth the "majority view" is *Buss v. Superior Court,* 16 Cal.4th 35, 65 Cal. Rptr.2d 366, 939 P.2d 766 (1997). The California court held that an insurer had a right of reimbursement for defenses costs for non-covered claims based on the existence of an implied contract between the insurer and its insured that was created through a reservation of rights letter. The *Buss* court also found a right of reimbursement under the doctrine of unjust enrichment indicating that without reimbursing the insurer, the insured would have been unjustly enriched for expenses not covered by the policy.

In *Buss,* the insurer provided Buss with a defense for a lawsuit in which only one of twenty-seven (27) claims was potentially covered. The insurer provided Buss with a defense as to the entire suit pursuant to a reservation of rights which indicated that the insurer reserved the right to be reimbursed for all defense costs if it was later determined that there was no coverage for the one potentially covered claim and also for the 26 claims that were not covered. The underlying action ultimately settled. Thereafter, the insurer brought an action seeking declaratory relief for the cost of defense based on the notion that it did not have a duty to defend the suit as there was no coverage afforded under the policy for same. Buss filed a motion for summary judgment to have the court decide whether it had to reimburse its insurer for the cost of defending all 27 claims in the underlying action. Buss's motion was denied by the trial court. The intermediate appellate court affirmed, finding that the insurer was not entitled to be reimbursed because one of the 27 claims was potentially covered. The appellate court held, however, that the insurer could seek reimbursement for the cost of defending the 26 claims that were never even potentially covered.

On appeal, the California Supreme Court affirmed and held that the insurer was not entitled to seek reimbursement for defense costs for a potentially covered claim because the insurer's duty to defend extended to any claims at least potentially covered. *Buss,* 65 Cal. Rptr.2d 366, 939 P.2d at 775. The court held that the insurer could, however, seek reimbursement of defense costs for the 26 claims that were not potentially covered as it never had a duty to defend those claims and because the insured had not paid premiums with regard to those claims. *Id.* at 776. Moreover, the *Buss* court found that the insurer had a "right of reimbursement that [was] implied in law as quasi-contractual, whether or not it [had] one that [was] implied in fact in the policy as contractual." *Id.*

Following *Buss,* insurers all around the country consistently reserved their rights to reimbursement for defense costs when providing a defense for potentially covered claims under the policy. When reimbursement was ultimately requested by the insurer after a determination that there was no duty to defend, many courts granted the relief requested based on either equitable principles or contractual ones. Indeed, many courts found that the reservations of rights letter sent by an insurer when the defense of a potentially covered claim was undertaken was an offer to create a new contract with regard to non-covered claims that the insured accepted when it accepted the insurer's payment of defense costs. These courts found that for all intents and purposes the insureds had accepted the modified contract set forth in the reservation of rights letter when they acquiesced and accepted the defense. Based on this rationale, these courts have allowed insurers to be reimbursed for the sums they expended for the defense. *See United Nat'l Ins. Co. v. SST Fitness Corp.,* 309 F.3d 914, 921 (6th Cir.2002) (applying Ohio law); *Underwriters at Lloyds London v. STD Enters., Inc.,* 395 F.Supp.2d 1142, 1150-51 (M.D.Fla.2005). Other courts have agreed with *Buss* that disallowing an insurer to be reimbursed for the defense costs would unjustly enrich the insured and therefore have provided such relief when requested. *Blue Ridge Ins. Co. v. Jacobsen,* 25 Cal.4th 489, 106 Cal.Rptr.2d 535, 22 P.3d 313, 321 (Cal.2001); *, Hebela v. Healthcare Ins. Co.,* 370 N.J.Super. 260, 851 A.2d 75, 86 N.J.Super.Ct.App.Div.2004).

There have been courts, however, which have held the opposite. These courts, disagreeing with the rationale in *Buss,* have instead held that an insurer has no right to reimbursement for defense costs for non-covered claims absent an express provision allowing reimbursement in the policy. This "minority view" has found that allowing reimbursement is inconsistent with the broad duty an insurer has to defend its insured. Moreover, these courts have rejected the *Buss* rationale that the reservation of rights letter created a quasi-contract indicating that the terms of the insurance contract cannot be unilaterally changed by an insurer. As to the contentions of unjust enrichment and quantum meruit, the courts adopting the "minority view" have found that allowing reimbursement under such theories would allow an insurer to benefit unfairly if it can hedge on its defense obligations by reserving its right to reimbursement while all the time controlling the defense just to avoid a bad faith claim. *See, e.g., Millipore Corp. v. Travelers Indem. Co.,* 115 F.3d 21, 35 (1st Cir.1997) (applying Massachusetts law); *Terra Nova,* 887 F.2d 1213; *Am. Modern Home Ins. Co. v. Reeds at Bayview Mobile Home Park, LLC,* 2006 WL 994573, at *3 (4th Cir.2006) (applying Maryland law); *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.,* 448 F.3d 252, 258, 259 (4th Cir.2006) (applying Maryland law); *Riley Stoker Corp. v. Fid. & Guar. Ins. Underwriters, Inc.,* 26 F.3d 581, 589 (5th Cir.1994) (applying Louisiana law); *Liberty Mut. Ins. Co. v. FAG Bearings Corp.,* 153 F.3d 919, 924 (8th Cir.1998) (applying Missouri law); *Pekin Ins. Co. v. Tysa, Inc.,* 2006 WL 3827232 (S.D.Iowa

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2006); *Dash v. Chicago Ins. Co.,* 2004 WL 1932760, at *10 (D.Mass.2004); *Employers Mut. Cas. Co. v. Indus. Rubber Prods., Inc.,* 2006 WL 453207, at *6 (D.Minn.2006); *Mobile Telecomm. Techs. Corp. v. Aetna Cas. & Sur. Co.,* 962 F.Supp. 952, 956 (S.D.Miss.1997); *Med. Protective Co. v. McMillan,* 2002 WL 31990490, at *7 (W.D.Va.2002); *Mt. Airy Ins. Co. v. Doe Law Firm,* 668 So.2d 534, 537 (Ala.1995); *Gen. Agents Ins. Co.,* 215 Ill.2d 146, 293 Ill.Dec. 594, 828 N.E.2d 1092; *Yount v. Maisano,* 627 So.2d 148, 153 (La.1993); *Med. Malpractice Joint Underwriting Ass'n of Mass. v. Goldberg,* 425 Mass. 46, 680 N.E.2d 1121, 1128 (Mass.1997); *LA Weight Loss Ctrs., Inc. v. Lexington Ins. Co.,* 2006 WL 689109 (C.P. Philadelphia 2006); *Shoshone First Bank,* 2 P.3d 510, 513-14; Elbert & Nardoni, *Buss Stop,* 13 Conn. Ins. L.J. 61.

II. UNDERLYING FACTS OF *AMERICAN AND FOREIGN INSURANCE COMPANY V. JERRY'S SPORT CENTER, INC.*

In *American and Foreign Insurance Company*, the insurer entered into a commercial liability primary and umbrella insurance contract with the insured. The policy insured against bodily injury and required the insurer to pay for the defense of an insured when suit was instituted claiming bodily injury. The relevant portions of the insurance contract were as follows:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply…

b. This insurance applies to "bodily injury" and "property damage" only if:

   i. The "bodily injury" or "property damage" is caused by an occurrence that takes place in the "coverage territory"; and

   ii. The "bodily injury" or "property damage" occurs during the policy period.

The National Association for the Advancement of Colored People (NAACP) and the National Spinal Cord Injury Association (NSCIA) filed a civil action against eighteen firearms wholesalers and distributors in the United States District Court for the Eastern District of New York. The NAACP and NSCIA sought to hold the firearms industry liable for the death and injuries to their members as well as other damages by claiming negligent creation of a public nuisance by virtue of the industry's failure to distribute firearms reasonably and in a safe manner. This suit was brought in June of 2000. In May of 2001, NAACP added the insured, Jerry's Sport Center, to the suit. With regard to the insured, the NAACP sought injunctive relief and creation of a fund for the education, supervision and regulation of gun dealers. The prayer for relief did not request compensation for the damages caused to the plaintiffs' members by the insured's actions.

The insured notified its insurer of the NAACP action and requested defense and indemnification alleging that the damages requested fell under the "bodily injury" coverage that was provided by its policy. The insurer retained a law firm in New York which had expertise representing gun industry defendants in similar actions. The insurer chose to obtain separate counsel for the insured versus allowing the insured to engage in a group defense with the other defendants. The insurer notified its insured of the representation in a June 15, 2001 letter. In that letter, the insurer also stated that it was providing the defense under a full reservation of rights, including the right "to seek reimbursement for any and all defense costs ultimately determined not to be covered." The insured did initially express concern that should there be no coverage it may be more costly for it to proceed with the firm selected by the insurer versus agreeing to the group defense. The insurer advised the insured that it had every right to retain its own counsel to represent its uninsured interests or could continue to allow the New York law firm to do so. The insured never selected other counsel.

By July 12, 2001, the insurer indicated that its preliminary assessment revealed that it may be under no duty to defend or indemnify the insured and again reserved its right to disclaim a defense based upon the policy. Just a week later, the insurer again informed the insured that it would continue to pay for the defense prior to making its final coverage determination but that it was again reserving the right to seek reimbursement for any of the defenses costs incurred. Another similar letter was sent on August 3, 2001.

A final coverage determination was made on September 7, 2001 when the insurer determined that it had no duty to defend or indemnify the insured and advised that the insurer would be filing a declaratory judgment action to seek such a determination. That action was filed on September 12, 2001. The insurer moved for summary judgment and requested reimbursement for "fees and costs paid to or on behalf of [Insured]" in connection with the defense of the NAACP action incurred and/or paid after the date of the filing of this declaratory judgment action, i.e., September 12, 2001."

The trial court granted summary judgment in the insurer's favor ultimately finding that the damages requested were not for compensatory damages for bodily injuries as defined under the policy. The insured appealed the trial court's grant of summary judgment to the Superior Court which affirmed.

Thereafter, the insurer sought reimbursement of defense fees expended on the insured's behalf from the date of the NAACP action to the date the declaratory judgment action was filed. The trial court found that the insurer was entitled to the remedy of restitution based on the doctrine of unjust enrichment. The insured again appealed to the Superior Court arguing that the trial court erred in holding that the insurer was entitled to reimbursement when the policy which governed the relationship was silent on the issue of reimbursement of defense costs. This time, the Superior Court agreed with the insured and reversed the trial court. After reviewing the "majority view" and "minority view" in numerous jurisdictions, the Superior Court rejected the argument that the reservation of rights letter created a new or updated written contract between the parties. Instead, the court found that the insurer could not unilaterally change the terms of the contract and therefore the parties were bound by the original

written insurance contract, which did not contemplate a right to reimbursement.

The Supreme Court granted allocatur to decide whether an insurer is entitled to reimbursement of defense costs when a court has determined that the insurer had no duty to defend the insured and the insurer has claimed a right to reimbursement only in a series of reservation of rights letters.

III. THE COURT'S HOLDING

In adopting the "minority view" the Pennsylvania Supreme Court held that the insurer was not entitled to reimbursement of defense costs because the insurance contract entered into did not contemplate such a right under the circumstances. In coming to this decision, and after reviewing each parties arguments, the court reviewed the jurisprudence from other jurisdictions including substantial analysis of the *Buss* decision and the decision in *General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.,* 215 Ill.2d 146, 293 Ill.Dec. 594, 828 N.E.2d 1092 (Ill.2005), which the court noted had facts similar to the matter before it.

In *General Agents*, the insurer also sent a reservation of rights letter stating that it did not believe the claim in that matter was covered. General Agents would provide a defense under a reservation of rights to claim reimbursement of the defense costs should a court later determine that it was correct and the claim was not covered. In the declaratory judgment action, the court agreed that the claim was not covered. *General Agents*, 828 N.E. 2d at 1094. General Agents then filed a motion in the trial court to recover the defense costs it had paid to defend its insured. The insured argued that the insurer could not obtain reimbursement as it was not within the written contract entered into by the parties. The insurer responded that because there was no coverage under the policy, the policy should not control.

The Illinois Supreme Court denied the insurer's request for reimbursement adopting the "minority view". In rejecting the "majority view" that court held that it could not condone, for public policy reasons, the argument that an insurer could modify the contract through a reservation of rights to allow for reimbursement of defenses costs:

> We recognize the courts have found an implied agreement where the insured accepts the insurer's payment of defense costs despite the insurer's reservation of a right to reimbursement of defense costs. However… recognizing such an implied agreement effectively places the insured in the position of making a Hobson's choice (1) between accepting the insurer's additional conditions on its defense or losing its right to a defense from the insurer.
>
> (1) A Hobson's choice is a free choice in which only one option is offered. As a person may refuse to take that option, the choice is therefore between taking it or leaving it.

Id. at 1102.

The Pennsylvania Supreme Court found that the "minority view" which has been adopted in an increasing number of jurisdictions was more consistent with the broad duty to defend under Pennsylvania law. The court noted that it was an insurer's duty to provide a defense for any claim that was potentially covered recognizing that it will not always be clear whether coverage should be afforded. However, the court noted that in circumstances, such as the one before it, where an insurer is unclear as to whether coverage exists, it should provide a defense and seek a declaratory judgment about coverage. Yet, once a determination is made in the declaratory judgment action with regard to the insurer's duty to defend, the court cautioned that such a determination would only affect an insurer's duty to defend going forward and would not be retroactive: The trial court's subsequent declaratory judgment determination that the claim was not covered relieved Royal of having to defend the case going forward, but did not nullify its initial determination that the claim was potentially covered." *Id*. Moreover, the court found that in this instance the insurer would not have been entitled to reimbursement even under *Buss* as the defense was initially provided for a potentially covered claim and was not from the outset a non-covered claim. Therefore, although the court implies that it is joining the "minority view," in actuality the claim before it would not have been covered under the "majority view" either because the claim was not, from its inception, a clearly non-covered claim.

However, like the many courts before it joining the "minority view", the court found that the insurer would not have been entitled to reimbursement for non-covered claims should that have been the case as it was undisputed that the policy did not contain a provision providing it the right to recover its defense costs in such a circumstance. The court also held that the reservation of rights letter did not create a modified contract as the insurer could not reserve a right in the correspondence which did not exist under the policy. A reservation of rights letter, the court noted, can only assert defenses and exclusions that are already set forth in a policy, not create new ones.

Finally, the court in supporting its decision, noted that the insurer not only had the duty but the right to defend its insured under the insurance contract and that this benefited both parties. It benefited the insured because the insured was protected from the cost of defense, and it benefited the insurer because the insurer had the right to control the defense and protect itself against potential indemnity exposure by selecting the attorney. Moreover, the court found that if an insurer could recover defense costs from its insured, then the insured could ultimately be paying for the insurer to protect itself from bad faith claims which would be inappropriate.

IV. ANALYSIS AND CONCLUSION

The court's holding that an insurer is not entitled to reimbursement for defense costs where a policy is silent on the issue centers on this Commonwealth's continuing imposition on insurers of a broadened duty to defend their insureds. The court clearly found persuasive the argument that the policy does not provide a right to an insurer to recover defense costs when it is later determined that a duty to defend does not exist. Indeed, the fact that there was no provision in the policy providing the insurer with such a right was integral to the court's decision.

But where in the policy does it state that the insurer even has the duty to defend a potential or non-covered claim? That duty does not exist under the policy either.

In fact, in *American and Foreign Insurance*, the policy language clearly indicated that the insurer would "have

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no duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" to which this insurance does not apply…." Although the court accurately quoted this policy provision, its opinion does not address it with regard to the decision. What is clear, however, is that the only reason the insurer provided the insured with a defense in this matter was because it was required to do so by the courts – not the policy. Yet, when the insurer attempted to recover the costs expended in doing so, it was denied reimbursement because no policy provision allows such recovery.

The court requires the insurer to defend suits for potentially covered claims and, if any exist, to defend non-covered claims as well. These duties have been imposed for public policy reasons. But how does it violate public policy to allow an insurer to be reimbursed for the costs expended in defending the non-covered claims once the litigation is resolved? At that point, the insured has benefited from the defense of all claims: covered, potentially covered or non-covered. Does it not follow then that the insurer should be able to seek reimbursement for the defense costs associated with claims that would never have been covered under the policy if they had been brought separately? The court thinks not.

Of course the counterargument would be that if the writers of the policy did not contemplate defending clearly non-covered claims when they first wrote the policy, they nevertheless have known that Pennsylvania common law requires coverage of potential claims and non-covered claims brought with covered claims. Therefore, the argument would follow that insurers have had plenty of time to insert a provision in the policy requiring reimbursement for defenses costs expended on non-covered claims when litigation has resolved and/or potentially covered claims when a determination has been made that the claim is not covered under the policy. Because insurers have failed to insert such a provision in the policy, some would argue that the insurer has accepted the duty to defend such suits and to pay the costs associated with same without seeking reimbursement from its insured.

The court further supports its decision by arguing that it benefits both the insured and insurer for the insurer to provide a defense for the potential claim. The benefits to the insured are obvious: the insured does not need to expend its own money to defend the suit brought against it. The court argues that the insurer is also benefited because it can "control" the defense by selecting counsel. The court appears to be suggesting that an insurer-selected attorney would look out for the insurer's interests over those of the insured. But doing so would violate the Professional Rules of Conduct as an insurer selected counsel is duty bound to place the insured's interests first, with respect to both the covered and non-covered claims. *Rules of Prof Conduct* 1.1 et seq. Therefore, the only "control" the insurer has is in selecting a competent attorney who will protect the insured's best interest. How that benefits an insurer when a part of the claim is a non-covered one under the policy remains unanswered.

Certainly it benefits an individual insured for an insurer to provide the insured with a broad duty to defend. Sued insureds benefit in such circumstances. Yet insureds are also adversely affected by this court's decision that an insurer is not entitled to reimbursement for defense costs on a claim that it never actually covered. If the insurer cannot recover those costs, to whom are they passed? Insurers do not have the luxury of denying claims that have a very slim chance of being covered under the policy because of the numerous cases which caution insurers that it would be perilous for them to do so and remind them that bad faith damages can be assessed if warranted. Ultimately, premiums will need to increase to cover these non-recoverable costs.

Alternatively, insurers will need to revise the policy language to include the right to reimbursement of defense costs should a court determine that no duty existed under the policy for coverage on a claim. How such policy provisions will be interpreted and perceived by the courts, however, is a question that has been left for another day.

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SKIER FALLS IN SUPREME COURT OVER FORM RELEASE AND ASSUMPTION OF THE RISK

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The doctrine of assumption of the risk found in the Pennsylvania Skier's Responsibility Act, 42 Pa.C.S.A. §7102 (c), and a form release have left a skier out in the cold on her claim for injuries suffered in a fall from a moving ski lift.

In ruling in favor of the defendant ski resort in *Chepkevich v. Hidden Valley Resort, L.P.,* 2 A.3d 1174 (Pa. 2010), the Pennsylvania Supreme Court focused in large part on the finding that the acts of boarding and riding a ski lift are inherent to the sport of downhill skiing, inherently dangerous and "common, frequent and expected" in the sport of skiing. This finding was a key to determination of both the assumption of the risk and release issues.

Although the decision might be seen as pertaining only to skiing, it appears it could have wider implications as it pertains to exculpatory clauses in form contracts in recreation and entertainment and possibly beyond.

FACTS

On December 31, 2001, plaintiff Lori Chepkevich and her 6-year old nephew Nicholas, were injured when they fell while boarding a ski lift at the Hidden Valley Resort in southwestern Pennsylvania. Chepkevich, an experienced skier and season pass holder at Hidden Valley, had signed a release when she purchased her season ticket. This was entitled "RELEASE FROM LIABILITY," and read:

> Skiing, Snowboarding, and Snowblading, including the use of lifts, is a dangerous sport with inherent and other risks which include but are not limited to variations in snow and terrain, ice and icy conditions, moguls, rocks, debris (above and below the surface), bare spots, lift towers, poles, snowmaking equipment (including pipes, hydrants, and component parts), fences and the absence of fences and other natural and manmade objects, visible or hidden, as well as collisions with equipment, obstacles or other skiers.... All the risks of skiing and boarding present the risk of serious or fatal injury. By accepting this Season Pass I agree to accept all these risks and agree not to sue Hidden Valley Resort or their employees if injured while using their facilities regardless of any negligence on their part.

On the day of the accident, Chepkevich had been skiing with family and friends for several hours when Nicholas became cold and wanted to return to the condominium where the family was staying. Chepkevich offered to take him there while the others continued skiing.

Chepkevich and Nicholas planned to use the resort's "Blizzard Lift" to return to the condo. She was concerned about her nephew's small size and inexperience so she asked the operator to slow the lift before it reach them so she could make sure he boarded safely. He replied that the lift had only one speed but that he would stop it twice: once to allow Chepkevich and Nicholas to move out of the line of skiers waiting to board and position themselves in the path of the chair; then a second time just before the chair reached them to allow them to board.

When the lift stopped the first time, the pair moved from the line into the path of the chair. The operator did not stop the lift a second time but Chepkevich was able to safely board. The operator attempted to hoist Nicholas onto the moving lift by grabbing his shoulder and hosting him up. But the boy was not properly seated and began to slip off the chair. Chepkevich reached over and attempted to pull the boy onto the seat while shouting for the operator to stop the lift. The lift continued moving and Chepkevich and her nephew fell off. Nicholas was not seriously injured but Chepkevich suffered a dislocated shoulder and fractured hip.

TRIAL COURT

Chepkevich and her husband filed suit against Hidden Valley in the Somerset County Court of Common Pleas, alleging that the negligence of the lift operator in stopping the lift the first time but not the second was the proximate cause of the accident. The trial court rejected the resort's defense of assumption of the risk, distinguishing *Hughes v. Seven Springs Farm, Inc.*, 563 Pa. 501, 762 A.2d 339, 344 (2000) (collision with another skier at base of slope risk inherent in sport) and relying instead on the Superior Court's decision in *Crews v. Seven Springs Mountain Resort*, 874 A.2d 100 (Pa.Super. 2005), appeal denied, 586 Pa. 726, 890 A.2d 1059 (2005) (risk of collision with underage drinker on snowboard not inherent in sport because it could be removed without altering the nature of the sport.) But the court held that the release was enforceable and granted summary judgment on that basis.

SUPERIOR COURT

The Superior Court panel, which included two judges later elected to the Supreme Court – Debra McCloskey Todd and Seamus P. McCaffery[1] – reversed and remanded. *Chepkevich v. Hidden Valley Resort, L.P.*, 911 A.2d 946 (Pa.Super. 2006). In doing so, the court distinguished *Hughes*, stating that it did not involve the negligent operation of a ski lift and that the plaintiff there admitted she was familiar with the Skier's Responsibility Code. The panel did not mention its decision in *Crews*.

Moving on to the question of the release, the Superior Court referred to *Beck-Hummel v. Ski Shawnee, Inc.*, 902 A.2d 1266 (Pa.Super. 2006). There the court found an issue of material fact to exist as to whether the exculpatory clause on the back of a snow tubing ticket was enforceable. The *Beck-Hummel* opinion set forth settled general principles respecting the enforceability of releases, stressing that: (1) releases are not favored in the law; (2) to be deemed enforceable, a release (a) must not contravene any policy of law; (b) must be a contract between individuals relating to their private affairs; (c) must involve free bargaining agents, rather than be a contract of adhesion; and (d) must spell out the parties' intent with particularity; and (3) a release must be construed strictly against the party claiming immunity under it. 902 A.2d at 1269.

The panel also found "particularly instructive," comment c to *Restatement (Second) of Torts* § 496B:

> In order for an express agreement assuming the risk to be effective, it must appear that the plaintiff has given his assent to the terms of the agreement. Particularly where the agreement is drawn by the defendant, and the plaintiff's conduct with respect to it is merely that of a recipient, it must appear that the terms were in fact brought home to him and understood by him, before it can be found that he has accepted them.

Restatement § 496B, cmt c. *Chepkevich*, 911 A.2d at 951.

Ultimately the Superior Court found that a question of material fact existed as to plaintiffs' contention that Lori Chepkevich reached an agreement with the lift operator which superseded any that might have been created by the Release. Therefore, it reversed the grant of summary judgment.

SUPREME COURT

In an opinion with more twists, turns and bumps than a double black diamond trail – not to mention unusual and frequent criticism of the Superior Court panel - the Supreme Court held that Chepkevich assumed the risk of falling from a ski lift, which was inherent in the sport; and that the release she signed was not a contract of adhesion, encompassed a risk inherent in the sport and therefore barred her suit. In its opinion, written by Chief Justice Castille, the court considered the issues of the validity and enforceability of the exculpatory clause in the release and whether it must define negligence and give examples; whether there was a contract of adhesion; whether plaintiff assumed the risk of injury while boarding the ski lift and whether that risk is inherent to the sport.

A. Skier's Responsibility Act

The court recognized that the doctrine of assumption of the risk was "largely eliminated" by passage in 1987 of the Comparative Negligence Act, 42 Pa.C.S.A. § 7102 (a)-(b). However, a short while later the General Assembly amended that statute to include the Skier's Responsibility Act, 42 Pa/C.S.A. § 7102(c). Because this act kept in place common law principles of assumption of the risk, the court reviewed these principles. It said that this defense as it applies to sports and places of amusement has been described as a "no duty" rule.

The court said *Hughes, supra,* which cited *Jones v. Three Rivers Mgmt. Corp.*, 483 Pa. 75, 394 A.2d 546 (1978) (sports facility owes no duty to protect against "common, frequent and expected" risks which are inherent in the amusement activity and where defendant has not deviated in some relevant respect from established custom), made it clear that ski resort operators have no duty to protect skiers from risks that are "common, frequent and expected" and thus "inherent" to the sport of downhill skiing. 2 A.3d at1186.

Hughes set forth a two-prong test for determining whether a skier assumed the risk of a particular injury: 1) whether the plaintiff was engaged in the sport of downhill skiing at the time of injury; and 2) whether the injury arose out of a risk inherent to the sport. *Hughes*, 762 A.2d 344. The court there emphasized that

> "the sport of downhill skiing encompasses more than merely skiing down a hill. It includes those activities directly and necessarily incident to the act of downhill skiing. Such activities include **boarding the ski lift**, riding the lift up the mountain, alighting from the lift, skiing from the lift to the trail and, after a run is completed, skiing towards the ski lift to start another run, or skiing towards the base lodge or other facility at the end of the day."

Id. (Boldface in original.)

It went on to say that boarding and riding a lift are inherent to the sport of downhill skiing and inherently dangerous and that the risk of falling from the lift is common, frequent and expected.

The Supreme Court said this obvious risk prompted Chepkevich to ask the lift operator to stop the lift, but the court said that the operator was under no duty to do so. And despite the fact that the operator did not stop the lift a second time, Chepkevich boarded anyway. "It is difficult to imagine a clearer example of assumption of the risk, and there can be no viable claim of negligence under such circumstances," the court wrote. *Id.*

The court rejected plaintiffs' argument that Chepkevich did not assume the "specific risk" involved in her accident, and instead said that her action arose from the "general risk" of falling from a lift, which was inherent in the sport and therefore defendant owed no duty to plaintiff. 2 A.3d at 1188.

B. The Release

Even if plaintiffs' action were not barred by assumption of the risk, the court said it would have been precluded by the release Chepkevich signed when she purchased her season pass.

In *Topp Copy Prods., Inc. v. Singletary*, 533 Pa. 468, 626 A.2d 98 (1993) the court cited three conditions which must be met for an exculpatory clause to be valid: 1) the clause must not contravene public policy; 2) the contract must be between persons relating entirely to their own private affairs; and 3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion. *Topp Copy*, 626 A.2d at 99.

In *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 192 A.2d 682 (1963), the court said that once an exculpatory clause is determined to be valid, it will still be unenforceable unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence. The court provided standards to interpret such clauses: 1) the contract must be construed strictly, since exculpatory language is not favored by the law; 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and 4) the burden of establishing the immunity is upon the party invoking protection under the clause. *Dilks*, 411 Pa. at 434, 192 A.2d at 687, cited in *Chepkevich*, 2 A.3d at 1189.

The opinion reasoned that voluntary sporting or recreational activities are different from other activities that require execution of exculpatory clauses because,

> The signer is under no compulsion, economic or otherwise, to participate, much less to sign the exculpatory agreement, because it does not relate to essential services, but merely governs a voluntary recreational activity . . . The signer is a free agent who can simply walk away without

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Skier Falls in Supreme Court *continued from page 23*

> signing the release and participating in the activity, and thus the contract signed under such circumstances is not unconscionable.

2 A.3d at 1191.

After determining the facial validity of the release, the court turned to its enforceability. In doing so, it distinguished *Beck-Hummel, supra,* on its facts and said that the mere fact that Chepkevich would not have been permitted to ski at Hidden Valley had she not signed the release did not render it an adhesion contract. 2 A.3d at 1192.

The court next considered the Superior Court's conclusion that the release was "arguably" an invalid contract of adhesion because it did not define negligence. It agreed with defendant's position that because an exculpatory clause need not contain the word "negligence" to bar suits arising out of negligence, it would be illogical to invalidate an agreement that *does* include that term, albeit undefined. Further, the absence of a definition or illustration of negligence does not render the release an invalid contract of adhesion because that issue "simply does not relate to the concerns implicated by adhesion contracts. 2 A.3d at 1191.

> It strains common sense to suggest that releases that fail to mention the word "negligence" should consistently be interpreted as barring suits based on negligence claims, while a release that clearly states that suits are barred "regardless of negligence" would not bar such suits. We see no reason to require the drafters of exculpatory releases to provide definitions and context for commonly used terms such as "negligence," nor do we believe that mention of the word exposes the drafters to a liability they otherwise could properly avoid.

Chepkevich, 2 A.3d at 1193.

The court also rejected plaintiffs' argument that because the release listed certain types of risks, it was limited to those risks. It pointed out that the release provided that "Skiing, Snowboarding and Snowblading **including the use of lifts,** is a dangerous sport with **inherent and other risks** . . . " (Boldface in original.) This makes it clear that the release pertains to risks inherent in skiing in conjunction with the underlying purposes of the Skier's Responsibility Act. Therefore, the release, even construed against Hidden Valley, encompassed the risk at issue and spelled out the parties' intention to release Hidden Valley from liability. 2 A.3d at 1194.

Finally, the court took issue with the Superior Court's finding that the lift operator's alleged agreement to stop the lift somehow modified or superseded the release. Even if the operator had the authority to modify the release, the court said, the agreement to stop the lift did not purport to do so. And the terms of the release explicitly encompassed any negligence of Hidden Valley employees, which is exactly what plaintiffs alleged. *Id.*

Although Justice Saylor agreed in a concurring opinion that the law "as it presently exists" supports the finding that the release in question was not an adhesion contract, he felt that this principle was wrongly based on *dicta* written by Justice Cohen in *Galligan v. Arovitch*, 421 Pa. 301, 219 A.2d 463 (1966). These remarks were unsupported by authority, Justice Saylor wrote, and cited only to a law review passage. *Galligan*, 421 Pa. at 304, 219 A.2d at 465.

Justice Saylor said by definition an adhesion contract is one which the customer must accept or reject with little opportunity to bargain over the terms. It would be better in determining the validity of an exculpatory clause, he feels, to analyze whether the contract as a whole is unconscionable and to determine unconscionability based on ":general principles." 2 A.3d at 1198.

Justice Baer, also concurring, agreed that summary judgment was appropriate on the issue of assumption of the risk because *Hughes, supra*, made it clear that boarding a ski lift is inherent in the sport. But he said the release seems to go beyond the public policy in the Skier's Responsibility Act because purports to protect Hidden Valley from "other risks" as well as those inherent in the sport. *Id.*

CONCLUSION

Although it did not need to do so, the Supreme Court addressed both the assumption of the risk and the release issues and approved a broad definition of risks inherent in a recreational activity, in this instance downhill skiing. While the opinion might seem to be limited to the Skier's Responsibility Act at issue in the case, it is likely that the general principles set forth could be used to support an argument for a wider interpretation of what is a "common, frequent and expected" occurrence at a recreational facility other than ski slopes.

But where *Chepkevich* will likely have even further impact is in the area of exculpatory clauses typically found on tickets and in other release forms used in entertainment. It will be easier for a defendant facility operator to argue that such a clause is not a contract of adhesion, but counter arguments of unconscionability based on Justice Saylor's dissent will likely be seen in future cases.

ENDNOTE

[1]Justice Todd and Justice McCaffery did not participate in the consideration of decision of the case.

VANDERHOFF V. HARLEYSVILLE INSURANCE COMPANY: CREATING AN UNINTENDED, "PHANTOM" PREJUDICE REQUIREMENT UNDER THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW

By Wesley R. Payne, IV, Esquire, and Mark Paladino, Esquire, White and Williams, LLP, Philadelphia, PA

I. INTRODUCTION

Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL) was enacted to curb soaring automobile insurance costs. However, the recent Pennsylvania Supreme Court decision in *Vanderhoff v. Harleysville Insurance Company*, No. 123 MAP 2006, 2010 WL 2653247 (Pa. July 6, 2010), hinders that effort and places an unintended burden on insurance companies defending uninsured motorist claims. In *Vanderhoff*, a 4-2 majority held that an insurer cannot deny uninsured motorist benefits resulting from an accident involving a "phantom vehicle"[1] unless the insurer shows prejudice due to the failure of an insured to notify it of the phantom vehicle accident. This holding contradicts both the plain meaning of § 1702 of the MVFRL, which requires notification of the police and the insurer, and the Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Foster*, 889 A.2d 78 (Pa. 2005), which held that the MVFRL does not require a showing of prejudice when notice is not given to the police. This article will explore the *Vanderhoff* decision and explain how it effectively rewrites the MVFRL's notice requirements.

II. PRIOR HISTORY – *BRAKEMAN,* THE MVFRL AND *FOSTER*

More than thirty years ago, in the landmark case of *Brakeman v. State Farm Mutual Automobile Insurance Company*, 371 A.2d 193 (Pa. 1977), the Pennsylvania Supreme Court held that where an insurance company seeks to be relieved of its obligations under an insurance policy due to late notice, the insurance company must show that the notice provision was breached and that the breach resulted in prejudice. Because the purpose of a policy's notice provision is to preserve the insurer's opportunity to investigate the claim fully, the court reasoned that relying on such a provision should only be permitted where late notice indeed resulted in the anticipated harm:

> Where the insurance company's interests have not been harmed by a late notice, even in the absence of extenuating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such a situation.

Brakeman, 371 A.2d at 197.

The MVFRL, enacted after *Brakeman*, was intended to control the spiraling consumer cost of automobile insurance and the consequent increase in the number of uninsured drivers. Therefore, one of the statute's primary goals was to reduce the number of fraudulent claims that inevitably lead to higher insurance premiums. Section 1702 of the MVFRL sought to accomplish this objective by including the following in its definition of "uninsured motor vehicle":

> (3) An unidentified motor vehicle that causes an accident resulting in injury *provided the accident is reported to the police or proper government authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter*, that the claimant or his legal representative has a legal action arising out of the accident.

75 Pa.C.S. § 1702 (emphasis added). This definition attempted to reduce fraudulent claims by guaranteeing that an insured claiming uninsured motorist benefits due to an accident caused by a phantom vehicle could not successfully do so without first meeting the MVFRL's notice requirements.

The Pennsylvania Supreme Court examined the effect of this provision on the failure of an insured to notify police in *Foster*. The insured claimed she had been hit by an unidentified vehicle and reported the accident to her employer and insurance company, but not the police. The insurance company filed a declaratory judgment action alleging that the insured was not entitled to uninsured motorist benefits because she had failed to report the accident to law enforcement as required by § 1702. Relying on *Brakeman*, the insured argued that she could not be denied benefits absent a showing of prejudice by the insurance company.

The *Foster* court rejected the insured's argument, concluding that *Brakeman* addressed the notice requirements of an insurance contract, whereas the matter at issue involved the dictates of a statute and notice to law enforcement:

> [T]he purpose behind § 1702's reporting requirement is protection of the public's interest in affordable automobile insurance – the primary goal of the MVFRL. … In contrast, the purpose of the notification requirement in *Brakeman* was protection of the insurer's private interest. The requirement was not imposed by a statutory scheme to further a public policy interest, but was drafted by the insurer to protect its own interest in being able to conduct timely investigations of claims.

Foster, 889 A.2d at 81. Thus, *Foster* held that the MVFRL did not require a showing of prejudice before an insured could be denied uninsured motorist benefits based on a lack of police notification.

III. THE *VANDERHOFF* MAJORITY

Despite directly addressing § 1702, *Foster* did not decide whether the MVFRL demanded a showing of prejudice in the instance of a failure to meet *the insurance company notification requirement*. The *Vanderhoff* court, however, was presented with this issue.

In *Vanderhoff*, the insured claimed that a phantom vehicle caused him to strike another vehicle,[2] but he did not file a claim for uninsured motorist benefits

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until eight months after the accident.[3] The insurance company therefore denied his claim. The insured argued that *Brakeman* required the insurance company to prove that it was prejudiced before his claim could be rejected, while the insurance company relied on *Foster* to assert that the MVFRL did not require such a showing.

By a 4-2 majority, the court held that a showing of prejudice was required. It distinguished *Foster*, finding that its analysis "related specifically to the importance of the police as a public and investigatory body, as distinguished from the private interests of an insurance company." *Vanderhoff*, 2010 WL 2653247 at *8. It then grounded its decision in *Brakeman* and analogous statutory interpretation, stating:

> Section 1702 was enacted with *Brakeman* as the controlling precedent. Accordingly, we conclude that the definition's silence as to prejudice does not alter the longstanding law set forth in *Brakeman*, requiring the insurer to demonstrate prejudice. While not directly applicable, the rules of statutory construction provide, "[t]hat when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." Although our decision in *Brakeman* addressed contractual rather than statutory language, the contractual language reviewed in *Brakeman* had the same effect as that enacted into § 1702. The absence of any language in the statute eliminating the prejudice requirement of *Brakeman* is therefore controlling.

Vanderhoff, 2010 WL 2653247 at *7 (internal citations omitted).

Finally, the court attempted to diffuse any public policy concerns, dispelling the notion that a prejudice requirement will thwart the MVFRL's primary objective of containing automobile insurance costs. It found that its decision would not result in increasing costs because 1) *Foster* ensures that law enforcement will be notified and able to investigate potential frauds; and 2) insurance companies that are actually prejudiced need not pay under *Brakeman*. *Vanderhoff*, 2010 WL 2653247 at *8.

IV. THE *VANDERHOFF* DISSENT

Justice Eakin, joined by Justice Saylor, dissented, citing principles of statutory construction and public policy. Because § 1702 does not distinguish between the requirements for notice to the police and notice to the insurer, Justice Eakin concluded that the analysis in *Foster* should control. *Vanderhoff*, 2010 WL 2653247 at *1 (Eakin, J., dissenting). Moreover, Justice Eakin found that the insurance company notification requirement serves the same public policy purpose as the police notification requirement – preventing fraud and reducing insurance premiums. *Id.*

V. ANALYSIS

By requiring a showing of prejudice, the *Vanderhoff* court ignored basic tenets of statutory construction and essentially rewrote § 1702. First, the court used an admittedly strained analysis to conclude that the absence of language eliminating a prejudice requirement was controlling. While it is true that a court may presume "that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject intends the same construction to be placed upon such language," such a presumption is only useful when help is needed in "ascertaining the intention of the General Assembly." *See* 1 Pa.C.S. § 1922. There is no question that the intention of the General Assembly in enacting the MVFRL was to curtail automobile insurance costs; § 1702 is unambiguous and was unquestionably aimed to achieve this goal. It was therefore unnecessary for the court to employ this presumption at the outset.

Furthermore, the court acknowledged that this presumption was "not directly applicable" because, in the instant matter, the interpretation of "a court of last resort" (*Brakeman*) addressed contractual rather than statutory language. The natural extension of this analysis is logically staggering – a court construing contract language that precedes the enactment of similar statutory language has effectively decided the intention of the General Assembly before the General Assembly has borne its intention. Such reasoning places the pen in the hand of a judge rather than a legislator and certainly does not represent a result that our lawmaking system champions. In this instance, that pen drafted a prejudice requirement that the General Assembly, in performing its lawmaking authority, chose not to include.

This truth was recognized in *Foster* and appropriately carried to its legal conclusion. The analysis was, at its core, a conglomeration of three thoughts: 1) the MVFRL was enacted to control increasing automobile insurance costs; 2) *every* component of its provisions, including § 1702, was tailored to accomplish that objection; and 3) the General Assembly could have included, but did not include, a prejudice requirement in § 1702 to achieve that goal. These same principles should have controlled in *Vanderhoff*. Instead, the *Vanderhoff* opinion stated that the insurance company notice requirement was not intended to serve the purposes of the MVFRL and therefore should be subject to a different standard than the police notice requirement. Again, the court strained to create distinction where none existed.

Ironically, in manufacturing such distinction, the court neglected the most significant (and clearest) distinction at issue – that between *Brakeman* and *Foster*. The *Brakeman* decision, unsurprisingly, is littered with verbiage restricting its holding to contractual, policy language.[4] *Foster* is far more on point; it directly addresses the statutory language of the MVFRL. The court casually dismissed this considerable difference by stating that the language in *Brakeman* had the same effect as that in § 1702. In doing so, the court committed the same folly described above – allowing itself to alter statutory language on the strength of antecedent, unlegislated case law.

VI. CONCLUSION

The *Vanderhoff* decision represents a setback in the MVFRL's ongoing attempt to reduce automobile insurance costs by eliminating fraudulent claims. Such claims are common and will continue to be so without effective application of the MVFRL. Unfortunately, the phantom vehicle problem may have just worsened, as the *Vanderhoff* court has created a "phantom" prejudice requirement by

ignoring the General Assembly and painstakingly attempting to distinguish the well reasoned rational of *Foster*.

ENDNOTES

[1]"Phantom vehicle" is used interchangeably with the MVFRL's "unidentified motor vehicle." *See*, *infra*, 75 Pa.C.S. § 1702.

[2]The insured claimed that he told the police about the phantom vehicle, but it was not noted in the police report. The trial court held a hearing to determine if the insured satisfied the police notification requirement and if a phantom vehicle was indeed present at the accident. It found the insured to be credible and concluded affirmatively on both factual issues.

[3]The insured filed a worker's compensation claim with the insurance company, who was also his worker's compensation carrier, within twenty days of the accident. He argued that he assumed that the insurance company had notice of the accident and was aware of the surrounding facts. The Superior Court rejected this argument and found that notice had not been given until eight months after the accident.

[4]For instance, the *Brakeman* Court found that "[t]he purpose *of a policy provision* requiring notice of an accident or loss to be given within a certain time is to give the insurer an opportunity to acquire, through an adequate investigation, full information about the circumstances of the case… ." *Brakeman*, 371 A.2d at 197 (emphasis added). The court also held "that the law established by our prior decisions relative to the effect of a clause *in a liability insurance policy* requiring the giving of notice of accident to the insurance company 'as soon as practicable' has been too restrictive and should be changed." *Id*. at 198 (emphasis added). At no point was statutory language contemplated.

MOHAWK INDUSTRIES, INC. V. CARPENTER AND ITS IMPLICATIONS FOR PENNSYLVANIA COLLATERAL ORDER DOCTRINE JURISPRUDENCE

By Scott J. Tredwell, Esquire and Robert J. Cahall, Esquire, McCormick & Priore, P.C., Philadelphia, PA

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 8, 2009, the Supreme Court of the United States affirmed an order issued by the Court of Appeals for the Eleventh Circuit requiring a civil litigant to disclose information protected by the attorney client privilege. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. __ (2009). In *Mohawk*, the plaintiff, Norman Carpenter, informed the human resources department of his employer, Mohawk Industries, Inc., that the company employed undocumented immigrants. *Id.* At that time, Mr. Carpenter was unaware that Mohawk stood accused in a pending class action, *Williams v. Mohawk Industries, Inc.*, of conspiring to depress its legal employees' wages by knowingly hiring undocumented immigrants. Mohawk Industries required Mr. Carpenter to meet with the company's retained counsel in the *Williams* case, at which time Mr. Carpenter was allegedly pressured to recant his statements. *Id.* Mr. Carpenter alleges that he was terminated by the company under false pretenses after he refused to recant his earlier statements. *Id.*

Conversely, Mohawk Industries alleged that Mr. Carpenter's version of events was "pure fantasy." *Id.* According to Mohawk Industries, Mr. Carpenter had attempted to have the company hire an undocumented immigrant, a company investigation ensued, including a meeting with retained counsel, and the company ultimately terminated Mr. Carpenter based on his "efforts to cause Mohawk to circumvent federal immigration law." *Id.*

During the course of Mr. Carpenter's litigation against Mohawk Industries, a motion to compel Mohawk Industries to produce information regarding Mr. Carpenter's meeting with retained counsel was filed. *Id.* The district court granted this motion, reasoning that, although the information was protected by the attorney client privilege, Mohawk Industries had implicitly waived the privilege through its disclosures in the *Williams* case. Put simply, by disclosing its own version of events, including the meeting with retained counsel, Mohawk had implicitly waived the attorney-client privilege.

II. SUPREME COURT HOLDING

Eight of the justices joined the majority opinion, authored by Justice Sotomayor, and Justice Thomas concurred in part in the judgment. In short, the Court held that "disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine." *Id.*

The Court noted that an immediately appealable collateral order must satisfy three requirements: it must conclusively determine the disputed question, it must resolve an important issue completely separate from the merits of the action, and it must be effectively unreviewable on appeal from a final judgment. *Id. citing Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949). The Court agreed with the decisions below that the order herein did not satisfy the third requirement, because "a discovery order that implicates the attorney client privilege" can be adequately reviewed "on appeal from a final judgment." *Id. citing Mohawk*, 541 F.3d 1048, 1052 (11th Cir. 2008).

The Court reasoned that "[i]n applying *Cohen*'s collateral order doctrine, we have stressed that it must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered. *Id.* (internal citations omitted). Noteworthy, the Court stated:

> In making this determination, we do not engage in an "individualized jurisdictional inquiry." Rather, our focus is on "the entire category to which a claim belongs." As long as the class of claims, taken as a whole, can be adequately vindicated by other means, "*the chance that the litigation at hand might be speed, or a 'particular injustice averted,' does not provide a basis for jurisdiction under § 1291.*

Id. (internal citation omitted) (emphasis added). Based on the above, the Court thus concluded:

> In our estimation, post judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client

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> privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Id.

Mohawk Industries argued that this result will have a "chilling" effect on attorney client communications. The Court rejected this argument, reasoning that: "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." *Id.* Moreover, the Court noted its belief that parties who felt a privilege ruling was particularly injurious have other avenues of review apart from a collateral order appeal. *Id.* Specifically, the Court felt that the possibility of obtaining an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the availability of a writ of mandamus (in extraordinary circumstances), and the option of simply defying the order, receiving whatever sanction results, and obtaining post judgment review without having revealed the privileged information. *Id.* Despite the fact that interlocutory appeals and writs of mandamus are discretionary and do not provide for review in every case, the Court believed them to be adequate alternative herein because "they serve as useful 'safety valve[s]'" for promptly correcting serious errors. *Id.* (internal citation omitted).

With regard to Mohawk's contention that requiring the disclosure of information may cause severe hardship on litigation, the Court responded:

> Mohawk is no doubt right that an order to disclose privileged material may, in some situations, have implications beyond the case at hand. But the same can be said about many categories of pretrial discovery orders for which collateral order appeals are unavailable. As with these orders, *rulings adverse to the privilege may vary in their significance; some may be momentous, but others are more mundane*. Section 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney-client privilege rulings. Moreover, protective orders are available to limit the spillover effects of disclosing sensitive information. *That a fraction of orders adverse to the attorney client privilege may nonetheless harm individual litigants in ways that are "only imperfectly reparable" does not justify making all such orders immediately appealable as of right under § 1291.*

Id. (internal citation omitted) (emphasis added). Accordingly, the Court held that disclosure orders which would implicate the attorney-client privilege are not entitled to immediate appeal as a collateral order under 28 U.S.C. § 1291.

III. PENNSYLVANIA'S ADOPTION AND APPLICATION OF *COHEN*.

As a threshold matter, the general rule in Pennsylvania has consistently been that an appeal "will lie only from a final order unless otherwise permitted by statute." *Pugar v. Greco*, 483 Pa. 68, 73 (Pa. 1978) (internal citations omitted). In determining what constitutes a final order, the Supreme Court of Pennsylvania essentially adopted the standards set forth in *Cohen*, *supra* in that the court will look to the "practical, rather than technical" construction of an order. *Id. See also Bell v. Beneficial Discount Co.*, 465 Pa. 225, 228 (Pa. 1975) ("Whether an order is final and appealable cannot necessarily be ascertained from the face of a decree alone, nor simply from the technical effect of an adjudication. The finality of an order is a judicial conclusion which can be reached only after an examination of its ramifications.")

This approach is codified in Pa.R.A.P. 313:

> (a) General rule. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.
>
> (b) Definition. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

The Supreme Court of Pennsylvania has consistently maintained that Rule 313 must be interpreted narrowly, and that the three-pronged requirement must remain stringent, lest the collateral order exception swallow the rule. *See, e.g. Melvin v. Doe*, 575 Pa. 264, 272 (Pa. 2003). Moreover, "it is not sufficient that the issue under review is important to a particular party; it 'must involve rights deeply rooted in public policy going beyond the particular litigation at hand.'" *Stahal v. Redcay*, 897 A.2d 478, 485 (Pa. Super. Ct. 2006) *quoting Melvin*, 575 Pa. at 272. *See also Pugar*, 483 Pa. at 75 ("[W]henever possible, review must await the determination of a suit notwithstanding any inconvenience of a party.") (internal citations omitted).

IV. PENNSYLVANIA LAW IS IRRECONCILABLE WITH *MOHAWK*.

Given Pennsylvania's strict, narrow application of the collateral order doctrine and its requirement that the rights involved be broadly implicated, rather than merely important in any given case, Pennsylvania law generally paralleled the approach set forth by *Cohen* and its federal progeny. However, the Supreme Court's recent holding in *Mohawk*, *supra* is in direct conflict with Pennsylvania's approach to the collateral order doctrine.

In Pennsylvania, discovery orders requiring the disclosure of confidential and privileged information are immediately appealable under the collateral order doctrine. *Ben v. Schwartz*, 556 Pa. 475 (Pa. 1999). In *Ben*, the professional licensing agency was ordered to disclose records pertaining to a dentist who had been named as a defendant in a malpractice lawsuit. *Id.* at 479. The bureau argued that such an order should be immediately appealable under Pa. R.A.P. 313 because it would hinder the investigative abilities of the agency if witnesses did not feel free to provide information, lest it be discoverable in a trial court action. *Id.* at 484. The court found that the resolution of whether such records were subject to any claim of privilege implicated rights rooted in public policy, and affected individuals beyond those involved in this particular lawsuit; accordingly, the importance and

irreparability requirements were met in this case. *Id.*

More directly on point, the Superior Court has held that claims of attorney-client privilege vis-à-vis orders of production are immediately appealable under Pa.R.A.P. 313. *Gocial v. Independence Blue Cross*, 827 A.2d 1216, 1220 (Pa. Super. Ct. 2003) (internal citations omitted). Likewise, the importance of the attorney-client privilege in Pennsylvania jurisprudence is indisputable: "[t]he attorney client privilege has been a part of Pennsylvania law since the founding of the Pennsylvania colony, and has been codified in our statutory law." *Commonwealth v. Noll*, 443 Pa. Super. 602, 607 (Pa. Super. Ct. 1995). The attorney-client privilege is set forth by statute as follows:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5928. Perhaps most compelling is the following passage from the Superior Court:

> [T]he issues of attorney-client and work-product privileges, as well as privacy concerns, implicate rights deeply rooted in public policy, especially where the disclosure of such information affects individuals other than those involved in this particular case. Furthermore, enforcement of the orders would force [the defendant] to disclose the disputed documents; thus, **there would be no effective means of review available**. As such, the orders on appeal are collateral to the principal action and immediately appealable.

Berkeyheiser v. A-Plus Investigations, 936 A.2d 1117, 1124 (Pa. Super. Ct. 2007) (emphasis added) (internal citation omitted). Indeed, this approach was consistent with the view of the Third Circuit:

> Undergirding these previous holdings is the notion that, once putatively protected material is disclosed, the "very right sought to be protected" has been destroyed. That is so because, as we noted previously, underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without fear of disclosure, so as to aid the administration of justice. . . .Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, **the cat is already out of the bag.**

Kelly v. Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997) (emphasis added) (internal citations omitted).

V. CONCLUSION

It remains to be seen whether Pennsylvania's courts will adopt, modify, or reject the rule set forth in *Mohawk*. If the Supreme Court of Pennsylvania continues the current trajectory of Pennsylvania law, then the sanctity of attorney-client communications should be preserved. Conversely, if the Pennsylvania court adopts the rationale of the United States Supreme Court, the pervasive, devastating effects on full and candid attorney-client communications will be felt by every Pennsylvania practitioner.

CASE LAW UPDATE: FORUM NON CONVENES

By Stephen J. Finley, Jr., Esquire, Gibbons P.C., Philadelphia, PA

I. INTRODUCTION

Change of venue, both improper venue and *forum non convenes*, continues to be a frequently litigated issue in Pennsylvania. Most often, venue issues arise as defendants seek to transfer cases out of Philadelphia County, especially when those cases involve claims of wrongful death or catastrophic personal injury. This article discusses recent decisions from Pennsylvania's appellate and trial courts addressing change of venue pursuant to the doctrine of *forum non convenes*.

II. APPLICABLE LAW

Pennsylvania Rule of Civil Procedure 1006(d)(1) provides that "for the convenience of the parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could have originally been brought." In its decision in *Cheeseman v. Lethal Exterminator, Inc.*,[1] the Pennsylvania Supreme Court established the factors a trial court must consider in deciding a petition to transfer venue under the doctrine of *forum non convenes*. The *Cheeseman* court held that a petition based upon *forum non convenes* may be granted if a defendant demonstrates that plaintiff's chosen forum is oppressive or vexatious. This standard may be satisfied with facts of record that the forum county was selected in order to harass the defendant (even possibly at some hardship to the plaintiff) or that trial in another county would provide easier access to sources of proof, including fact witnesses, medical records or the site of the event giving rise to the lawsuit. It is important to note that under the *Cheeseman* standard a transfer to another county is proper if a defendant satisfies either of these two criteria. Recent case law from Pennsylvania's appellate and trial courts confirms that the *Cheeseman* precedent controls the adjudication of a motion brought pursuant to Pennsylvania Rule of Civil Procedure 1006 and the doctrine of *forum non convenes*.

III. RECENT APPELLATE COURT CASE LAW

A. *Hunter v. Shire*

The most recent Pennsylvania appellate court decision addressing *forum non convenes* was handed down by the Superior Court in March, 2010. In *Hunter v. Shire U.S., Inc.*[2] , a product liability action involving allegations of a defective pharmaceutical, Shire moved before the Philadelphia Court of Common Pleas to dismiss the case for re-filing in the State of Georgia or, in

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the alterative, to transfer the case from Philadelphia County to nearby Chester County. The Court of Common Pleas denied Shire's motion and an appeal followed.

The Superior Court affirmed the lower court's decision. Noting that a plaintiff's choice of forum is to be afforded great weight, the Superior Court found that the trial court did not abuse its discretion in keeping the case in Philadelphia County. Judge Bowes wrote for the Superior Court stating that Shire did not "demonstrate with detailed averments in its petition and accompanying brief why the chosen forum was vexatious or burdensome to it." In the absence of an evidentiary basis to support a finding that the plaintiff's chosen forum is vexatious or oppressive, transfer on *forum non convenes* grounds is improper.

The court also explained that that proximity of Chester County to Philadelphia County cut against transferring venue, writing "Chester and Philadelphia Counties are adjacent to each other and are readily accessible in a short amount of travel time. Hence, this case is not one of those rare ones where we are permitted to disturb [the Plaintiff's] choice of forum." As a matter of geography, Philadelphia and Chester County are not adjacent to each other, though at their nearest points the two counties are only about ten miles apart.

Shire's failure to identify facts of record in its moving papers, and the proximity of the forum county to the county to which Shire sought to transfer the action, combined to defeat the motion. What is not clear from the Superior Court's decision is if Shire had provided citations to evidence of record in its moving papers, would the Superior Court have overlooked the proximity of Philadelphia County and Chester County and given a thorough weighing of the evidence such as location of witnesses, location of medical providers and availability of other sources of proof in resolving the appeal.

B. *Walls v. Phoenix Insurance Company*

Prior to its holding in *Hunter*, the Superior Court issued an opinion in early 2009 reversing a decision of the Philadelphia County Court of Common Pleas which had ordered a case transferred from Philadelphia County to Monroe County. In *Walls v. Phoenix Insurance Company*,[3] plaintiff sued the insurer of her Monroe County residence over the denial of a claim. The trial court, after a hearing on the matter, granted Phoenix's motion to transfer to Monroe County, holding that suit could have been filed in Monroe County, the occurrence giving rise to the suit took place in Monroe County, the plaintiff herself resided there, trial in Monroe County would provide easier access for the jury to view the premises, and none of the witnesses that were expected to be called at trial were located in Philadelphia County, including Phoenix's insurance adjuster.

On appeal, the Superior Court found that Phoenix failed to establish that litigation in Philadelphia County was oppressive or vexatious. The Superior Court criticized the lower court as to each of its findings. First, the Superior Court noted that plaintiff's county of residence should not have been a factor in the trial court's ruling, as it should be presumed that the plaintiff took into account the inconvenience in litigating in her selected forum prior to filing suit.

Second, the trial court's conclusion that trial of the case could involve inspection of the premises was not supported by the record. The only support for this conclusion was an affidavit from a defense expert who concluded that it "may be necessary for members of the jury to see the plaintiff's home in order to understand the damages." The Superior Court determined that such a "mere guess about the likelihood" of a site inspection is not the type of detailed record evidence that the *Cheeseman* standard requires in order to support a transfer of venue. Furthermore, the Superior Court was highly suspicious of the defense position that a site inspection would be necessary, given the low probability that the site would remain unchanged by the time trial commenced. The Superior Court also found the defense insistence that a site inspection was necessary for an assessment of damages inconsistent with its stated position that there was no liability. Moreover, the Superior Court saw no reason why photographs, videos or internet webcast would not be sufficient to allow the jury to see the condition of the property.

Third, the Superior Court ruled that the trial court erred in considering the residence, and relative inconvenience, of defendant's insurance adjuster, holding that he was "not a hapless citizen being hauled into court, but is a professional insurance claims adjustor who will surely be fully compensated by his client." The court acknowledged that continued litigation in Philadelphia would cause the defendant's claims adjustor to incur greater expenses, and that these expenses would be bourn by the defendant, but characterized this expense as part of the normal cost of litigation. The Superior Court further noted that were the case to be litigated in Monroe County, the defendant would ultimately face a far greater cost by having defense counsel travel to Monroe County, or reside there during trial.

Finally, the Superior Court determined that the trial court erroneously relied upon defendant's contention that other potential witnesses resided in Monroe County. The record contained no support for the position that any yet to be identified witness had any knowledge of the case. Of the witnesses who had been identified, including the parties and the defense insurance adjustor, only plaintiff resided in Monroe County, while two witnesses resided in counties adjacent to Philadelphia County. The Superior Court, having rejected each finding of the trial court, concluded "although the trial court cited to a list of factors in support of its conclusion that plaintiff's choice of forum was vexatious, we conclude that those factors … fail, as a matter of law, to meet the burden of defendant to establish that plaintiff's choice of forum was oppressive or vexatious."

IV. RECENT COURT OF COMMON PLEAS DECISIONS

A. *Mills v. Evenflo, et. al.*

In *Mills v. Evenflo*[4], a wrongful death and personal injury action arising out of an automobile accident in Franklin County, Pennsylvania, Judge Manfredi of the Philadelphia Court of Common Pleas ruled that plaintiff's selected venue of Philadelphia County was oppressive and vexatious. In *Mills*, plaintiffs resided in Franklin County; the only in-state defendant, a car dealership, operated in Franklin County; the first responders to the accident scene were all located in Franklin County; and all of the medical treatment was rendered in Franklin

County by medical providers who resided there. The court also took note of the fact that Franklin County is approximately 150 miles from Philadelphia. The court determined that, based on the record before it (which included affidavits from likely witnesses), venue in Philadelphia County was "vexatious to virtually all of the witnesses, who would suffer great financial burden in traveling and staying in Philadelphia for trial."

The court also rejected plaintiff's argument that the venue was proper in Philadelphia because the vehicle involved in the accident underlying the lawsuit had been transported to Philadelphia County and was being stored there in anticipation of trial. The court wrote "Plaintiff cannot put the rabbit in the hat by electing to bring the vehicle to Philadelphia, and then declaring that [litigating] anywhere else is not inconvenient to witnesses." As in the *Walls* case, *supra*, the court in *Mills* also rejected plaintiff's argument that the location of paid witnesses and consultants should be a factor in the court's analysis.

B. *Kobaisy v. SP Industries, et. al.*

In *Kobaisy v. SP. Industries, et. al.*,[5] another opinion authored by Judge Manfredi of the Philadelphia Court of Common Pleas, plaintiff, an employee of the University of Mississippi in Oxford, Mississippi, alleged that she was injured on the job in an explosion caused by defective equipment supplied by the defendants. The defense sought to have the case dismissed for re-filing in Mississippi or, in the alternative, transferred to Bucks County on *forum non conveniens* grounds. After denying the defense motion to dismiss, the court also rejected the motion to transfer venue. The court determined that the defendants failed to identify any facts of record to establish that Philadelphia is either oppressive or vexatious to any party or witness. The court ruled that, contrary to the defense position, "on the sparse record before us, the only conclusion we can reach is that Philadelphia is an obvious and convenient cross-roads for all the various witnesses in this case."

C. *Keagy v. Conrail*

Judge Abramsom of the Philadelphia Court of Common Pleas ruled in *Keagy v. Conrail*[6] that the matter should be transferred out of Philadelphia County. Plaintiff sued Conrail alleging that the decedent was exposed to chemical waste while employed as a laborer at a Conrail facility in Blair County, Pennsylvania. After granting a short period of time for discovery directed to the issue of venue, the court entered an order transferring the case to Blair County.

Judge Abramson prepared an opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and held that Conrail satisfied its burden of showing that the plaintiff's chosen forum in Philadelphia County was oppressive and vexatious. The trial court noted that the plaintiff resided in Blair County, which is also where the decedent worked and all of the alleged exposure(s) occurred. Many, if not all, of the witnesses that were expected to be called to testify at trial, including the decedent's former supervisors and co-workers at Conrail, resided in or near Blair County. The decedent received medical care from providers located in Blair County. The court also noted that venue in Blair County "would also provide an easier ability to conduct a view of the premises." The Superior Court affirmed this transfer of venue, without opinion.

D. *Bratic v. Rubendall, et. al.*

In *Bratic v. Rubendall, et. al.*,[7] yet another decision regarding a challenge to venue in Philadelphia County, plaintiff filed suit alleging wrongful use of civil proceedings and abuse of process in connection with an underlying lawsuit brought in the Dauphin County Court of Common Pleas. In undertaking its analysis, the court noted that the case involved residents of Dauphin County suing non-Philadelphia residents. The court noted that in order to prevail on its claims, plaintiff must establish that the defendants (who brought suit in the underlying lawsuit) lacked probable cause to believe that their claim could be held valid upon final adjudication. The record revealed eight witnesses on this central issue, each of whom resided in Dauphin County, which the court noted is over 100 miles from Philadelphia. Based on these facts, the court determined that litigation in Philadelphia County was both vexatious and oppressive and that "trying this case in Dauphin County would provide better access to all potential witnesses and other sources of proof such as court documents from the prior Dauphin County action."

E. *Fetter v. Laurel Sport Shop, Inc., et. al.*

In *Fetter v. Laurel Sport Shop, Inc., et. al.*,[8] plaintiff instituted a civil action stemming from injuries he sustained when a muzzle loader allegedly sold by defendants malfunctioned, causing plaintiff to lose a portion of his hand. Philadelphia Common Pleas Court Judge Howland Abramson noted that "[t]he Pennsylvania Supreme Court has set a high bar to successfully move to transfer venue on *forum non convenes* grounds," but concluded that the defendants satisfied their burden here. The court noted that the sole connection between any of the parties and Philadelphia County was that products manufactured and distributed by some of the defendants are "included in the inventory of gun dealers within Philadelphia County." Judge Abramson noted that while as little as 1% of a corporation's total business can support venue in a particular county, the quantity of a party's business activity in a county is only relevant to a determination of improper venue, not *forum non convenes*. The court analyzed the facts of record and determined that nearly all of the witnesses, including medical providers, were located in or near Bedford County. Moreover, the depositions that had been taken thus far in the case were all held at the Bedford County Courthouse, which the court viewed as an indication that Bedford County was the most convenient venue for the parties to the litigation.

V. CONCLUSION

Transfer of venue remains a regularly litigated issue. Given the deference that a court is to give to a plaintiff's chosen forum, a defendant seeking to transfer venue to another county must satisfy a high burden. However, as the case law cited above demonstrates, that hurdle is not insurmountable, and our courts will grant motions to transfer venue based on *forum non convenes* where the record establishes that the chosen forum is vexatious or oppressive.

Defendants seeking to transfer venue should rely upon citations to facts in a well developed record in their motion papers. This may require taking limited discovery on the issue of venue early in the case or producing affidavits from likely witness in support of a motion. A

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well-crafted case management order may aid in developing a record concerning the location of the parties, the identify of any witnesses and their location, the identity and location of plaintiff's medical providers, the location of pertinent business records and the location and availability of other sources of proof.

Recent precedent demonstrates that a motion to transfer venue between adjacent counties is unlikely to be granted. Furthermore, the location of paid consultants or experts should not be considered in determining whether or not a forum is oppressive or vexatious. However, when the record demonstrates that a plaintiff's chosen forum was selected in order to harass a defendant, or where it is clear that venue in another county will provide easier access to sources of proof, a trial court is well within its discretion to order a change of venue under Rule 1006 and the *Cheeseman* standard.

ENDNOTES

[1]701 A.2d 156 (Pa. 1997)

[2]992 A.2d 891 (Pa. Super. 2010)

[3]979 A.2d 847 (Pa. super. 2009)

[4]2009 Phila. Ct. Com. Pl. LEXIS 25

[5]2009 Phila. Ct. Com. Pl. LEXIS 58

[6]2009 Phila. Ct. Com. Pl. LEXIS 75, *affirmed* 990 A.2d 63 (Pa. Super. 209)

[7]2009 Phila. Ct. Com. Pl. LEXIS 198

[8]2010 Phila. Ct. Com. Pl. LEXIS 64

MOTOR VEHICLE LAW UPDATE – PART I

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UNINSURED/UNDERINSURED MOTORIST CLAIMS

(a) Definition of Uninsured/ Underinsured

In *Shaw v. State Farm Ins. Co.*, 331 Fed. Appx. 946 (3d Cir. 2009), the plaintiff was injured at work when he fell off the back of a garbage truck. The plaintiff recovered workers' compensation benefits, and thereafter sought UIM coverage under his policy with State Farm Insurance Company. State Farm denied coverage because it determined that the plaintiff was not "legally entitled" to damages from his co-worker or his employer, and that the garbage truck was not "uninsured" or "underinsured". The parties stipulated that the garbage truck had five million dollars worth of coverage and that the plaintiff's damages did not exceed five million dollars. In holding that State Farm properly denied coverage, the Third Circuit reasoned that the definitions of the terms "underinsured" and "uninsured" in both the Pennsylvania Motor Vehicle Financial Responsibility Law and the policy itself clearly provided that the truck was neither uninsured or underinsured because the damages sustained by the plaintiff did not exceed the amount of coverage provided by the policy insuring the garbage truck.

(b) Resident Relative

In *Travelers Personal Ins. Co. v. Estate of Parzych*, 2009 WL 4756229 (E.D.Pa. 2009), the district court held that a son who lived with his wife and her child, but who had occasionally, sporadically and temporarily stayed with his parents did not qualify as a resident relative entitled to underinsured motorist benefits. In this regard, the district court noted the following relevant factors: the decedent lived with his girlfriend, then wife, and her son in an apartment in Hatfield for over a year prior to his death; the decedent's credit card bills, bank statements, and cell phone bills were delivered to the Hatfield apartment; when he did sleep at his parents, it was only as a matter of convenience, whether to shovel snow, for work, playing in a nearby billiards league or babysitting purposes. Further, the court held that Travelers was not estopped from disclaiming coverage even where the decedent was listed as a driver on the parents' policy. In this regard, the district court reasoned that the estate failed to show that the decedent was traveling in a listed car or that he resided at the parents' household, and thus, the estate could not demonstrate that the parents reasonably relied on the fact that the insurer accepted their premiums in their belief that the decedent was entitled UIM benefits under their policy.

(c) Maintenance or Use of A Motor Vehicle

In *McCleester v. State Farm Mut. Aut. Ins. Co*., 2009 WL 3182047 (M.D.Pa. 2009), the District Court for the Middle District of Pennsylvania held that the plaintiff was not entitled to first party benefits when he suffered serious and permanent injury to his right arm after being struck by a rock which was thrown by an adolescent as the plaintiff was proceeding on the interstate, during the course and scope of his employment, because his injury did not arise out of the maintenance or use of his vehicle as required by the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §7501, et seq. In so holding, the District Court reasoned that the injury did not arise out of the use of the motor vehicle, but instead, the criminal act of a third party in throwing the rock.

(d) Dual Recovery Prohibited

In *First Liberty Ins. Corp. v. Budow*, 2009 WL 45474 (3d Cir. 2009), the Third Circuit adopted the district court's holding prohibiting the claimant from recovering both liability and underinsured motorist benefits under the same policy. In that case, the claimant was a passenger in a car owned by her parents and operated by a permissive user. The permissive user had his own liability policy, as well. The claimant recovered under both the liability portion of her parent's policy, as well as the liability portion of the permissive user's policy. Thereafter, she made a claim for underinsured motorist coverage under the parent's policy. Liberty Mutual declined coverage because under the policy, there was an exclusion which stated that an "underinsured motor vehicle" does not include any vehicle or equipment: For which liability coverage is provided under Part A of this policy [the liability portion]. In denying underinsured motorist benefits, the district court held that the Pennsylvania Motor Vehicle Financial Responsibility Law did not require the invalidation of the clause. In so holding, the district court noted that forcing First Liberty to provide underinsured benefits in that case would

require it to underwrite unknown risks and provide gratis coverage given the exclusion. Likewise, the district court reasoned that purchasing underinsured motor vehicle insurance does not relieve the insured from providing adequate liability insurance for his own vehicle, and thus, the parents were in full control of the amount of liability coverage provided to permissive users. Had they wanted greater protection for passengers in their vehicle while being operated by permissive users, the parents could have increased the amount of their liability coverage. Finally, the district court acknowledged that this was a classic example of an insured attempting to convert underinsured motor vehicle insurance into liability insurance which has been consistently prohibited by Pennsylvania courts. *See First Liberty v. Budow*, 2007 WL 2011883 (E.D.Pa. 2007) (district court opinion).

(e) Household Exclusion

In *Erie Ins. Exch. v. Baker*, 972 A.2d 507 (Pa. 2009), the Pennsylvania Supreme Court reaffirmed the validity and enforceability of the household exclusion in a personal auto policy. In *Baker*, Eugene Baker had a policy of insurance issued by Erie for three vehicles, including stacked underinsured motorist coverage of $100,000.00/$300,000.00. In June of 1999, while operating his motorcycle, Eugene Baker was involved in a motor vehicle accident. Baker's motorcycle was insured through Universal Underwriters Insurance Company. That policy provided only $15,000.00 in under-insured motorist coverage. Baker sought underinsured motorist coverage under both the Universal Underwriters Insurance Company policy and the Erie policy. Erie denied coverage based upon the household exclusion which stated that the insurance "does not apply to … damages sustained by anyone we protect while occupying or being struck by a motor vehicle owned by you or a relative, but not insured for Uninsured or Underinsured Motorists Coverage under this policy." The validity and enforceability of the exclusion was upheld at both the trial and appellate levels.

The Supreme Court granted Baker's petition for allowance of appeal with respect to the issue of:

> Whether Section 1738(a) of the [Motor Vehicle Financial Responsibility Law] precludes application of the so-called "household exclusion" to prevent interpolicy stacking of UIM benefits when there has been no valid stacking waiver by the insured.

Baker argued that the exclusion was invalid because it acts as a "disguised waiver" of stacking that does not comply with the explicit waiver requirements of Section 1738(d). While the Supreme Court noted that it was a novel argument, the court nevertheless held that enforcement of the household exclusion did not involve stacking at all. Instead, the court held that the exclusion "is a valid and unambiguous preclusion of coverage of unknown risks." In so holding, the court reasoned that:

> Baker was injured in a collision while driving a fourth vehicle from his household, his Universal-insured motorcycle. The third-party tortfeasor's insurance was insufficient to cover his damages. Baker therefore sought UIM benefits from the Universal policy on his motorcycle, and received the policy limits of $15,000, which still did not adequately compensate him. Next in priority was the other policy on which Baker was an insured, the Erie policy covering his three other vehicles. See 75 Pa.C.S. §1733(a). But the Erie policy has an exclusion precluding UIM coverage in this very situation, that is, where Baker was injured while driving a vehicle he owned, but did not insure with Erie - - his motorcycle. As a result, Baker was not entitled to stack the coverages of his three Erie-insured vehicles because *there was no UIM coverage to stack*.

(emphasis in original).

In Progressive *Direct Ins. Co. v. Galloway*, 2009 WL 772832 (W.D.Pa. 2009), the District Court for the Western District of Pennsylvania also upheld the validity and enforceability of the household exclusion. In that case, the decedent was a passenger in a vehicle owned and operated by his brother William. He was killed in a single car accident. At the time of the accident, the decedent's family maintained two policies with Progressive. The first policy contained four vehicles and listed only the parents of the decedent on the policy. That policy provided stacked underinsured motorist coverage in the amount of $50,000.00 per person. The second policy which insured the vehicle involved in the accident, as well as another vehicle, listed the decedent, the decedent's parents and the decedent's brother on the policy. The estate recovered the limit of underinsured motorist benefits under that policy, and subsequently submitted a claim under the first policy. That claim was denied based upon the household exclusion. Relying on a long line of cases upholding the household exclusion, the court applied the exclusion to relieve Progressive of the obligation to provide coverage in this instance.

In *Ginther v. Farmers New Century Ins. Co.*, 324 Fed.Appx. 172 (3d. Cir. 2009) the Third Circuit held that the household exclusion precluded an insured from stacking policies. In *Ginther*, the insured had two separate policies issued by Farmers New Century, each policy providing $100,000.00 of nonstacked UIM coverage for one of the insured's two vehicles. The policies each provided that:

> "We do not provide Underinsured Motorist Coverage for bodily injury sustained by you while occupying or when struck by any motor vehicle you own which is not insured for this coverage under this policy."

Following a December 2001 motor vehicle accident, the insured settled for the limits of the tortfeasors policies. Thereafter, the insured filed a UIM claim seeking $200,000.00. Farmers New Century paid benefits in the amount of $100,000.00, the limit of UIM coverage for the policy covering the vehicle the insured was operating at the time of the accident. The insured brought a declaratory judgment action seeking the $100,000.00 UIM limit under the policy covering his other vehicle. The district court held that the household exclusion precluded recovery in this situation. The Third Circuit upheld the district court's determination and reasoned that the exclusion was clear, unambiguous, and not contrary to the underlying public policy of the MVFRL. Thus, the household exclusion applied to prohibit the insured from stacking his two car insurance policies to recover additional UIM benefits from one policy for an accident that occurred while he was driving a vehicle insured under a separate policy.

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The Court of Common Please of Lackawanna County also upheld the validity and enforceability of the household exclusion in *Steinetz v. Allstate Prop. & Cas. Ins. Co.*, 08 CV 5668 (Lackawanna Cty.Ct.Comm. Pl. 2009) (Minora, J.). In that case, the plaintiff was injured when he was traveling as a passenger in the vehicle owned and operated by his father, with whom he lived. The father maintained coverage for the vehicle pursuant to a policy issued by Nationwide Insurance Company. After recovering the limits of liability under the Nationwide policy, the plaintiff sought underinsured motorist benefits under his own policy issued by Allstate. Allstate denied coverage based upon the household exclusion. The court, for the reasons, discussed in the cases cited above, upheld the denial thereby reaffirming the validity and enforceability of the household exclusion.

The Middle District of Pennsylvania applied the household exclusion in *Liberty Mut. Fire Ins. Co. v. Tallman*, 2010 WL 891834 (M.D.Pa. 2010) to preclude the defendant from recovering stacked underinsured motorist benefits under an automobile policy when he was injured while riding a motorcycle not insured under that policy. Instead, the motorcycle was insured under a separate policy issued to the defendant, also by the plaintiff, Liberty Mutual.

(f) Regular Use Exclusion

In *Williams v. GEICO Government Employees Insurance Co.,* 986 A.2d 45 (Pa. 2009), the Supreme Court granted a Petition for Allowance of Appeal in order to address the issue of whether, under the MVFRL and the court's decision in *Burstein_v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204 (Pa. 2002), the "regular use" exclusion is valid where the insured is a police officer who sustained bodily injury in the course of performing his duties while driving a police vehicle for which vehicle he could not have obtained underinsured motorist coverage.

The District Court for the Western District of Pennsylvania, in *Fleeger v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 690681 (W.D.Pa. 2009), upheld the validity and enforceability of the regular use exclusion contained in the plaintiff's policy of insurance. In that case, the plaintiff, Fleeger lived with her boyfriend Barr. Barr owned a 1990 Safari cargo van which he used for business. He insured that vehicle through State Farm. Barr also owned an Isuzu Rodeo vehicle with Fleeger. Both he and Fleeger were named insureds under a policy of insurance also issued by State Farm. That policy provided $15,000.00 in underinsured motorist coverage. In November of 2004, Fleeger was a passenger in the 1990 Safari cargo van being operated by Barr, who while under the influence, collided with a utility pole. Fleeger suffered severe injuries and recovered the limits of liability insurance under the policy insuring Barr's 1990 Safari cargo van. Thereafter, Fleeger sought underinsured motorist benefits under the policy issued to her and Barr. State Farm denied coverage based upon a policy exclusion which provided that an underinsured motor vehicle did not include a motor vehicle "furnished for the regular use of you, your spouse or any relative." The term "you" included both Fleeger and Barr as named insureds under the policy. Thus, State Farm denied underinsured motorist benefits, not because the 1990 Safari cargo van was available for the regular use of Fleeger, which it was not, but because it was available for the regular use of Barr. In applying the exclusion, the district court noted that the policy language was clear and unambiguous. Additionally, the district court noted that the exclusion was narrowly tailored to exclude only vehicles not insured under the Isuzu policy furnished for the regular use of either Fleeger or Barr, and did not exclude a broad category of vehicles such as government owned vehicles or all motorcycles. The district court reasoned that Pennsylvania law requires insurers to offer UIM coverage, however, narrowly tailored policy exclusions, like the one at issue, will be upheld as products of the rights of the parties to enter into specific contractual arrangements.

The Philadelphia Court of Common Pleas also recognized the validity and enforceability of the regular use exclusion in *Adamitis v. Erie Ins. Exch.*, July Term, 2008 , No. 2560 (Phila.Ct.Com.Pl. 2009) (Massiah-Jackson, J.). There, the plaintiff was injured in a motor vehicle accident with an underinsured motorist while operating a bus in the course and scope of his employment with the Berks Area Reading Transit Authority. The Transit Authority, as a self-insured entity, was not required to maintain underinsured motorist coverage. Accordingly, the plaintiff sought coverage under his personal automobile policy issued by Erie Insurance Exchange. Erie denied coverage based upon the regular use exclusion. In applying the exclusion, the court reasoned that the regular use exclusion had been previously validated by Pennsylvania courts, and moreover, the language at issue was clear and unambiguous. The court also held that enforcement of the exclusion did not violate public policy because the purpose and policy of the Pennsylvania Motor Vehicle Financial Responsibility Law is not to protect employees, but to protect "insurers against forced underwriting of unknown risks" which increases the costs of automobile insurance. Thus, when insurance companies are not compelled to underwrite unknown risks, then the public, including the plaintiff should benefit.

In *Costello v. Gov't Employees Ins. Co.*, 2010 WL 1254273 (M.D.Pa. 2010), the Middle District of Pennsylvania held that the regular use exclusion barred the claims of the plaintiff for underinsured motorist coverage where the plaintiff had been operating a vehicle assigned to him by the Commonwealth of Pennsylvania; the plaintiff drove the vehicle back and forth to work each day; and the vehicle was kept at the plaintiff's residence. The plaintiff further argued that his reasonable expectation was that underinsured motorist coverage would be provided where it was never rejected. However, the court noted that it was premature to rule on that issue in the context of a motion for judgment on the pleadings.

In *Dixon v. Geico*, 210 Pa.Super. 133 (2010), the Superior Court of Pennsylvania affirmed the validity of the regular use exclusion, but held that questions existed as to whether the exclusion applied in the context of the present case. In *Dixon*, the insured made claim for the recovery of underinsured motorist benefits arising from an accident which occurred when the insured was operating a vehicle in the course and scope of his employment. In so holding, the court reasoned that

he did not have regular access to this particular vehicle or any vehicle from a fleet. His use of the vehicle was merely a transport of a restored vehicle back to its primary location. Thus, the matter was remanded for consideration of whether the exclusion was applicable under these circumstances.

(g) "Occupying" a Motor Vehicle

In *Merchants Mut. Ins. Co. v. Benchoof*, 2010 WL 2245572 (W.D.Pa. 2010) the District Court for the Western District of Pennsylvania held that the defendant was "occupying" a motor vehicle for the purposes of his claim for underinsured motorist coverage where he had exited his vehicle in order to receive directions from a tow truck driver that came to help the defendant render aid to a motorist. In so holding, the court applied the test for occupancy set forth by the Pennsylvania Supreme Court in *Utica Mut. Ins. Co. v. Contrisciane*, 473 A.2d 1005 (Pa. 1984) which requires an analysis of the following four factors:

(1) there is a causal relation or connection between the injury and the use of the insured vehicle;

(2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;

(3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

(4) the person must also be engaged in a transaction essential to the use of the vehicle at the time.

Id. at *4.

The District Court for the Eastern District of Pennsylvania also considered the issue of whether an injured party was "occupying" a vehicle at the time of the accident in *Stonington Ins. Co. v. Dardas*, 2010 WL 2853916 (E.D.Pa. 2010). In that case, the defendant was operating a tow truck owned by his employer when the tow truck caught fire. The defendant could not extinguish the fire so he began removing items from the tow truck. He was injured while doing so. The defendant sought underinsured motorist benefits under the policy issued by Stonington Ins. Co. to his employer. Stonington denied coverage contending that the defendant was not occupying the vehicle. The court applied the test set forth by the Pennsylvania Supreme Court in the *Contrisciane* case and ultimately held that the four factors had been met. Thus, the defendant was entitled to coverage.

(h) Carrying Persons or Property for a Fee Exclusion

In *Nationwide Mut. Ins. Co. v. Brophy*, 2010 WL 925913 (3d Cir. 2010), the Third Circuit enforced an exclusion which removed coverage where the person was carrying persons or property for a fee. In that case, the defendant, Rose Brophy, was a mail carrier employed by the United States Government when she was injured in a motor vehicle accident. She sought benefits under the policy issued to her by the plaintiff, Nationwide. Nationwide denied coverage based upon the exclusion. On appeal, the Third Circuit affirmed the trial court's ruling in favor of Nationwide. The Third Circuit also noted that the issue of whether the defendant was entitled to coverage was not subject to arbitration. Additionally, the Third Circuit held that extrinsic evidence was inadmissible to show intent where the policy was not ambiguous.

(i) Named Driver Exclusion

The District Court for the Middle District of Pennsylvania upheld the validity and enforceability of the named driver exclusion in *Selective Way Ins. Co. v. Gingrich*, 2009 WL 1586877 (M.D. Pa. 2009). In that case, the defendant, while under the influence was operating a vehicle insured by the plaintiff, Selective. He was involved in a collision that resulted in the death of a third party. The defendant was listed as an excluded driver under the policy insuring the vehicle involved in the accident. The spouse of the decedent filed suit against the defendant. Selective, although providing a defense, filed the instant action for declaratory relief. In upholding the validity and enforceability of the exclusion, the district court stated that the exclusion was clear and unambiguous and further that under Pennsylvania law, an insurance company is entitled to exclude certain drivers from coverage even when driving a covered vehicle.

(j) Listed Driver

In *Erie Ins. Exch. v. Bazdar*, 06-5381 (Cumberland Cty.Ct.Com.Pl. 2009) (Bayley, J), the court held that a "named driver" living in the residence of the insured was not eligible to recover underinsured motorist benefits where she did not qualify as an insured. In that case, the claimant, Bazdar, was listed as a "named driver" on the policy of her boyfriend, Gramm, issued to him by Erie. The policy provided underinsured motorist coverage to the named insured; a resident relative of the named insured; or an occupant of an auto insured under the policy. At the time of the accident, Bazdar was a passenger on a motorcycle owned by Gramm, but not insured under the Erie policy. In upholding Erie's denial of coverage, the court reasoned that Bazdar did not demonstrate that she was entitled to recovery of underinsured motorist benefits because the fact that she was a "named driver" did not convert her into a class one insured under the policy. Likewise, as she was neither a resident relative of the named insured nor an occupant of an insured vehicle, she did not qualify as a class two insured.

(k) UM/UIM Sign Downs

On December 8, 2009, the Superior Court in *Erie v. Larrimore*, 2009 PA Super 236 (December 8, 2009), held that the insured's signature on an application for insurance which contained limits of UM/UIM coverage less than the bodily injury limits, as well as the insured's signature on a 75 PA.C.S.A. §1791 Important Notice did not qualify as a 75 Pa.C.S.A. §1734 sign down form. In so holding the court relied principally on its prior decision in *Motorists Ins. Cos. v. Emig*, 664 A.2d 559, 564 (Pa. Super. 1995), where the court stated that §1734 is a simple clear cut rule for the insurance company to follow, to lower the limits it must insist on a written authorization signed by the named insured. Important to its holding, the Superior Court recognized that Erie employed specifically crafted UM/UIM sign down forms and that, in the present case, Erie was not in possession of such a form signed by the insured.

On December 29, 2009, the Supreme Court, in *Orsag v. Farmers New Century Insurance*, 986 A.2d 128 (Pa. 2009), granted the petition for allowance of appeal to consider the issue:

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If an insured signs an insurance application that contains lowered uninsured/underinsured motorist coverage limits is that signature alone sufficient to meet the requirements of Section 1734 of Pennsylvania's Motor Vehicle Financial Responsibility Law?

(l) UM/UIM Rejection Forms

The Superior Court in *Toth v. Donegal Cos.*, 2009 PA Super 4 (January 14, 2009) held that Donegal was not required to verify that the signature of the first named insured on a UM/UIM rejection form was actually that of the first named insured. In that case, Donegal denied the Toth's underinsured motorist claim because it had a signed UM/UIM rejection form. The trial court held the form was void because it was not signed by Toth, the first named insured , but by her husband, in both their names and allegedly with her permission. In reversing the trial court, the Superior Court reasoned that the insurer is not required to launch an investigation every time it receives a UIM rejection form bearing the apparent signature of the first named insured. The MVFRL does not require the forms to be notarized. Thus, the insured bears the burden of proving that the signature on the UIM rejection form is a forgery, placed there without the knowledge or consent, and that the insured did not willingly waive UIM coverage; otherwise, the rejection form is presumptively valid.

(m) Stacking

(1) Waivers

The Third Circuit in *State Auto Property & Cas. Ins. Co. v. Pro Design*, 566 F.3d 86 (3d Cir. 2009), held that a stacking waiver remained valid despite the addition of vehicles to a single vehicle policy. In that case, the insured, at the inception of a single vehicle policy signed a form waiving stacking of UIM benefits. Additional vehicles were later added to the policies. The insured argued that 75 Pa.C.S.A. §1738 required the execution of an additional waiver upon the addition of vehicles to the policy. The Third Circuit noted that resolution of this issue required the court to interpret two potentially conflicting decision of the Supreme Court of Pennsylvania in *Sackett I* and *Sacket II*.

The court noted that in *Sackett I*, the Pennsylvania Supreme Court considered the issue of whether the insured's purchase of UIM coverage occurred when the policy incepted or whether another purchase occurred after the insured acquire and added a new vehicle to the policy. In *Sackett I*, the Pennsylvania Supreme Court held that an insurer must provide a stacking waiver each time a new vehicle is added to the policy. However, in *Sackett II*, the Pennsylvania Supreme Court reevaluated its definition of the term "purchase" and held that the extension of coverage under an after-acquired-vehicle provision to a vehicle added to a pre-exiting multi-vehicle policy is not a new purchase of coverage, and therefore, the insurer need not obtain new or supplement stacking waivers.

The Third Circuit reasoned that given the holding in *Sackett II* the Supreme Court of Pennsylvania would extend its ruling to apply to the single-vehicle policy. In that regard, the Third Circuit noted that the addition of a vehicle to an additional policy is not a purchase, and therefore, a waiver was not necessary when adding a second and third vehicle to the policy in question.

In *Sackett v. Nationwide Mut. Ins. Co.*, 2010 Pa. Super. 129 (2010), the Superior Court of Pennsylvania held that the plaintiff was entitled to stack underinsured motorist benefits where the insurer failed to obtain a waiver of stacking after the insured added an additional vehicle to their policy. The case was on appeal from the trial court's decision following remand from the Supreme Court. The facts of record indicated that Nationwide issued an insurance policy to the plaintiffs for two vehicles. At that time, a valid waiver declining stacked UIM coverage was executed. Two years later, the plaintiffs purchased another vehicle and requested coverage identical to their other two cars. A new waiver of stacking was not signed. The Superior Court applied the decision of the Pennsylvania Supreme Court in *Sackett I*, which held that when adding an additional vehicle to a multi-vehicle policy, the insurer is required to secure another signed wavier form declining stacked coverage on that new vehicle, and found that the Sacketts were entitled to stack UIM coverage as a matter of law.

(2) Fleet/Garage Policies

In *Erie Ins. Exch. v. Holt, et al.*, 08-07699 (Chester Cty.Ct.Comm.Pl 2009) the court held that the requirements of 75 Pa.C.S.A. §1738 which requires stacking unless otherwise waived, did not apply to a garage auto policy which provided coverage to "dealer tags" which can be moved from car to car, and not to specifically named automobiles.

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