COUNTERPOINT

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AFTER NEARLY 100 YEARS, THE FRYE STANDARD STILL HAS SOME TEETH

*By Wesley R. Payne, IV, Esquire and Jonathan Woy**

I. Introduction and Background

A common complaint by many attorneys with respect to vetting expert opinions in matters filed within the Commonwealth of Pennsylvania is that the standard utilized, which was set nearly 100 years ago in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), is outdated and does not allow a party the same latitude to challenge and test an opponent's scientific expert opinions nearly as well or as thoroughly as the standard adopted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 479 (1993). The Frye standard merely asks the trial court to determine if the methodology used by an expert is '*generally accepted*'. Whereas the Daubert standard requires the trial judge not only to determine if the proposed expert testimony is '*generally accepted'* but in addition must ensure that the proposed testimony is "*relevant to the task at hand"* and that the expert opinion '*rests upon a reliable foundation*.' Science and the use of science in the courtroom have advanced and evolved over the years and the ability to evaluate the merits of an opponent's expert opinion, in cases where the exposure may well exceed millions of dollars, is paramount to fairly and appropriately weeding out junk science and properly evaluating the case.

This dilemma is presented in all forms of asbestos litigation. Expert testimony is commonly admitted in asbestos personal injury lawsuits to prove that a product did or did not contain asbestos and that the plaintiff's exposure to the asbestos-containing product caused or did not cause the plaintiff's disease development, such as mesothelioma. Likewise, in talcum powder litigation expert opinion has been utilized to prove that there are trace amounts of asbestos contained in talcum powder and that the asbestos contaminated talcum powder may have caused plaintiff's ovarian cancer. Additionally, lawsuits brought by individuals

continued on page 2

Park and Cross At Your Own Risk

By Claire B. Ventola, Esq.

On January 19, 2017, in *Newell v. Mont. West, Inc.*, 2017 Pa. Super. LEXIS 40, No. 281 EDA 2016 (Pa.Super. Ct. 2017), a case of first impression, the Superior Court of Pennsylvania held that a property owner or possessor of land adjacent to a roadway does not owe any legal duty to business invitees injured while they are crossing that roadway. In so holding, the court rejected the plaintiff's allegation that the defendant caused the plaintiff-decedent's accident because it did not provide adequate parking to its invitees, which created an unsafe condition on its property. The Superior Court held that a property owner or operator owes no duty to its business invitees to provide adequate parking. According to the court, to impose such a duty on property owners and operators would create a new duty that would significantly burden property owners and operators across Pennsylvania and would expose them to greatly expanded potential liabilities.

In *Newell*, the plaintiff-decedent was fatally struck by a motor vehicle while crossing Route 309 to return to his car, which was parked across Route 309 on another's property, following a concert at the defendant's nightclub. The plaintiff alleged that the nightclub owner and operator was negligent because it failed to protect is invitees from dangers on adjoining public highways, failed to provide sufficient parking for its invitees and failed to warn its business invitees of the adjacent highway's dangers, even though those dangers were known to the property owner and operator. At the trial court level, Judge Lachman granted summary judgment in favor of the property owner and operator of the nightclub, finding that the defendant owed no duty of care to the decedent

continued on page 4

On The Inside

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P.O. Box 6099
Harrisburg, PA 17120
Phone: 800-734-0737 FAX: 800-734-0732
Email: cwasilefski@padefense.org or lgamby@padefense.org

Thomas R. Bond, Esquire . . . . . Editor in Chief
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After Nearly 100 Years

continued from page 1

with mesothelioma who did not work in occupations traditionally associated with asbestos exposure represent another potential liability exposure for talcum powder manufacturers and retailers. In such cases, expert testimony linking mesothelioma to exposure to asbestos in talcum powder has been sought by plaintiffs.

An example of such a case is Winkel v. Colgate-Palmolive, et al., No. BC549253, Calif. Super., Los Angeles Co. In Winkel plaintiff received a 13 million dollar verdict against Colgate-Palmolive, and several other defendants. She presented expert testimony that her mesothelioma was caused by her use of Cashmere Bouquet talcum powder, which purportedly contained asbestos, spanning from the early 1960s until the mid-1970s. Thus, the lines of causation between asbestos, talcum powder and mesothelioma were seemingly merging.

II. Brandt v. The Bon-Ton Stores, Inc., et al.

In a September 25, 2017 decision following a Frye hearing, a Philadelphia state court trial judge in Brandt v. The Bon-Ton Stores, Inc., et al., Philadelphia Court of Common Please, December Term, 2015, No. 2987, excluded the opinions of plaintiff's experts; Dr. Ronald Gordon and Mr. Sean Fitzgerald, because they did not use generally accepted methodology in the formulation of their opinions that the talcum powder contained asbestos or that plaintiff's mesothelioma was caused by asbestos allegedly contained in talcum powder used by the plaintiff. The court, citing Trach v. Fellin, 817 A.2d 1102,1112 (Pa. Super. 2003), stated that "the court's role is not to weigh in on the findings of these experts, but to ensure the methodologies that have benn employed are generally accepted and reliable." And that "[A] Frye hearing is warranted when a trial judge has articulated grounds to believe that an expert witness has not applied accepted *scientific methodology* in a *conventional fashion* in reaching his or her conclusion." Betz v. Pneumo Abex LLC, 615 PA. 504, 545 (2012).

In Pennsylvania, the proponent of expert testimony bears the burden of establishing its admissibility under Pennsylvania Rule of Evidence 702. Rule 702 allows for expert testimony where (a) the expert's knowledge is beyond that possessed by the average layperson; (b) the expert's knowledge will help the trier of fact to understand the evidence; and (c) *the expert's methodology is generally accepted in the relevant field*. Rule 702's third requirement is based on the aforementioned rule from Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Under Frye, as adopted by the Pennsylvania Supreme Court and codified in Rule 702, expert testimony is inadmissible unless the principles and methodology used by the expert have reached general acceptance in the relevant community.

In Brandt, like Winkel, the plaintiff claimed that she had developed mesothelioma as a result of exposure to asbestos in the Cashmere Bouquet brand of cosmetic talcum powder. She sought to introduce the testimony of two scientists to establish the presence of asbestos in the talcum powder she used, as well as demonstrate a causal connection between the asbestos and her mesothelioma. Defendant filed a motion to exclude the opinions of both experts and Frye hearings were held in which the defendant examined the plaintiff's experts based upon their methodology and presented the testimony of its own expert to establish the proper standards and methodologies.

A. Sean Fitzgerald – Lack of Proper Identification of Asbestos Fibers

At the first Frye hearing, Plaintiff's geologist, Sean Fitzgerald, testified that the cosmetic talcum powder he tested contained significant numbers of asbestos fibers and that they were released when the product was used. In terms of methodology, Mr. Fitzgerald discussed the various tools available to detect asbestos and testified that he uses Transmission Electron Microscopy ("TEM") to distinguish asbestos fibers from non-asbestos fibers. One component of his TEM analysis is an evaluation of a fiber's morphology (i.e., its shape and size). He also considers electron diffraction ("ED") patterns, which illustrate a fiber's crystalline structure, and an energy dispersive spectrometer ("EDS"), which produces a chart detailing the chemical composition of the object being scanned.

Mr. Fitzgerald testified that he first conducted "glovebox" air sample testing. A "glovebox" is a small plastic box with gloves built into the wall to manipulate the contents of the box. He released various amounts of cosmetic talcum powder supplied by the plaintiff's attorney in the glovebox and extracted air samples to be examined using TEM. Once the samples were extracted, Mr. Fitzgerald employed the "Yamate" protocol in part. The Yamate protocol contains three levels of increasingly sensitive analysis to differentiate asbestos from non-asbestos fibers. Mr. Fitzgerald testified that he only fully conducted the first two levels of analysis and admitted that he only partly conducted the third level.

The court considered this a deviation from generally accepted methodology.

Further, Mr. Fitzgerald admitted that he did not initially do a bulk testing of the talc provided by his client because his client told him that the samples had been tested and were found to contain asbestos. Because he admitted that glovebox testing should be preceded by a bulk analysis to confirm the presence of asbestos in the sample itself, the court considered this a second deviation from generally accepted methodology.

Mr. Fitzgerald also acknowledged that one issue with the TEM analysis he employed was distinguishing between asbestiform and non-asbestiform amphibole minerals. TEM analysis relies on the aspect ratio of each particular fiber to determine whether or not it is asbestiform. However, the process of milling the fibers into talc breaks each individual fiber into fragments, distorting the aspect ratio. Although he acknowledged that there are identification protocols that state that zone-axis ED and quantitative EDS are the only methods that can reliably differentiate asbestos from non-asbestos amphibole minerals, he did not use either. The court considered this another deviation from generally accepted methodology.

Based upon Mr. Fitzgerald's admitted failure to bulk test the sample for asbestos and his deviation from scientifically accepted methodology, the court found that "… although some individual components of Mr. Fitzgerald's methodology are generally accepted, other components, and the methodology used to analyze his findings, are not. That's the problem." The court went on to determine:

… the testing, how he structures the testing, and how he measures and analyzes the results, are in fact self-designed variations of scientifically accepted methodologies; a mishmash of scientifically accepted methodologies The standards he uses to measure acceptable levels of asbestos exposure, i.e. the background, change not in accordance with the item and the environment being measured but in a manner that would appear arbitrary at times.

As a result, the court found that Mr. Fitzgerald's modified, varied and arbitrary testing deviated from generally accepted methodology of identifying asbestos in a product. The court precluded his opinion based upon the Frye standard.

B. Dr. Ronald Gordon – Lack of Scientifically Accepted Methodology to Establish Causation

The plaintiff also offered testimony of Dr. Ronald Gordon, an experimental pathologist working at Mt. Sinai Hospital. Dr. Gordon sought to testify that the asbestos in the Cashmere Bouquet caused the plaintiff's mesothelioma. Accordingly, he examined 1/600th of a gram of the plaintiff's lung tissue and 1/600th of a gram of the plaintiff's lymph tissue. He admitted that this was less than the optimal amounts of two grams of lung tissue and one gram of lymph tissue. Ultimately, he identified one asbestos fiber in the lung tissue and one asbestos fiber in the lymph tissue.

He then extrapolated his findings using a formula based on the weight of the tissue used. He then compared his extrapolated findings to a control group of thirty-five tissue samples from individuals that could not be identified as having any exposure to asbestos. Dr. Gordon testified that there were no asbestos fibers present in any of the thirty-five tissue samples in the control group. According to the Yamate protocol, the minimum detectable difference between a control group sample and a study sample is five fibers. Dr. Gordon admitted that, the difference between the number of fibers found in the plaintiff's lung and lymph tissue (three) and the control tissue (zero) was less than that minimum detectible difference. He also admitted that his extrapolation was not based on any statistical analysis, and that neither lung tissue nor lymph tissue is homogenous. Upon review of Dr. Gordon's testimony, the court found as follows:

… Dr. Gordon's methodology in ascribing causation of Plaintiff's mesothelioma was not established through generally acceptable scientific methodology. Dr. Gordon used substantially less than the standard amounts for his testing of both lung and lymph tissue samples. Similar to Mr. Fitzgerald, he used some generally accepted testing methods in combination with methodologies not generally accepted; he varied and/or modified accepted methodology. When asked why he varied the methodology, his response was "to find asbestos."

Likewise, the court found that Dr. Gordon's causation opinion was precluded pursuant to the Frye standard.

III. Conclusion

Although the court acknowledged that both of the plaintiff's experts employed individual elements of several different generally accepted asbestos detection protocols and causation methodologies, they modified, varied, or deviated from those generally accepted protocols and methodologies. The "mishmash" of methodologies that they employed simply was not enough to meet the requirements of Frye and Rule 702. Based upon the mishmash approach employed by the experts, the court barred both experts from testifying. Accordingly, when analyzing scientific and causation testimony of an opposing expert, counsel must not only look to determine if the appropriate 'buzz words' with respect to scientific testing are contained within the report but he/she must actually determine and carefully scrutinize the report or reports to determine if the appropriate test, protocols and methodologies were actually followed. If not, counsel should make the appropriate motion or application to request a Frye hearing and be prepared to affirmatively present evidence of the appropriate methods and protocols that should have been used. So although the Frye standard may be older and may not provide as much latitude to attack the opinions of an opposing expert, it still has teeth and should not be overlooked when your opponent expert fails to utilize or attempts to modify scientifically accepted methodology.

**By Wesley R. Payne, IV, Esquire, partner, White and Williams LLP and Jonathan Woy, associate, White and Williams.*

Park and Cross

continued from page 1

at the time of his death because his accident occurred while he was crossing Route 309, not on any property owned or possessed by the defendants. On appeal, the Superior Court affirmed Judge Lachman's holding.

The *Newell* court held that, "[u]nder Pennsylvania law, state highways are the property of the Commonwealth. The Commonwealth has the exclusive duty for the maintenance and repair of state highways." (*Allen*, 625 A.2d at 1328-29.) The court cited Restatement (Second) of Torts § 349 for the proposition that a possessor of land abutting a public highway owes no duty to maintain said highway or to protect pedestrians—including business invitees—injured by alleged "hazards" or "dangerous conditions" of that highway while crossing the street. Specifically, the court stated:

A pedestrian who walks on a public highway places himself at risk of injury from vehicles traveling on the highway. Any duty of care owed to that pedestrian must belong to those who maintain the road and those motorists who are licensed to drive safely on it. **The duty does not extend to landowners who have premises adjacent to the roadway.** (Emphasis added.)

Moreover, the *Newell* court specifically held that a landowner does not owe any duty to provide its guests or business invitees with adequate parking. The court stated:

A landowner may not be held liable to a business invitee for injuries that occur to the invitee on an adjoining highway or other property as a result of breach by the landowner of an alleged duty to provide sufficient parking on its own premises. **We hold that no such duty arises under Pennsylvania law that would form the basis for a negligence action in these circumstances.** (Emphasis added.)

Finally, the *Newell* court rejected the plaintiff's argument that Restatement 2d Torts § 323 creates a duty to warn where a property owner or operator has previously warned invitees about conditions of the adjacent highway. The court found that the property owner's sporadic protective conduct did not create a duty of voluntary assumption to protect its invitees from accidents on the adjacent highway. The court held that such a theory of voluntary assumption of a duty to protect patrons from highway accidents raises significant public policy concerns because highway safety is a governmental responsibility. Therefore, a property owner and operator has no duty to warn its invitees of dangers of an adjacent highway, and if a property owner or operator chooses to so warn, no duty is created.

**Claire B. Ventola, Esquire is a shareholder and a member of the Casualty Department in the Philadelphia, Pennsylvania office of Marshall Dennehey Warner Coleman & Goggin.*

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Pennsylvania Supreme Court to Clarify Subrogation within the Context of Workers' Compensation Law

*By Thomas R. Bond, Esquire**

Several important workers' compensation cases involving the pursuit of subrogation recoveries under the Pennsylvania Workers' Compensation act (Act) when the injured worker has not filed a third party action have recently been handed down by our appellate courts. These cases underscore the importance of carefully crafting the wording to be used in the portion of the pleadings calling for identification of the plaintiff(s). Before discussing these cases, it would be beneficial to briefly examine the statutory language in Section 319 of the Act.

Section 319 of the Pennsylvania Workers' Compensation Act provides in pertinent part:

> Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future instalments of compensation.

77 P.S. § 671 (emphasis added). (Purdon Supp. 1982).

The Pennsylvania Supreme Court held in the case of *Winfree v. Philadelphia Electric Co*., 554 A.2d 485 (Pa. 1989) that: "The statute is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise. Furthermore, it does more than confer a 'right' of subrogation upon the employer; rather, subrogation is automatic."

It should be noted that subrogation recoveries can have a real impact on the bottom line of employers beyond the monetary amount recovered. The sums that employers recover by way of subrogation are generally excluded from the evaluation of the employer's claim performance, loss rating determination, reserve requirements and premium assessment. In Pennsylvania, Workers' Compensation premiums are set by the procedures created by the Pennsylvania Compensation Rating Bureau ("PCRB"). In calculating "incurred loss", only "net loss" should be used. "Incurred loss" must therefore take into account monies reimbursed from the third party suit in order to better reflect the actual loss for use in predicting future risk. *Pennsylvania Workers Compensation Manual of Rules, Classifications and Rating Value*

for Workers Compensation and For Employers Liability Insurance, Section (V-8(b)) (Effective April 1, 2011).

The employer's right of subrogation out of third party recoveries by injured worker is very clear, but what steps can employers take when the injured workers does not pursue a third party action? There have been several recent Pennsylvania decisions speaking to this issue that bear reviewing. The reader is strongly urged to pay particularly close attention to the wording used to identify the plaintiff(s) in the following two cases.

In the Pennsylvania Supreme Court Court. case of *Liberty Mutual Insurance Company* v. *Domtar Paper Co*, 113 A.3rd 1230 (PA. 2015) (hereinafter "*Domtar Paper Co*.") the stated identity of the plaintiff as set forth in the case caption reads **"Liberty Mutual Insurance Company as Subrogee of George Lawrence**"(Emphasis added).

Lawrence, an injured worker, had sustained a fall on premises owned or controlled by the Defendants, and he had received disability and medical benefits from Liberty Mutual, his employer's workers' compensation carrier.

The Court noted Lawrence had not commenced an action against the alleged tortfeasor, and was not listed as a Use Plaintiff in the action filed by Liberty Mutual.

The Pennsylvania Supreme Court held that Liberty Mutual, in listing itself in the case caption as "Subrogee", was simply attempting to pursue its own subrogation claim directly against the third-party tortfeasors and, accordingly, ruled that the complaint filed by Liberty Mutual had been properly dismissed by the trial court below.

In doing so, the Court cited case law where it has been consistently held that an employer/insurer has no independent right to sue a tortfeasor in the absence of the injured employee being included in the action.

The Court firmly stated that the right of action against a third-party tortfeasor under Section 319 of the Act remains in the injured employee, and that the employer/insurer's right of subrogation under Section 319 must be achieved in a single action brought in the name of the injured employee, or joined by the injured employee. The Court emphasized that in Pennsylvania courts disfavor splitting causes of action, and has frequently remained true to this maxim in the context of workers' compensation subrogation.

The Court noted that Lawrence had not commenced an action against the alleged tortfeasors, was not named in the action by Liberty Mutual, and did not join the action filed by Liberty Mutual.

Recently, another important appellate decision was handed down by the Pennsylvania Superior Court in the case of *The Hartford Insurance Group on Behalf of Chunli Chen v. Thrifty Car Rental, Kafumba Kamari and Rental Car Finance Group,* No. 976 EDA 2016; Opinion filed February 10, 2017; Opinion by Judge Olson. (Hereinafter to be referred to as the *Hartford Ins*).

Key facts in this include the fact Chunli Chen ("Chen") was standing in the parking lot of Thrifty Car Rental waiting to rent a car when she was struck by a rental car operated by defendant, Kafumba Kamara, and owned by defendant, Thrifty Car Rental, and/or defendant Rental Car Finance Group ("Defendants"). Chen was in the course of employment at the time of this mishap and received workers' compensation benefits from The Hartford Insurance Group ("Hartford."). Up until the time Hartford brought this suit, Hartford had paid $59,424.71 in medical and wage benefits pursuant to a workers' compensation insurance policy maintained by her employer, Reliance Sourcing, Inc.

On September 15, 2015, Hartford initiated an action sounding in negligence against the Defendants, declaring in the caption of the complaint that plaintiff was "**The Hartford Insurance Group *on behalf of Chunli Chen*** " (Emphasis added).

Defendants argued that the complaint must be dismissed because Hartford was "attempting to file suit to assert subrogation rights directly against the alleged third-party tortfeasor."

It is significant to point out that Chen had neither assigned her cause of action to Hartford, nor was a party to the lawsuit. In fact, Chen did not even verify the complaint filed by Hartford.

On February 25, 2016, the trial court entered an order dismissing Hartford's complaint with prejudice.

As the trial court explained, "under Pennsylvania law, actions against a third-party tortfeasor must be brought by the injured employee; the workers' compensation insurance carrier has no independent cause of action against the tortfeasor under section 319 of the Workers' Compensation Act."

The Pennsylvania Superior Court, in reversing this ruling, stressed that the plaintiffs were identified as "the Hartford Insurance Company on behalf of the insured employee, Chen." The Court reasoned, therefore, that the complaint was intended to establish the liability of third-party tortfeasor to Chen ***in the full amount*** to which Chen is entitled due to Defendants' alleged negligence (Emphasis supplied).

Therefore, the Court concluded that, in contrast to the holding reached in *Domtar Paper,* Hartford was not attempting to pursue a subrogation claim directly against a third-party tortfeasor, and was not seeking to recover only the amount that it paid in worker's compensation benefits, thereby avoiding a "splitting" of Chen's cause of action.

On August 9th, 2017, however, the Supreme Court of Pennsylvania Granted the Petition for Appeal filed in this case (No. 205 EAL 207).

The Court framed the issue that it will hear with respect to Section 319 right of subrogation recovery as follows:

> Can a Workers' Compensation lienholder bring a direct action on behalf of the injured worker to recoup amounts paid to the Injured worker from the alleged tortfeasor contrary to the standard set in *Liberty Mutual Insurance Company v. Domtar Paper Co.*, 631 Pa. 463, 113 A.3d 1230 (Pa. 2015)?

continued on page 6

PA Supreme Court

continued from page 5

Tracking back to our discussion of *Domtar Paper*, that standard would seem to be that the viability of a cause of action initiated by a workers' compensation insurance carrier to protect and realize its right of subrogation will turn on the question of whether the injured employee was named in the action, or had been joined into the action filed by the insurance carrier. Pending a ruling in the *Hartford Ins.* case, practitioners would be well-advised to adhere to this standard.

**Tom R. Bond, Esquire is Of Counsel with the Philadelphia Office of O'Hagan Meyer, P.C. His email address is tbond@ohaganmeyer.com.*

AUTOMOBILE CASE LAW UPDATE

*By Joseph Hudock, Esquire**

PENNSYLVANIA SUPERIOR COURT ORDERS NEW TRIAL WHERE TRIAL COURT ADMITTED EVIDENCE OF PLAINTIFF'S ALCOHOL CONSUMPTION WITHOUT SUPPORTING EVIDENCE OF UNFITNESS TO OPERATE VEHICLE

ROHE v. VINSON, 158 A.3d. 88 (Pa. Super. 2016)

Mr. Rohe ("plaintiff") suffered a right, above the knee amputation as a result of a motorcycle/truck accident which occurred along Route 220 in Bradford County, Pennsylvania.

Immediately prior to the accident, the plaintiff was behind a tractor trailer and a tri-axle dump truck operated by defendant Vinson. Plaintiff attempted to pass both the tractor trailer and the tri-axle in a legal passing zone. He successfully passed the tractor trailer. As he was attempting to pass the tri-axle truck, he noticed that its left turn signal was on and it was attempting to make a left into a gas station. Plaintiff's motorcycle struck the bumper of the tri-axle truck and he was ejected.

Plaintiff brought an action against Mr. Vinson and his employer ("defendants") alleging that Vinson failed to activate his turn signal early enough and failed to yield the right of way to the plaintiff. Discovery revealed that plaintiff had consumed between six (6) and eight (8) 12 ounce beers prior to the accident.

Plaintiff filed a motion in limine to preclude evidence of his alcohol consumption as his BAC post-accident was below the legal limit. Further, there was no indication from other witnesses, etc. that the plaintiff was unfit to operate the motorcycle at the time of the loss. In opposing the motion, the defendant put forth the toxicology report of Gary Lage, Ph.D., who opined that the plaintiff would have been impaired at the time of the accident and the impairment would have been a significant cause of the accident. Based upon this, the trial court allowed the case to proceed to trial with the evidence of plaintiff's alcohol consumption.

The jury returned a verdict in favor of the defendants finding that defendant Vinson was "not negligent". Post-trial motions were filed and denied. Plaintiff then filed an appeal to the Superior Court contending that the trial court erred in admitting the evidence of alcohol consumption without more.

The Superior Court agreed with plaintiff and ordered a new trial as the verdict may have been based upon improperly admitted evidence. The Superior Court affirmed the long line of cases which hold that there must be "other evidence of intoxication" when a person's BAC is below the legal limit. The Superior Court indicated that it was "skeptical" of the toxicologist's testimony which "related back" a BAC to the time of the incident. Also, the Superior Court held that there was no evidence of the plaintiff's unfitness to operate the motorcycle and that the toxicology report was alone insufficient.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT DEAD MAN'S STATUTE NOT WAIVED BY DEFENDANT'S LIMITED PARTICIPATION IN DISCOVERY

DAVIS v. WRIGHT ex rel. WRIGHT, 156 A.3d 1261 (Pa.Super. 2017).

Plaintiffs, Davis and Gibson, alleged personal injuries as a result of a motor vehicle accident which occurred while Gibson was a guest passenger in Davis' vehicle. The plaintiffs alleged that the injuries were the result of the negligence of Bryon Wright, Jr. ("decedent"), who passed away subsequent to the accident. The decedent's personal representative ("defendant") filed an Answer alleging that the decedent was not negligent in any fashion. The representative also filed a counterclaim against Davis alleging that the accident was solely his fault. Approximately nine (9) months after the Complaint was filed, the personal representative filed a motion for summary judgment alleging, in part, that the plaintiffs were precluded from testifying against the decedent by virtue of the Dead Man's Statute, 42. Pa. C.S.A. §5930. The plaintiffs were, therefore, unable to prove a case of negligence on the part of the decedent.

The plaintiffs responded that the Dead Man's Statute was inapplicable as it had not been raised as an affirmative defense. Also, such a defense was waived as the defendant had participated in discovery. The plaintiffs further argued that there was evidence outside of their own testimony to prove a case of negligence against the decedent.

Despite these arguments, the trial court granted the defendant's motion for summary judgment. The trial court also later dismissed the counterclaim. The plaintiffs appealed to the Superior Court alleging error on the part of the trial court and its interpretation of the Dead Man's Statute.

continued on page 8

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Automobile Case Law Update *continued from page 6*

On appeal, the Superior Court initially held that the Dead Man's Statute was not waived as it is not an affirmative defense required to be pled in a responsive pleading. Further, it was not waived by the defendant's limited participation in discovery. The plaintiffs were not served any discovery by the defendant nor did the personal representative testify as to facts occurring after the decedent's passing. Therefore, plaintiffs were not competent to testify at trial regarding the accident.

As to the next issue, the trial court below it found that there was insufficient evidence of record for plaintiffs to prove their case through competent independent sources. The Superior Court concurred with this finding.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT SLEEP DISTURBANCE IS NOT A SERIOUS INJURY; TRIAL COURT PROPERLY RULED THAT OTHER PLAINTIFF'S DUI WAS ADMISSIBLE BUT ERRED IN ALLOWING EVIDENCE OF CHARGES FOR DRIVING UNDER SUSPENDED LICENSE AND HARASSMENT

VETTER v. MILLER, 157 A.3d 943 (Pa.Super. 2017).

The plaintiffs, John Vetter and Ashley Jones, were leaving a wedding reception where they had been drinking when they alleged that the defendant began to tailgate them. When they stopped at a red light, Vetter, the driver, got out of his vehicle to confront the defendant. The defendant tried to get away from Vetter and struck him with his vehicle dragging him 100 feet. Vetter's BAC at the time was .09. Plaintiff Jones alleged that she suffered negligent infliction of emotional distress in witnessing Vetter, her husband, be injured.

Jones had selected limited tort on her policy and the defendant filed a motion for summary judgment on the basis that Jones' only injury was sleep disturbance. Jones also alleged that she had post-traumatic stress disorder; but, the court granted the motion noting that there was no evidence that her injury caused a serious impairment of a body function and she had been working full-time while pursuing a nursing degree and taking care of her 4-1/2-year-old son.

The case proceeded to trial on Vetter's claim and the jury found that he was 74% negligent and that defendant was 26% negligent. On appeal to the Superior Court, Vetter argued that the trial court erred in admitting his guilty plea to driving with a suspended license and in allowing evidence that he had been arrested for harassment. The Superior Court found that the admission of the DUI conviction was proper, however, allowing evidence of a suspended license and harassment arrest was reversible error; and, a new trial was ordered.

IN LATEST PRONOUNCEMENT ON SACKETT ISSUES, PENNSYLVANIA SUPERIOR COURT HOLDS THAT "AFTER ACQUIRED VEHICLE" CLAUSE INAPPLICABLE WHERE VEHICLE ADDED TO POLICY BEFORE PURCHASE COMPLETED

PERGOLESE v. STANDARD FIRE INS. CO., 2017 Pa.Super.LEXIS 243 (Pa.Super. Apr. 11, 2017).

Pergolese ("the insured") insured four (4) vehicles under one policy with Standard Fire Insurance Company ("insurer") and a fifth vehicle under a separate policy with that insurer. Upon policy inception the appropriate §1738 stacking waivers were executed. Over the years, the insured had replaced numerous vehicles. As such, new stacking waivers were arguably not required.

However, Pergolese dropped one of the vehicles from the policy that insured four (4) vehicles leaving three (3) vehicles insured. There was no replacement vehicle at that time. Forty-four (44) days later the insured contacted his agent to add a fourth vehicle to his policy prior to taking possession of the same. No new stacking waiver was requested by the insurer at that time.

The insured was severely injured in a motor vehicle accident in July of 2001 and demanded $500,000 in stacked UIM coverage. This request was denied as the insurer was of the position that the after acquired vehicle provision did not require a new stacking waiver when the subject vehicle was added to the policy.

A declaratory judgment action was filed. The record demonstrated that the latest vehicle added to the policy was not "a replacement vehicle". Cross-motions for summary judgment were filed; and, the trial court granted the insured's motion for summary judgment finding that §1738 required that the insurer obtain a new waiver of stacking under this specific factual scenario. An appeal was filed to the Pennsylvania Superior Court.

Citing its prior decision in Bumbarger v. Peerless Ins. Co., (93 A.2d 872 (Pa. Super. 2014), the Superior Court held that the insured had requested proof of coverage prior to completing the purchase. As such, the vehicle was not added to the policy by way of the after-acquired vehicle clause; and, as the addition of the additional vehicle constituted the "purchase of UM/UIM coverage", a new stacking waiver was required.

Since no waiver was obtained, the insured was entitled to $500,000 in stacked UIM coverage. Of note, the opinion did not explain why the insured was entitled to stacking under the companion single vehicle policy.

FEDERAL COURT FOR MIDDLE DISTRICT OF PENNSYLVANIA DISMISSES BAD FAITH CLAIM WHICH IS UNSUPPORTED BY SPECIFIC FACTS

MEYERS v. PROTECTIVE INS. CO., No. 3:16-cv-01821, 2017 U.S.Dist. LEXIS 11338 (M.D.Pa. Jan. 27, 2017).

Plaintiff was working as a delivery driver when he was struck and injured by a hit-and-run vehicle. He made an uninsured motorists claim to Protective Insurance Company and claimed that he provided Protective with all the information necessary to pay the $1,000,000 policy limits. The parties were unable to resolve the claim; and, plaintiff filed a complaint for breach of contract and bad faith. The complaint contained a "laundry list" of 36 general allegations describing ways

in which an insurance company could act in bad faith.

Protective filed a motion to dismiss the bad faith claim arguing that it was not supported by well-pleaded allegations. The court specifically found that a 3-1/2 month delay between the demand and initial offer was not unreasonable. There was also no evidence that the initial offer of $225,000 was unreasonable since it exceeded the special damages by nearly $100,000.

Protective was also accused of bad faith for having requested four IMEs. However, the court noted that plaintiff himself admitted he had a significant medical history, there was a delay in reporting the accident, and only minor property damage. The court ultimately concluded that plaintiff's allegations were conclusory and they were stricken, but the court gave plaintiff leave to file an amended complaint if plaintiff was able to plead more specific facts.

LACKAWANNA COUNTY TRIAL COURT HOLDS THAT A PARTY MAY NOT SUBSTITUTE ANOTHER PARTY IN A REISSUED WRIT OF SUMMONS WITHOUT THE CONSENT OF ALL OTHER PARTIES OR LEAVE OF COURT

MARSH v. LIZZA, No. 16CV2812 (C.C.P. Lackawanna Co., Mar. 1, 2017).

Plaintiff filed a Wrongful Death and Survival action against his sister alleging that his sister's negligent conduct led to their mother's death. Plaintiff filed a writ of summons identifying his mother's estate as the named plaintiff. The writ was subsequently reissued three times. Without securing his sister's consent or seeking leave of court, plaintiff changed the name of the named plaintiff on the fourth reissued writ by substituting himself for his mother's estate. The sister filed preliminary objections asserting that, under Pa.R.C.P. 1033, a plaintiff can only be substituted with consent of all parties or leave of court. The court, therefore, found that the amended writ of summons and complaint were both nullities and granted defendant's preliminary objections.

LACKAWANNA COUNTY TRIAL COURT ADDRESSES ENFORCEABILITY OF WRITTEN WAIVER OF RIGHT TO SEEK RULE 229.1 DAMAGES IN CONTEXT OF A SATISFIED MEDICARE LIEN

MARKIEWICZ v. CVS CAREMARK, CORP., No. 14 CV 4043 (C.C.P. Lackawanna Co, Mar. 10, 2017).

The parties resolved plaintiff's claim for $10,000. A settlement agreement was reached whereby the plaintiff was ultimately responsible for satisfying any medical liens, including any Medicare or Medicaid liens. The agreement also specifically set forth that plaintiff was waiving any potential damages under Pa. R.C.P. 229.1. The defendant tendered a settlement draft after deducting the amount of the Medicare lien and paying that amount directly to CMS. As such, plaintiff filed a motion for sanctions alleging that defendant violated Rule 229.1 by directly satisfying the lien, thus, depriving the plaintiff of the ability to negotiate the lien. Defendant responded that there was no right to recover any damages pursuant to Rule 229.1 as the settlement draft was delivered within the time set forth in the agreement and that any such damages were waived.

The trial court held that the plaintiff was not entitled to interest or attorney's fees under Rule 229.1 as such damages were specifically waived by the express terms of the settlement agreement. However, the court held that if defendant was going to pay CMS directly, it must be reflected in the settlement agreement. As such, defendant's actions violated the settlement agreement. The court gave plaintiff leave of court to bring a petition for breach of the settlement agreement separate from the Rule 229.1 motion.

LUZERNE COUNTY TRIAL COURT DISMISSES ALLEGATIONS OF "RECKLESSNESS" AND PUNITIVE DAMAGE CLAIM WHERE PLAINTIFF PLEADS NO FACTS IN SUPPORT

WALKER v. HELSEL, No. 2016-09969 (C.C.P. Luzerne Co., Feb. 22, 2017).

Plaintiff and defendant were involved in a motor vehicle accident, and plaintiff filed a Complaint alleging "recklessness" and "reckless indifference" on the part of the defendant and sought punitive damages. Defendant filed preliminary objections to these allegations and also objected to those portions of the plaintiff's Complaint which referenced the police report, evidence of defendant's guilty plea and insurance information. After reviewing the complaint, the court agreed with defendant that there were no facts that supported allegations of recklessness. The court, therefore, granted the preliminary objections but gave plaintiff leave to re-assert those allegations if supported by evidence obtained in discovery. The court found that statements from the police report, evidence of a guilty plea and liability insurance information did not constitute scandalous or impertinent matter, and therefore, overruled defendant's preliminary objections in this regard.

NORTHAMPTON COUNTY TRIAL COURT DISMISSES ALLEGATIONS OF RECKLESSNESS AND PUNITIVE DAMAGES FROM REAR-END ACCIDENT CASE

WASILOW v. ALLEN, No. C-48-CV-2006-00633 (C.C.P. Northampton Co., Sept. 27, 2016).

The parties were involved in a motor vehicle accident in Montgomery County. The plaintiff alleged that defendant "violently struck" plaintiff's vehicle from behind while plaintiff was stopped. Plaintiff filed a complaint including allegations of "recklessness" and "reckless behavior". Defendant filed preliminary objections. On these facts, the court found that, even if the allegations against the defendant were true and constituted negligence, there was nothing alleged against defendant which could be considered outrageous or willful, wanton or reckless conduct. Accordingly, the court granted defendant's preliminary objections.

PUNITIVE DAMAGE CLAIM ALLOWED TO PROCEED WHERE FEDEX DRIVER WAS LOOKING AT TRACKING DEVICE AT TIME OF ACCIDENT

continued on page 10

Automobile Case Law Update *continued from page 9*

RAMOS v. FRASCA, No. C-48-CV-2016-1166 (C.C.P. Northampton Co., Aug. 5, 2016).

Plaintiff brought an action for personal injuries allegedly sustained when her vehicle was rear-ended by a FedEx truck operated by defendant Frasca. According to the plaintiff, Frasca was either using his cell phone or some other electronic tracking device at the time of the accident. As such, her complaint contained a claim for punitive damages.

Defendants filed preliminary objections to the punitive damages claim contending that there was no "reckless conduct". Defendant also requested that the court strike any reference to operation of the vehicle in a "careless manner".

In overruling the preliminary objections, the court held that it was too early to determine if the defendant's conduct met the requisite "reckless conduct" as the complaint contained allegations that the defendant was actually looking at and utilizing a tracking device at impact, as distinguished from a situation where the allegation was merely one of cell phone use (however, analogous to texting on a cell phone). The court also overruled the demurrer to the "careless driving" language.

**Joseph Hudock, Esquire, is a partner in the Pittsburgh Office of Summers, McDonnell, Hudock, Guthrie, and Steel, P.C.*

Pennsylvania Employment Law Update Significant Case Summaries

*By Lee C. Durivage, Esquire**

Third Circuit holds that plaintiffs may not seek damages pursuant to Section 1983 for stand-alone violations of Title VII or the ADA.

Williams v. Pa. Human Relations Comm'n, 2017 U.S. App. LEXIS 16618 (3d. Cir. Aug. 30, 2017)

The plaintiff, an investigator with the Pennsylvania Human Relations Commission, alleged that her supervisors subjected her to harassment on the basis of her race and constructively discharged her, in violation of Title VII and the Americans with Disabilities Act. The plaintiff further sought damages from her supervisors, individually, pursuant to Section 1983.

Following the trial court's order granting the Commission's motion for summary judgment, the plaintiff appealed to the Third Circuit. In this case of first impression, the Third Circuit addressed "[w]hether violations of Title VII and the ADA may be brought through [Section] 1983."

In affirming the trial court's decision, the Third Circuit expressly stated, "In light of the comprehensive administrative scheme established by Title VII and the ADA, we conclude that these claims, standing alone, may not be asserted under [Section] 1983." In holding that the plaintiff could not seek damages under Section 1983, the Third Circuit noted that its decision was in line with every circuit that had addressed the issue. Notably, the court reasoned that Congress did not intend for Section 1983 to serve as a remedy for a violation of Title VII and the ADA when it created an entirely separate administrative process for those statutes. Indeed, the Third Circuit outlined all of the administrative steps a plaintiff is required to exhaust before pursuing Title VII and ADA claims in court. Whereas Section 1983 "[h]as only a one-step 'remedial scheme,' plaintiffs may file [Section 1983] suits directly in federal court." In conclusion, the Third Circuit determined that, "[g]iven these respective statutes, Congress's intent is clear" and "[a]llowing pure Title VII and ADA claims under [Section] 1983 would thwart Congress's carefully crafted administrative scheme by throwing open a back door to the federal courthouse when the front door is purposely fortified."

Third Circuit finds that a custodial foreman's authority to assign work to the plaintiff required a finding that he was the plaintiff's supervisor for purposes of Title VII.

Moody v. Atlantic City Board of Education, 2017 U.S. App. LEXIS 17191 (Sept. 6, 2017)

The plaintiff was a substitute custodian in the employer's school district. As a substitute custodian, she could obtain assignments at any school within the school district. In an effort to increase her hours, the plaintiff met with several custodial foremen in the district, as they had the authority to request that she work when one of their regular employees was out. Shortly after her meetings, she began to consistently receive assignments at one of the schools.

In her lawsuit, she alleged that the custodial foreman of that school began to sexually harass her, including commenting that he would provide her with more hours if she performed sexual favors for him; grabbing her breasts or buttocks; and she found him in his office unclothed on one occasion. Approximately two months later, the custodial foreman appeared at her home and told her she would get an employment contract if she had sex with him. After he began kissing her, she reluctantly had sex with him, asserting that she felt that her job was threatened. Shortly thereafter, she rejected his advances. Within the next two months, her hours were cut at that particular school. The plaintiff complained to upper management regarding the incidents. The school investigated the concerns by interviewing ten employees. While the school did not find evidence of sexual

harassment, it ordered the plaintiff and the custodial foreman to avoid any contact with each other.

The plaintiff then filed her federal lawsuit, alleging a hostile work environment and retaliation by the school district. The trial court granted the school district's motion for summary judgment, finding that: (1) the custodial foreman was not her supervisor for purposes of Title VII; and (2) the plaintiff failed to demonstrate that she sustained a tangible employment action. Finally, the trial court determined that the school district took prompt remedial action, which entitled it to the Ellerth/Faragher affirmative defense.

However, The Third Circuit reversed and remanded the dismissal in a split decision. Specifically, the Third Circuit held that the custodial foreman was the plaintiff's supervisor in light of the Supreme Court's decision in *Vance*. In so holding, the Third Circuit stated that, "Authority to assign work is a 'tangible employment action' because it is a decision that can 'inflict direct economic harm' by causing a 'significant change in benefits'" and that, by virtue of the custodial foreman's "power…to even allow [plaintiff] to work, he could effect a 'tangible employment action' by setting her hours and hence her pay." The Third Circuit further determined that questions of fact existed as to whether the plaintiff sustained a "tangible employment action," noting that there were many ways her work hours could be viewed. For example, the plaintiff worked 94 hours in the three pay periods prior to rejecting the foreman's advances and 62.5 hours in the three pay periods thereafter. Therefore, a reasonable juror could conclude that the foreman "[g]ave [plaintiff] hours to entice her to accede to his sexual demands and then reduced her hours after she rejected him) versus the fact that she received approximately the same number of hours in December as she did in January, after she rejected his advance (wherein a reasonable juror could also conclude that he "did not reduce [plaintiff's] hours at all following her rejection of his advances)." Based upon the language of this opinion, plaintiffs will continue to look to expand the concept of "supervisor" in connection with work assignments, even if those individuals are unable to hire or fire those plaintiffs.

Third Circuit permits age discrimination claims to proceed to trial when the employer deviated from its standard ranking system to the benefit of three significantly younger candidates for employment.

Bulifant v. Delaware River & Bay Auth., 2017 U.S. App. LEXIS 12157 (3d. Cir. July 7, 2017)

The plaintiffs sought review of the dismissal of their age discrimination claims following the employer's failure to hire them for full-time positions. In making its hiring decision, the employer utilized a standardized approach in which: (1) the same panel of interviewers were used; (2) the panel used the same preset questions; and (3) each panelist assigned numerical scores across four competencies (and provided comments) for each candidate. The candidates were then ranked and submitted to human resources and the managing director for a final decision. The managing director testified that the rankings are an "important guide," although human resources and managing directors have the ability to deviate somewhat from the strict numerical rankings in order to achieve other goals, such as diversity. In February 2012, the plaintiffs were not hired in favor of other candidates who scored higher than them, consistent with the employer's general practice. In September 2012, however, the employer hired the four highest ranked candidates (ages 52, 52, 24 and 52), skipped the plaintiffs (ages 61 and 53, who were ranked fifth and sixth, respectively) and then hired the seventh through ninth ranked candidates (ages 35, 26 and 33). While the managing director previously testified that there would be an explanation when the employer deviated from the numerical ranking, no contemporaneous documentation existed with respect to these hiring decisions. In January 2013, the employer resumed its adherence to the numerical rankings, hiring the two highest-ranking candidates.

In reversing the decision to dismiss the age discrimination lawsuit, the Third Circuit determined that the plaintiffs "[h]ave offered enough competing evidence that a reasonable jury could conclude [that the employer's] explanations were pretextual." Specifically, the Third Circuit noted that the plaintiffs pointed to the employer's "[d]eviation from its ranking system in favor of three significantly younger applicants with no contemporaneously documented explanation." The court found that this "[e]vidence is compelling, as the [employer] consistently followed its rankings when hiring for the other positions, and has acknowledged that it presumptively follows the rankings—so much so that it has a policy of creating a written record documenting its reasons in the event of a deviation." Indeed, the Third Circuit further noted, "Three applicants in their twenties and thirties leapfrogging two applicants in their fifties and sixties with no documented explanation as to why—is significant evidence of pretext in itself." In addition to the deviation argument, the Third Circuit determined that the plaintiffs successfully "undercut the [employer's] post-hoc explanation that its deviation from its rankings was necessary to promote diversity in its workforce." Specifically, while that explanation may have been sufficient for the seventh and ninth ranked candidates, the eighth ranked candidate (who was the youngest candidate) was, like the plaintiffs, a white male. Of course, this decision is an important reminder for employers to review their hiring policies and practices to ensure that any standardized procedures are followed and, if the procedures are not followed, that there is an explanation as to why that did not occur.

**Lee Durivage, Esquire is a shareholder and member of Marshall Dennehey Warner Coleman & Goggin's Employment Law Practice Group. Lee works in the firm's Philadelphia, Pennsylvania, office.*

POST-KOKEN UPDATE

*By Daniel E. Cummins, Esq.**

Severance vs. Consolidation of Post-Koken Actions

In his decision in the case of ***Mulgrew v. GEICO***, No. 3:16-cv-02217 (M.D. Pa. Oct. 11, 2017 Caputo, J.), the court denied a Defendant's Motion to Sever and Stay the Plaintiff's bad faith claim in a underinsured motorist matter.

The court referred to Federal Rule of Civil Procedure 21 which grants the Federal District Courts' broad discretion in deciding whether or not to sever a case.

Judge Caputo noted that the factors used to decide a Motion to Sever under Rule 21 are the same as utilized in deciding a Motion to Bifurcate under Rule 42(b).

The court differentiated between the two rules by indicating that a Rule 21 severance essentially creates a separate case, the disposition of which is final and appealable, whereas Rule 42(b) does not create a new case but bifurcates issues or claims within a single case for separate trials. A claim that is bifurcated under Rule 42(b) is not final and appealable as long as the other claims in the case remain unresolved.

The factors to be considered in deciding such motions to sever or bifurcate in Federal Court cases includes the (1) convenience of the parties, (2) avoiding prejudice, and (3) promoting expedition and economy.

In denying the Motion, Judge Caputo found that both the convenience of the parties and the judicial economy weighed against severance. The court also rejected the Defendant's claim that the resolution of the breach of contract action could greatly impact and potentially moot the bad faith claim. The court noted that litigation on the bad faith claim is not contingent upon the success of the breach of contract claim in that a Plaintiff could simultaneously prevail on a bad faith claim while losing the UIM claim. The court also found that severance would hinder judicial economy by requiring separate cases and separate trials instead of handling these claims within a single action.

The court additionally opined that the potential prejudice to the carrier of litigating the breach of contract and bad faith claims at the same time did not outweigh the countervailing goal of judicial economy in the prompt resolution of the entire matter.

For these reasons, Judge Caputo denied the Motion to Sever and Stay the Plaintiff's Bad Faith Claim.

In his recent decision in the case of ***Newhouse v. GEICO***, No. 4:17-CV-00477 (M.D. Pa. Sept. 18, 2017 Brann, J.), US Middle District Judge Matthew W. Brann denied GEICO's Motion to Sever and Stay the bad faith portion of a post-Koken claim filed by a Plaintiff also asserting a UIM claim.

The court declined to sever or bifurcate the UIM and bad faith claims after finding that the Plaintiff would utilize similar evidence and testimony for both claims. The court also rejected the carrier's argument that it would be prejudice by a lack of bifurcation because, relative to the bad faith action, the carrier will have to present information on how it values a claim before the jury assesses liability and damages in the UIM portion of the claim.

In the case of ***Jones-Silverman v. Allstate Fire & Casualty Ins. Co.***, No. 17-1711 (E.D. Pa. July 31, 2017 Baylson, J.), the Eastern District Federal Court denied a carrier's Motion to Bifurcate a Plaintiff's UIM breach of contract and bad faith claims.

The court found that the required evidence of each of the claims overlapped such that a bifurcation would amount to a waste of judicial resources.

The court also noted that, even if the parties settled their breach of contract claim, the insured could still pursue a bad faith claim based upon a theory of undue delay and claims handling. Accordingly, the court found that the potential resolution of the breach of contract claim did not necessarily render a bad faith claim moot.

The court otherwise ruled that it was equipped to address any issues of prejudice to the UIM carrier that may arise through the normal rules and procedures of litigation if the case was not bifurcated and a single trial was allowed.

As such, the court denied the carrier's Motion for Bifurcation.

In the Federal Eastern District Court of Pennsylvania case of ***Reeves v. Travelers Cos.***, No. 16-6448 (E.D. Pa. April 11, 2017 Baylson, J.), the court denied an insurance company's Motion to Bifurcate the UIM Bad Faith and Breach of Contract Claims arising out of a motor vehicle accident.

The carrier argued that the evidence and testimony regarding the bad faith claim would be irrelevant to the breach of contract UIM claim and would only confuse the jury on the case presented.

The carrier also asserted that evidence from the bad faith claim would unduly influence the jury's decision against the carrier in the breach of contract claim.

The carrier additionally asserted that, if the breach of contract claim was resolved or concluded in favor of the carrier, then the bad faith claim would be rendered moot.

The Plaintiff asserted, in part, that bifurcation would be inefficient because the carrier's conduct alleged in the bad faith claim was the very same type of conduct alleged in support of the breach of contract claim.

The court found that the carrier did not meet its burden of demonstrating that the prejudice it would face from trying both claims together would outweigh the detrimental effects of bifurcation upon the parties in the court in terms of judicial economy. The court noted that bifurcating the matter would unnecessary prolong the case. The court additionally stated that, while the two claims were separate, the evidence related to both claims was similar. The court found

that presenting the same evidence to two separate juries would constitute a waste of resources.

The court also rejected the carrier's position that a finding for the carrier on the breach of contract claim would automatically render the bad faith claim moot. In this regard, the court stated that Pennsylvania law allows for the recovery for bad faith due to an undue delay in processing a claim.

In the case of ***Eizen Fineberg & McCarthy, P.C. v. Ironshore Specialty Ins. Co.***, No. 16-2461 (E.D. Pa. Dec. 7, 2016 Slomsky, J.), the court denied a carrier's Motion to Bifurcate the insured's bad faith claim from a coverage claim.

The carrier argued that the bad faith claims were dependent upon a finding of a breach of contract and that it would impose unnecessary discovery burdens on the parties in a case that could be resolved through a finding of no coverage (and, therefore, no bad faith).

The court refused to find that the insured's bad faith was dependent upon the carrier's coverage claim. The court noted that there could be other bases for the claim for bad faith. The court also noted that judicial economy would be served by litigating the two (2) claims together.

In a recent decision by Order only out of the Allegheny County Court of Common Pleas, ***Nebel v. Encompass Home and Auto Insurance Company***, No. GD-15-015891 (C.P. Allegh. Co. Oct. 6, 2016 Folino, J.), the court granted a Defendant's Motion to Sever and Stay the Bad Faith portion of a UIM/bad faith matter.

In its Order, the court allowed discovery to proceed as set forth in Judge Wettick's *Wutz* Opinion. However, the trial of the bad faith was continued to a later time to allow for the filing a summary judgment and to allow the parties to organize discovery and expert reports.

In what may be the first decision of its kind out of Northumberland County, Judge Hugh A. Jones denied a UIM carrier's Motion to Sever and Stay a Bad Faith claim in the case of ***Kerchoff v. Donegal Ins. Group***, No. 16-CV-1266 (C.P. Northumberland Jan. 4, 2017 Jones, J.).

This Post-Koken matter involved bad faith and breach of contract UIM claims asserted following a motor vehicle accident.

In the case of ***Zinno v. GEICO***, No. 16-792 (E.D. Pa. Nov. 21, 2016 Baylson, J.), the court denied the carrier's Motion to Bifurcate the breach of contract and bad faith claims in this UIM case. The court also denied the carrier's Motion for a Stay of the discovery on the bad faith side of the claim.

The court denied the motion after finding that factors pertaining to the convenient to the parties, avoidance of prejudice, or efficiency did not warrant the bifurcation of the two (2) claims or the request for a stay of discovery.

Admissibility of Insurance Information at Trial

In his recent December 8, 2016 Opinion in the case of ***Rodkey v. Progressive Direct Ins. Co.***, No. 3:16-CV-454 (M.D. Pa. Dec. 8, 2016 Munley, J.), Judge James M. Munley addressed the issue of the admissibility of insurance information at a Post-Koken trial.

This matter arose out of an uninsured motorist claim brought by a Plaintiff who was allegedly the victim of a hit-and-run accident.

In pre-trial motions in limine, the defense sought to preclude evidence of the amounts of premiums the Plaintiff had paid for her uninsured motorist benefits insurance as well as evidence of the amount of uninsured motorists benefits available under the policy. The court denied both motions and ruled that the Plaintiff was allowed to present this evidence at trial.

The court found such evidence to be relevant to the breach of contract claim stated. Judge Munley also rejected the defense argument that the admission of such evidence would cause confusion and/or be prejudicial. The court felt that any potential confusion or prejudice could be addressed by way of jury instructions and argument of counsel.

The court otherwise ruled on a separate motion that the plaintiff would be allowed to pursue a recovery of her co-pays and deductible related to medical expenses as those expenses were not "paid or payable" as defined by Pennsylvania's Motor Vehicle Financial Responsibility Law.

**Daniel E. Cummins is a partner in the Scranton, PA firm of Foley, Comerford & Cummins and is the creator and writer of the Tort Talk blog which can be viewed at www.TortTalk.com.*

Pennsylvania Workers' Compensation Updates

*By Francis X. Wickersham, Esquire**

Fatal motor vehicle accident occurred within the course and scope of employment because the decedent was responding to an operational issue at one of his employer's locations.

Mandeep Rana v. WCAB (Asha Corporation); 1401 C.D. 2016; filed Sep. 29, 2017; Judge Cosgrove

The decedent was employed as a manager-in-training for a franchisee of Dunkin Donuts, which operated three locations. The decedent was assigned primarily to one location, but with the expectation that he would respond to operational issues at the other locations. On November 12, 2010, a message was left for the decedent by the employer at around 10:00 P.M., informing him that a kitchen employee at one of the locations had fallen ill during his shift. The decedent called the employer and said he would investigate the situation. While en route, the decedent and another employee were involved in a motor vehicle accident. Two days later, the decedent passed away due to injuries from the accident.

The claimants, the decedent's parents, filed a fatal claim petition. The Workers' Compensation Judge found that the decedent was furthering the employer's business and was on special assignment at the time of the accident and ordered payment of benefits to the claimants. The judge further found that, due to reciprocity between the United States and India, the claimants were considered dependents of the decedent.

The employer appealed to the Workers' Compensation Appeal Board on the basis the decedent was performing his regular job duties. The Board agreed, and reversed the judge's decision.

On appeal to the Commonwealth Court, the claimants argued that the decedent had no fixed place of employment, an exception to the general rule that an employee may not be compensated for an injury suffered while commuting to and from work. The employer responded by arguing that the decedent had a fixed place of employment since he regularly worked at any one of its three locations. Furthermore, the employer argued the decedent was not on a special mission, returning to stores after hours were a normal part of the decedent's duties.

The Commonwealth Court disagreed with the employer and reversed the Appeal Board's decision. According to the court's analysis, the decedent, as manager for one of the locations, was a stationary employee as to that store. However, the court found that the decedent was not a stationary employee with regard to the other locations but, rather, a traveling employee. Consequently, the court concluded that the decedent's motor vehicle accident was within the scope and course of his employment. The court also said that the accident could also be deemed compensable under the special assignment doctrine. The court noted that the decedent, having already worked his regular shift, was travelling to the other store to investigate a situation on behalf of the employer.

An insurance company is not entitled to Supersedeas Fund reimbursement when the underlying determination identifies the employer as liable for payment of compensation and does not conclude that compensation was not, in fact, payable.

Volpe Tile & Marble, Inc. v. WCAB (Redelheim); 118 C.D. 2017; filed Sep. 29, 2017; Senior Judge Leadbetter

An insurance company's application for Supersedeas Fund Reimbursement was denied by a Workers' Compensation Judge. In denying the application, the judge concluded that, under § 443(a), the company failed to establish that, upon the outcome of the proceedings, it was determined that compensation was not, in fact, payable.

The claimant sustained a work injury in July 2006 and was paid benefits. Later, his benefits were suspended by Supplemental Agreement. The claimant then filed a reinstatement petition, seeking a resumption of benefits as of December 2007. The employer and the insurance company filed a joinder petition against another insurance company, alleging the claimant suffered a new injury in December 2007. The judge granted the reinstatement petition. The employer and the insurance company filed an appeal and an application for supersedeas, which was denied by the Appeal Board.

While the appeal was pending, the claimant entered into Compromise and Release Agreements with both insurance companies. Both C&Rs were approved by the judge. However, the parties allowed the appeal before the Board to proceed. Ultimately, the Board reversed the judge's decision granting the reinstatement petition and remanded the case to determine the average weekly wage and compensation rate for the new injury in December 2007. On remand, the judge dismissed as moot the claimant's reinstatement petition and the joinder petition filed against the other insurance company due to the C&Rs.

The original insurance company then filed an application for Supersedeas Fund reimbursement. After it was denied by the judge, the Board affirmed. According to the Board, there was no finding that compensation was not payable to the claimant, but rather, it was determined that another company was the responsible insurer.

On appeal to the Commonwealth Court, it was argued that the benefits paid to the claimant as a result of the Board's denial of supersedeas were "not payable" under § 443 (a) of the Act and, therefore, reimbursement should have been granted. The Commonwealth Court, however, rejected the argument. According to the court, the Board did not determine that compensation was not payable to the claimant but, rather, the company was not the liable insurance carrier. In the court's view, the application for Supersedeas Fund reimbursement did not meet the required criterion that compensation was not payable to the claimant.

continued on page 16

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Pennsylvania Workers' Compensation Updates

continued from page 14

***Protz II* prompts Commonwealth Court to reverse a Worker's Compensation Judge's decision to modify benefits based on an IRE performed in 2005 using the Fifth Edition of the AMA Guides.**

Debra Thompson v. WCAB (Exelon Corporation); No. 1227 C.D. 2016; filed Aug. 16, 2017; Judge Brobson

The claimant was injured on October 16, 1998, and received varying periods of temporary total disability and partial disability benefits. On October 8, 2001, she began working a light-duty position and was paid partial disability benefits. She was then laid off on September 23, 2003, and received severance and unemployment compensation through September 15, 2004, at which time total disability benefits were reinstated. In September of 2005, an IRE was performed, and the claimant was given an impairment rating of 23%. A Notice of Change of Workers' Compensation Disability Status (Notice) was issued, changing her status from total to partial effective August 30, 2005. Later, in April of 2011, the claimant filed a review petition regarding the 2005 IRE, alleging she had not yet reached maximum medical improvement.

The Worker's Compensation Judge concluded that the claimant was properly adjusted to partial disability status based on the results of the 2005 IRE. The claimant appealed to the Worker's Compensation Appeal Board, which concluded that she was time barred from challenging the change in status since she did not appeal it within the 60-day period after receiving the Notice adjusting her to partial disability. Additionally, the Board held that the claimant could not challenge the IRE within the 500-week period of partial disability without a qualifying IRE determination.

The claimant then appealed to the Commonwealth Court. The court vacated the Board's order and remanded the case to the Board on the issue of whether the Notice deprived the claimant of due process. In July of 2016, the Board concluded the Workers' Compensation Judge did not err in determining that the employer was entitled to an automatic modification of the claimant's benefits for total to partial disability.

Again, the claimant appealed to the Commonwealth Court, this time arguing that the Workers' Compensation Judge erred in concluding that her benefits were modified based on an IRE performed using the Fifth Edition of the AMA Guides, which the Commonwealth Court declared unconstitutional in Protz v. WCAB (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (Protz I).

The Commonwealth Court reversed the Board's opinion, affirming modification of the claimant's benefits from total to partial based on the Supreme Court's holding in Protz II, 161 A.3d 827 (Pa. 2017). According to the court, in Protz II, the Supreme Court struck the entirety of Section 306 (A.2) of the Act as unconstitutional and, in effect, eliminated the entire IRE process from the Act.

An employer that establishes that a claimant's loss of earnings is not related to the work injury, but is related to other factors, is not required to prove job availability within the claimant's medical restrictions.

Carlos Torijano v. WCAB (In a Flash Plumbing); No. 1686 C.D. 2016; filed: Aug. 30, 2017; Judge Hearthway

The claimant sustained a work injury to his low back while working for the employer as a plumber's helper. A Notice of Compensation Payable described the injury as a low back strain. The employer filed a suspension petition, alleging that a specific job was offered to the claimant within his restrictions, which he refused. The claimant contested the petition.

At the Workers' Compensation Judge level, the employer presented medical evidence that the claimant could perform light-duty work at the time his physician first examined him and that he had fully recovered by the time the physician last saw him. Additionally, the employer presented testimony from a witness who said that the claimant did return to work with a 10-pound lifting restriction on June 11, 2014, but that he was reprimanded for not calling in before jobs, which he was required to do. According to this witness, the claimant became upset when asked to sign a paper regarding the reprimand and thereafter did not show up for work. The claimant was never fired. Another witness for the employer testified that the claimant quit because he was asked to sign the letter about the reprimand. Additionally, the claimant admitted he told the insurance adjuster that the only reason he was not working was because of the reprimand.

The Workers' Compensation Judge granted the suspension petition, mainly because the claimant refused to work because of the reprimand. The judge considered this a "voluntary quit." The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court affirmed the suspension as well. According to the court, the critical fact was the claimant's admission that he voluntarily left his job because of his reprimand. The court concluded that the claimant's loss of earnings was related to a factor other than the work injury, requiring a suspension of benefits.

The claimant is not entitled to a reinstatement of benefits for the worsening of a condition that had already been judicially excluded as related to the work injury.

Janie McNeil v. WCAB (Department of Corrections, SCI-Graterford); No. 2022 C.D. 2016; filed Sep. 1, 2017; Judge McCullough

The claimant suffered multiple injuries while working as a gate sergeant for the employer on January 26, 2011. Later, the employer filed a termination petition, alleging full recovery from the work injuries. The claimant filed a review petition, alleging an incorrect description of the work injury.

The claimant's review petition was partially granted by the Workers' Compensation Judge, as to further thoracic and lumbar strain and sprain injuries, but denied as to a work-related left shoulder rotator cuff tear. The judge's decision was affirmed by the Workers' Compensation Appeal Board, and no further appeal was taken.

The claimant then filed a reinstatement petition, seeking payment of benefits as of the date his left shoulder surgery was performed. The employer moved to dismiss the petition on the basis that the claimant was seeking a reinstatement of benefits for surgery performed on a condition that was found to be unrelated to the work injury. No evidence was presented by the employer, and the judge dismissed the petition. The Appeal Board affirmed the decision on appeal.

The Commonwealth Court dismissed the claimant's appeal. In the court's view, the Workers' Compensation Judge previously found that the left rotator cuff was excluded from the work injury and the judge's order became final as to the scope of that work injury. According to the court, the claimant was collaterally estopped from relitigating a critical fact in the reinstatement petition proceeding.

The employer's utilization review petition was improperly granted where the employer asserted they were not liable for treatment of RSD/CRPS when they accepted responsibility in a C&R Agreement for fractured right and left feet.

Thomas Haslam v. WCAB (London Grove Communication); No. 1655 C.D. 2016; filed Sep. 1, 2017; Judge Hearthway

In February of 1998, the claimant sustained injuries when he fell off a building in the course and scope of his employment. The employer accepted the injury by issuing an Notice of Compensation Payable. The nature of the injury accepted was a right and left foot fracture. In 2008, the indemnity portion of the case was settled by Compromise & Release Agreement. Later, the employer filed a Utilization Review Request, seeking review of compounded medication being provided to the claimant. It was determined that the medication was reasonable and necessary. The employer then filed a petition challenging the Utilization Review Determination. In connection with that petition, the employer argued that the claimant was being treated for RSD/CRSP, which was not expressly accepted by the employer in the C&R Agreement. The claimant also filed a review petition requesting recognition of the RSD/CRPS as being related to the original work injury.

The Workers' Compensation Judge denied the employer's UR Petition and granted the claimant's review petition. The judge held that the claimant's RSD/CRPS was within the scope of the C&R Agreement. The employer appealed to the Workers' Compensation Appeal Board, which reversed the judge's decision and determined that the C&R Agreement precluded the claimant from expanding the description of his injury.

The Commonwealth Court reversed the Board. In doing so, it noted that the employer did not contend that the challenged treatment was not reasonable and necessary for the claimant's pain but, rather, argued it should not be liable for the treatment because the C&R Agreement only accepted responsibility for "fractured right and left feet." The court pointed out that the utilization review process was not the proper method to determine causation of an injury or condition. Although the court agreed that the Appeal Board correctly concluded the claimant could not expand the description of the injury acknowledged in the C&R Agreement, they also found that the Board was wrong to conclude that the medical treatment at issue was beyond the scope of the C&R Agreement. The court pointed out that the agreement described the claimant's work injuries as "various injuries and bodily parts including but not limited to fractured right and left feet." In the court's reading of the agreement, the employer did not agree to pay ***only for*** medical treatment of fractured feet, but rather, agreed to pay for all reasonable and necessary expenses ***related to*** the fractured feet.

An insurance company that paid the medical expenses for a firefighter claimant with cancer can include expenses paid prior to the passage of Act 46 as a recoverable lien. The company's "Statement of Benefits" was sufficient evidence of the lien.

City of Philadelphia v. WCAB (Knudson), No. 675 C.D. 2016; Filed July 3, 2017; Judge Brobson

The claimant, a Philadelphia firefighter, filed a claim petition for benefits under Section 108(r) of the Act. During litigation of that petition, the claimant's health insurer (IBC) submitted a document, "Statement of Benefits," listing the medical expenses they paid as evidence to support its lien. In the decision granting the claim petition, the Workers Compensation Judge determined that only medical expenses for services provided after the effective date of Act 46 (which designated cancer in firefighters as an occupational disease) were reimbursable.

IBC appealed this aspect of the judge's decision to the Workers Compensation Appeal Board. The employer filed a cross appeal, challenging IBC's right to a lien and the sufficiency of the proof offered in support of that lien. The Board affirmed the judge's decision that IBC's evidence for the lien was sufficient. However, the Board reversed the judge's decision limiting IBC's recovery to medical expenses to services given after Act 46's effective date.

The employer appealed to the Commonwealth Court, arguing that IBC's lien could only attach to medical expenses incurred after the effective date of Act 46 and that the single document IBC submitted into evidence (Statement of Benefits) was insufficient evidence of its lien. The Commonwealth Court disagreed and affirmed the Appeal Board. As the court pointed, Act 46 clearly states that the Act shall apply to claims filed on or after the effective date of the section. The claimant filed his claim petition on June 13, 2012, after the passage of Act 46 in 2011. Additionally, the court held that the evidence presented by IBC in support of its lien was sufficient, noting that the employer, on the record before the Workers' Compensation Judge, waived any hearsay objections to the Statement of Benefits. It appeared to the court as though the employer chose to raise questions about these documents for the first time before the Board.

An employer is entitled to subrogation under the Act even if the employer was contesting a claim petition at the time third party settlement funds were distributed.

continued on page 18

Pennsylvania Workers' Compensation Updates

continued from page 17

Anthony Kalmanowicz v. WCAB (Eastern Industry, Inc.); No. 1790 C.D. 2016; Filed July 7, 2017; Judge Brobson

In his claim petition, the claimant alleged he sustained multiple injuries in a work-related motor vehicle accident. While this petition was pending, the claimant entered into a settlement agreement with a third party to resolve his case for $15,000 and netted, after attorney's fees and costs, $9,498.25. Later, the Workers' Compensation Judge granted the claim petition.

The employer consequently filed a petition seeking recovery of its lien. However, the judge dismissed this petition, concluding that at the time of the claimant's settlement of the third-party claim, the employer had not accepted the work injuries.

The employer appealed, and the Appeal Board reversed. The claimant then appealed to the Commonwealth Court, where he argued that the employer's contest of the claim petition at the time third-party settlement funds were distributed prohibits the employer from recovering its lien under the Act. The court rejected this argument, holding the employer did not waive its right to subrogation under Section 319 of the Act by contesting the claim petition.

The Construction Workplace Misclassification Act cannot apply retroactively to determine whether the claimant was an independent contractor and cannot function merely as a guide to determine who qualifies as an independent contractor.

D&R Construction v. WCAB (Suarez, et. al); Nos. 1558 C.D.2016 and 1578 C.D. 2016; Department of Labor and Industry, Bureau of Workers Compensation, Uninsured Employers Guaranty Fund v. WCAB (Suarez, et al.); 1574 C.D. 2016 and 1575 C.D. 2016; Filed Aug. 1, 2017; Judge Hearthway

This case involved a claim petition filed against D&R Construction for work injuries sustained by the claimant on August 28, 2010. It was D&R's position that the claimant was an independent contractor, not an employee.

Thereafter, the claimant filed a petition against the Uninsured Employers Guaranty Fund, raising the same allegations. The Workers' Compensation Judge dismissed this petition, finding that the claimant is an independent contractor. However, on appeal, the Board reversed and held that the claimant was an employee. In doing so, the Board relied on the Construction Workplace Misclassification Act (CWMA), stating that the factors listed in the Act were "instructive."

The issues presented to the Commonwealth Court on appeal were whether the Board erred in retroactively applying the CWMA to determine whether the claimant was an independent contractor, and whether the Board erred in considering the CWMA as guidance for the common law analysis to determine who qualifies as an independent contractor. The court held that the CWMA, enacted on October 13, 2010, could not apply retroactively to this August 28, 2010, injury. According to the court, the CWMA altered the elements of proof required to establish an independent contractor's status in the construction industry, which was a substantive change affecting substantive rights. Additionally, the CWMA contains no language expressly stating that it may apply retroactively. Thus, the court found that the Board's retroactive application of the CWMA was improper.

Additionally, the court held that the CWMA could not function as mere guidance in determining whether an individual in the construction industry is an employee or an independent contractor. The CWMA establishes mandatory criteria. The absence of any one criterion negates independent contractor status, and the individual is deemed an employee.

Permanency is a required element for burden of proof in a claim for specific loss benefits for the loss of use of the right index finger.

Carlos Urena Morocho v. WCAB (Home Equity Renovations, Inc.); No. 1393 C.D. 2016; Filed: Aug. 3, 2017; Judge Hearthway.

The claimant injured to his right hand (including injuries to his thumb, index and middle fingers) while using a table saw in the course and scope of his employment. He filed claim petitions against the employer and the Uninsured Employers Guaranty Fund seeking benefits, including benefits for loss of use of the right index finger.

The claimant testified about the difficulties he was experiencing using his right index finger. He submitted medical records, which showed that emergency surgery was performed on the finger. The procedure was an open reduction, internal fixation, and a distal interphalangeal fusion of the finger. He also submitted a report from the surgeon, which stated that the claimant had effectively lost the function of the index finger, "at this time," for all intents and purposes.

The Workers' Compensation Judge found that the claimant sustained the permanent loss of use of his right index finger. He awarded specific loss benefits, consisting of 50 weeks of compensation plus a six-week healing period. The employer and the Fund appealed to the Appeal Board. They argued that the judge erred in finding that permanent loss of use of the right index finger was sustained. The Board agreed and reversed the judge's decision.

The claimant appealed to the Commonwealth Court, which affirmed the decision of the Board. The court noted that the report from the claimant's medical expert stated that the claimant lost function of his index finger "at this time." The court agreed that the record lacked competent medical evidence of permanency. Therefore, it held that the claimant was not able to meet his burden of proof.

**Frank Wickersham is a shareholder and member of Marshall Dennehey Warner Coleman & Goggin's Workers' Compensation Department. Frank works in the firm's King of Prussia, Pennsylvania office.*

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