COUNTERPOINT

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ADMISSIBILITY OF COMPLIANCE EVIDENCE POST-*TINCHER*

By James M. Beck, Esquire, Reed Smith LLP, Senior Life Sciences Policy Analyst

Since *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), rejected the strict negligence/strict liability dichotomy that had plagued Pennsylvania products liability litigation under *Azzarello v. Black Brothers Co.*, 391 A.2d 1020 (Pa. 1978), for over 35 years, admissibility of regulatory and industry standard compliance evidence has been a major open issue. Practically every other state[1] and major product liability commentators[2] recognize the relevance of compliance evidence in strict liability cases. But during *Azzarello*'s reign of error, the Pennsylvania Supreme Court held that strict liability precluded evidence that the defendant's product complied with industry standards in *Lewis v. Coffing Hoist Div.*, 528 A.2d 590 (Pa. 1987). "'[I]ndustry standards'" go to the negligence concept of reasonable care, and . . . under our decision in *Azzarello* such a concept has no place in an action based on strict liability in tort." *Id.* at 594.

However, both *Azzarello* and the rationale for the *Lewis* exclusion disappeared with *Tincher*. "Even a cursory reading of *Tincher* belies th[e] argument" that *Tincher* "overruled *Azzarello* but did little else." *Renninger v. A&R Machine Shop*, 163 A.3d 988, 1000 (Pa. Super. 2017). *Tincher* "reject[s] prior law's effort to completely divorce negligence and strict liability concepts." *Roverano v. John Crane, Inc.*, 177 A.3d 892, 907 (Pa. Super. 2017).[3] Specifically, *Tincher* held that, "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." 104 A.3d at 401. Accordingly, *Tincher* expressly rejected the view that "negligence concepts" in strict liability could only "confuse" juries:

> [A] strict reading of *Azzarello* is undesirable. . . . Subsequent application of *Azzarello* elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason. . . . [T]he effect of the per se rule that negligence rhetoric and concepts were to be eliminated from strict liability law was to validate the suggestion that the cause of action, so shaped, was not viable.

continued on page 2

Medical Marijuana in the Workplace: Weeding Through the Legal Implications

By Douglas Hart, Esquire and Courtney Brennan, Esquire, Burns White

Pennsylvania's Medical Marijuana Act (MMA), 35 Pa. C. S. A. 10231.101, went into effect on May 17, 2016, and was fully implemented earlier this year. Pennsylvania has now joined 30 other states and the District of Columbia in legalizing medical marijuana. Employers, most of whom were provided little guidance regarding the legislation, are struggling to understand how the new law affects the workplace and their rights, and what adaptations need to be made to ensure compliance. Employers throughout Pennsylvania are voicing concerns about the importance of maintaining a drug-free workforce, as it fosters a more productive work environment, improves reliability, ensures competence, and minimizes impairment. While MMA requires employers to make certain accommodations, the application of the law—if interpreted and implemented correctly—should not jeopardize workplace safety or the quality of the work product.

Let's be Blunt: What MMA Does and Doesn't Mean for Employers

Medical Marijuana and Qualifying for Its Use

Although medical marijuana remains a Schedule I controlled substance, it is available to treat twenty-one specific

continued on page 4

On The Inside

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Admissibility

continued from page 1

Id. *Tincher* expressly left open the evidentiary issue of the *Lewis* exclusion. 104 A.3d at 409-10 ("not purport[ing] to either approve or disapprove prior decisional law" on issues including state of the art). *Lewis* is now part of "a large body of post-*Azzarello* and pre-*Tincher* law" that can no longer be considered binding precedent. *Renninger*, 163 A.3d at 1000.

Tincher replaced *Azzarello*-era design defect standards with a "composite" test utilizing both "risk/utility" and "consumer expectations" defect approaches, which it derived primarily from the California dual test established in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978). *See* 104 A.3d at 387-89. In *Barker*, California recognized that "the evidentiary matters" relevant to its test "are similar to those issues typically presented in a negligent design case." 573 P.2d at 326. *Barker* thus rejected the *Lewis* exclusion under California law.

The risk/utility prong of *Tincher*'s design defect test provides "an opportunity to analyze *post* hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, which obviously reflects the ***negligence roots*** of strict liability." *Id.* at 389 (emphasis added); *accord Renninger*, 163 A.3d at 997 (recognizing risk/utility test as "derived from negligence principles"). Risk/utility thus explores a manufacturer's "conduct." *Tincher*, 104 A.3d at 371 ("in design cases the character of the product and the conduct of the manufacturer are largely inseparable"). As the risk/utility inquiry expressly involves "conduct," compliance evidence should be admissible. "Pennsylvania courts permit[] defendants to adduce evidence of compliance with governmental regulation in their efforts to demonstrate due care (when conduct is in issue)." *Lance v. Wyeth*, 85 A.3d 434, 456 (Pa. 2014).

Similarly, compliance evidence is relevant to the "consumer expectations" prong, because "evidence of wide use in an industry may be relevant to prove a defect because the evidence is probative, while not conclusive, on the issue of what the consumer can reasonably expect." *Estate of Hicks v. Dana Cos.*, 984 A.2d 943, 966 (Pa. Super. 2009) (en banc). Thus a basis exists for rejecting the *Lewis* exclusion under both prongs of the *Tincher* "composite" design defect test.

Thus, numerous post-*Tincher* Pennsylvania decisions have held that the *Lewis* exclusion expired with *Azzarello* and support admissibility of state-of-the-art compliance evidence. *See High v. Pennsy Supply, Inc.*, 154 A.3d 341, 350 n.5 (Pa. Super. 2017) (expert compliance testimony relevant to product's "nature" in consumer expectations approach); *Amato v. Bell & Gossett*, 116 A.3d 607, 622 (Pa. Super. 2015) (defendants may defend on "state-of-the-art" grounds after *Tincher*), *appeal dismissed*, 150 A.3d 956 (Pa. 2016); *Vitale v. Electrolux Home Products, Inc.*, 2018 WL 3868671, at *3 (E.D. Pa. Aug. 14, 2018) ("*Tincher* blurred the bright line demarcation between negligence theories and strict products liability . . . in favor of the admissibility of evidence of compliance with industry standards to defend against strict liability claims") (citation and quotation marks omitted); *Mercurio v. Louisville Ladder, Inc.*, 2018 WL 2465181, at *7 (M.D. Pa. May 31, 2018) (following *Cloud* and *Rapchak*); *Cloud v. Electrolux Home Products, Inc.*, 2017 WL 3835602, at *2 (E.D. Pa. Jan. 26, 2017) ("After *Tincher*, courts should not draw a bright line between negligence theories and strict liability theories regarding evidence of industry standards"); *Rapchak v. Haldex Brake Products Corp.*, 2016 WL 3752908, at *3 (W.D. Pa. July 14, 2016) (the "the principles of *Tincher* counsel in favor of [the] admissibility" of compliance with "industry or government standards"); *Sliker v. National Feeding Systems, Inc.*, 2015 WL 6735548, at *7 (Pa. C.P. Clarion Co. Oct. 19, 2015) (industry standards evidence admissible as "particularly relevant to factor (2)" of Tincher's risk/utility approach).

It is against this backdrop that the Superior Court's decisions in *Webb v. Volvo Cars, LLC*, 148 A.3d 473, 483 (Pa. Super. 2016), and more recently in *Dunlap v. Federal Signal Corp.*, 194 A.3d 1067, 2018 WL 3967348 (Pa. Super. August 20, 2018), should be viewed. Most notably, both *Webb* and *Dunlap* involved compliance evidence initially introduced by plaintiffs – not defendants.

Webb was an appeal from a pre-*Tincher* trial of a crashworthiness case. The plaintiff affirmatively introduced compliance evidence in support of his negligence claim, but after that claim was nonsuited, plaintiff did a 180 and sought to have the jury instructed to ignore that same evidence under then-prevailing *Lewis* exclusion. 148 A.3d at 480-81. The trial judge refused to give that instruction, but did tell the jury that compliance evidence was not conclusive. Id. at 480 ("You may not find for [defendants] simply because their products passed several motor vehicle safety standards.").

On appeal after *Tincher*, the Superior Court in *Webb* recognized that, under "the prevailing precedent at the time of trial" (meaning *Azzarello*/*Lewis*) admission of compliance would have been error. *Webb*, 148 A.3d at 480. But in between, as discussed above, *Tincher* had reversed *Azzarello* specifically on the negligence/strict liability dichotomy.

To summarize, *Azzarello*, with its strict prohibition on introducing negligence concepts into strict products liability claims, is no longer the law in Pennsylvania. The rule presently at issue – the prohibition of government or industry standards evidence in a strict products liability case – clearly has its genesis in the now-defunct *Azzarello* regime. The *Lewis* and *Gaudio*[4] Courts both relied primarily on *Azzarello* to support the preclusion of government or industry standards evidence, because it introduces negligence concepts into a strict liability claim.

Id. at 483.

Observing that *Tincher* had "declined to address the retroactive effect of its holding," *id.* at 482, *Webb* declined to predict the demise of the *Lewis* exclusion from *Tincher* alone:

We conclude that the overruling of *Azzarello* does not provide this panel with a sufficient basis for disregarding the evidentiary rule expressed in *Lewis* and *Gaudio*. While it is clear after *Tincher* that the firm division between strict liability and negligence concepts no longer exists, it is not clear that the prohibition on evidence of government or industry standards no longer applies. . . . *Tincher* expressed two theories of strict products liability – consumer expectations and risk-utility. It is possible that government/industry standards evidence could be admissible under both theories, one and not the other, or neither. It is also possible that the admissibility of such evidence will depend upon the circumstances of a case.

148 A.3d at 483. *Webb* also speculated on "the possibility of shifting the burden of production and persuasion to the defendant under the risk-utility theory" and such a "burden shift" might affect "the admissibility of government or industry standards evidence in risk-utility cases." *Id.* Believing that "the continued vitality of the prohibition on government and industry standards evidence is a question best addressed in a post-*Tincher* case," *Webb* avoided the issue by granting a new trial based solely on the pre-*Tincher* error. *Id.*

As discussed previously, since *Webb* was "decided" in 2016, numerous additional decisions have concluded that the *Lewis* exclusion is extinct.[5] The Superior Court forcefully interred the old *Azzarello* "every element"/"guarantor" jury instruction in *Tincher v. Omega Flex, Inc.*, 180 A.3d 386, 399 915007 (Pa. Super. 2018) ("*Tincher II*") ("fundamental error analysis is particularly applicable here because the trial court gave a charge under law that the Supreme Court has explicitly overruled in the same case"), thereby eliminating the retroactivity issue that had plagued *Webb*.

However, no Pennsylvania appellate court has yet confronted the *Lewis* exclusion directly. Another sideswipe recently occurred in *Dunlap*, in which plaintiffs in mass tort litigation unsuccessfully sought to use compliance evidence as a substitute for expert testimony in a strict liability case brought under *Tincher*'s risk/utility defect prong. *Dunlap* affirmed summary judgment for the defendant, and primarily stands for the proposition that risk/utility requires plaintiffs to produce expert testimony on alternative design issues. *See* 2018 WL 3967348, at *6 (because they are "matters that are beyond the ken of ordinary persons," "expert opinion on the effectiveness of [plaintiffs'] alternative design . . . was required"). However, the plaintiff's attempt to substitute compliance evidence for expert testimony led to a reprise of the *Webb dictum*.

"The continued viability of the evidentiary rule espoused in *Lewis* and *Gaudio* [was] not before" the *Dunlap* court, *id.* at *5 n.8, any more than it was before the court in *Webb*, but nonetheless *Dunlap* quoted from *Webb*'s previously-quoted discussion of *Tincher*'s effect on the *Lewis* exclusion. 2018 WL 3967348, at *5. *Dunlap* significantly overstated the result in *Webb*, asserting that *Webb* "concluded . . . that the overruling of *Azzarello* did not provide a sufficient basis to disregard the evidentiary rule . . . that a product's compliance with government standards is irrelevant and inadmissible in a strict products liability action." 2018 WL 3967348, at *5. In fact, as discussed above, *Webb* merely addressed a pre-*Tincher* trial ruling under pre-*Tincher* law due to that court's uncertainty over *Tincher*'s retroactive effect.

This overstatement of *Webb* led to a strong dissent in *Dunlap* chastising the majority for appearing to continue the *Lewis* exclusion after *Tincher*. 2018 WL 3967348, at *6 ("contrary to the Majority's assertion, the *Webb* holding is narrow and does not sufficiently discuss the negligence and strict liability principles underlying the evidentiary rule barring governmental/industry standard evidence") (Lazarus, J. dissenting). However, the dissent in turn overstated what the majority actually held in *Dunlap*. *First*, the majority "d[id] not disagree . . . that the evidentiary rule prohibiting admission of industry standards might be re-examined post-*Tincher*." *Id.* at *5 n.7. *Second*, *Dunlap* held only that compliance evidence is not by itself conclusive of the defect question, something that has not been the defense position:

[E]vidence that a product comported with industry standards [i]s not proof of non-defectiveness. The question herein is whether [plaintiffs' experts] adduced sufficient evidence on the effectiveness of their proposed alternative design to withstand summary judgment. . . . In lieu of expert opinion on that subject, [they] merely deferred to the [industry] standards, which are minimum requirements only. . . . [plaintiffs' experts'] proof that their proposed [alternative] design met the industry standard was not enough to establish a *prima facie* case that it was more effective.

Id. at *6.[6]

Thus, defendants should continue to argue that the *Lewis* exclusion of compliance evidence is a dead letter after *Tincher*, as numerous federal courts

continued on page 4

Admissibility

continued from page 3

have held, and as the Superior Court has itself suggested. Attempts by plaintiffs to distort *Webb* and *Dunlap* as holding something that those decisions, in fact, expressly declined to reach should be strongly resisted, using the arguments stated herein.

ENDNOTES

[1]*See*, *e.g.*, Brief of Amicus Curiae Product Liability Advisory Council, Inc. in Support of Appellant, 2016 WL 1127998 at *37-47, filed in *Amato v. Crane Co*., Nos. 4-5 EAP 2016 (Pa. March 14, 2016) (every state except Montana admits compliance evidence in strict liability product liability litigation).

[2]*E.g.*, on David G. Owen, Products Liability Law §6.4, at pp. 392-3 (Hornbook Series 2d ed. 2008) (inadmissibility of compliance evidence in strict liability "an outmoded holdover from early, misguided efforts to distinguish strict liability from negligence"; a "great majority of courts allow applicable evidence of industry custom"). *Tincher* relied heavily on Prof. Owens' product liability treatise. 104 A.3d at 387-402 (twelve separate citations).

[3]*Allocatur granted on other grounds*, 190 A.3d 591 (Pa. 2018) (Fair Share Act apportionment).

[4]*Gaudio v. Ford Motor Co.*, 976 A.2d 524 (Pa. Super. 2009), was another *Azzarello*-era decision that applied the *Lewis* exclusion to compliance with Federal Motor Vehicle Safety Standards. *Id.* at 543-44.

[5]Nor has any movement occurred towards the speculated shift in the burden of proof. *Capece v. Hess Maschinenfabrik GmbH & Co. KG*, 2015 WL 1291798, at *3 n.1 (M.D. Pa. March 20, 2015); *Meyers v. LVD Acquisitions, LLC*, 2016 WL 8652790, at *1 (Pa. C.P. Mifflin Co. Sept. 23, 2016), *aff'd mem.*, 168 A.3d 359 (Pa. Super. 2017); *Dunlap v American Lafrance, LLC*, 2016 WL 9340617, at *2 n.4 (Pa. C.P. Allegheny Co. April 14, 2016), *aff'd on other grounds*, 194 A.3d 1067, 2018 WL 3967348 (Pa. Super. Aug. 20, 2018).

[6]The defense position, as stated in PDI SSJI 16.122(2), is that compliance evidence "is not conclusive, [but] it is a factor [the jury] should consider in determining whether the design of the product was defective so as to render the product unreasonably dangerous."

Medical Marijuana

continued from page 1

conditions under the federal Controlled Substance Act. The legal form of the drug is dispensed as a pill, oil, tincture or liquid; in topical form; or in a form medically appropriate for vaporization or nebulization. Legal marijuana is not available as an edible or in a form that one can smoke.

From HIV, ALS and multiple sclerosis to cancer, sickle cell anemia and many other diseases, countless patients are seeking the benefits of medical marijuana to ease symptoms and provide relief from various illnesses. To qualify, individuals must apply to the program, be certified and under the continuing care of a physician who is registered with the Department of Health, and have a valid identification card that includes their name, address, and date of birth. Upon meeting the qualification criteria, an individual legally using medical marijuana is free to find employment within the state without fear of workplace discrimination. What does this mean to a Pennsylvania employer?

Discrimination and Case Law

Section 2103(b)(1) of MMA provides that employers may not discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana. This language essentially designates qualified patients as a protected class, requiring an employer to acknowledge and treat applicants or employees as such, within an organization's Equal Employment Opportunity policies.

A federal district court in Connecticut provided direction as to the scope of Pennsylvania's MMA as it pertains to the hiring process. In *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017), the court considered the Connecticut Palliative Use of Marijuana Act, which includes an identical anti-discrimination provision as Pennsylvania's MMA. In *Noffsinger*, the plaintiff received a job offer as a director of recreational therapy, but upon disclosing her use of prescription marijuana as a qualifying patient before the pre-employment drug screen, the employer rescinded the job offer. *Id.* at 332. The court largely denied defendant's motion to dismiss the lawsuit, finding that a plaintiff who uses marijuana for medicinal purposes may maintain a cause of action against an employer who refuses to employ her for this reason. *Id.* at 330.

But…Not so Fast

While discrimination based on medical marijuana use is prohibited, MMA does NOT:

- mandate employers to allow medical marijuana on the premises;
- restrict an employer's ability to discipline an employee for being under the influence of medical marijuana while at work or when the employee's conduct fails to meet the normally accepted standard of care within that particular position §2103(2); or
- require an employer to commit any act that would put the employer or anyone acting on its behalf in violation of federal law §2103(3).

Further, as medical marijuana remains illegal under federal law, Pennsylvania employers are not required to accommodate its use under the Americans with Disabilities Act (ADA). Additionally, employers operating under federal law may still fire employees based on their marijuana use, and federally mandated, drug-free workplace programs require employers to report positive marijuana test results.

Employer MMA Compliance Checklist

Pennsylvania employers grappling with the new legislation cannot prepare for every contingency, but certain basic steps can assist organizations in an effort to comply with the MMA, as well as mitigate potential risk and safeguard against potential legal claims. Employers should:

1. refrain from asking applicants directly whether they are certified to use medical marijuana;

2. determine what accommodations are necessary and possible to ensure an employee can perform his or her job in a safe and productive manner;

3. insure all job descriptions are accurate and updated, citing safety restrictions, in the event that the employer needs to demonstrate why restrictions on the position are necessary; and

4. review and rewrite drug-screening policy language—like removing the term 'zero tolerance'—to acknowledge legal medical marijuana use as an exception.

By following these four basic steps, employers can lay a solid foundation to terminate an employee or defend a claim if necessary.

Conclusion

At first glance, the MMA appears to influence employers' ability to manage drug use in the workplace negatively. However, the reality is that Pennsylvania employers retain the right to ensure a safe and productive workplace and culture. Clearly, this is a new and evolving legal area – and many questions remain unanswered. It is anticipated, however, that as medical marijuana use increases and becomes accepted further, more direction will be provided to employers. Until then, employers should maintain best-practice hiring and retention standards, clarify all job descriptions to outline specific safety requirements, and amend drug policy language to accommodate medical marijuana users. Any specific questions employers have regarding the application of the legislation, company policy revisions, or proper actions, should be reviewed with legal counsel. These steps will help to protect companies and mitigate the risks associated with medical marijuana in the workplace, as this area of the law advances.

Watching Your [Virtual] Step: Employers Need To Act Carefully When Addressing and Monitoring Employees' Computer Use

By Robert J. Cahall[1], Esquire, McCormick & Priore, P.C.

INTRODUCTION

Given the increasing overlap between employees' work and personal lives, unwitting employers may incur liability for overstepping when viewing an employee's electronic or email history. As succinctly stated by the Supreme Court of New Jersey, "[i]n the past twenty years, businesses and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those and other forms of technology evolve, the line separating business from personal activities can easily blur." *Stengart v. Loving Care Agency, Inc*., 990 A.2d 650, 654–55 (N.J. 2010). Many employers promulgate computer and internet activity access polices, but these policies may be outdated, vague, and inconsistently enforced.

This article addresses the particular risk involved with accessing and reviewing an employee's emails. Under certain circumstances, such review and access may be permissible. Under others, it may run afoul of both civil and criminal statutes. The line is not always clear and, further, once an allegation of improper access is made, proving the mechanism and extent of access to defend the claim may present challenges.

1. Defining Unauthorized Access by The Employer.

A threshold question in electronic data access cases is what constitutes unauthorized access. Employees aggrieved by alleged unauthorized access of their personal electronic data generally can bring claims under both federal and state law. The federal laws often invoked in this context are the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C § 1030.

The states have enacted various counterparts to these federal laws. In Pennsylvania, the relevant statute can be found at 18 Pa. C.S. § 5741. Section 5741(a) defines it as an offense to "obtain, alter or prevent authorized access to a wire or electronic communication while it is in electronic storage by intentionally: (1) accessing without authorization a facility through which an electronic communication service is provided; or (2) exceeding the scope of one's authorization to access the facility." If the offense is not committed for commercial advantage or malicious destruction and damage, the offender is subject to a fine of not more than $5,000.00 or imprisonment of not greater than six (6) months. *See* § 5741(b).

The statute also provides a civil remedy, found at § 5747. That provision requires that the aggrieved person establish the offender acted "with a knowing or intentional state of mind," and, if proven, the aggrieved person may recover actual damages, attorney's fees and litigation costs, and injunctive relief. *Id*. One of the statutory defenses available is that the defendant reached a good faith determination that the statute permitted the conduct at issue. *See* § 5747(d) (3).

The United States District Court for the Eastern District of Pennsylvania addressed claims under the Stored Communications Act and its Pennsylvania state law analogue, § 5741, in *Brooks v. AM Resorts, LLC*, 954 F. Supp. 2d 331 (E.D. Pa. 2013). There, the plaintiff, Brooks, was a former employee of the defendant, AM Resorts. During Brooks' tenure with AM Resorts, he provided his employer with his *personal* email account address and password due to difficulties in accessing his *work* email account. After he was terminated, he engaged in an email exchange with his attorney, through his *personal* email account, regarding his termination. Although those emails were not shared with his employer, he nonetheless

continued on page 6

Watching

continued from page 5

received a response from his former supervisor stating that the supervisor had received the email, and that the company lawyer's would be in touch with plaintiff; attached to that email from the former supervisor was the privileged email exchange between the employee and his lawyer.

The employee concluded that his former employer had accessed his personal email account without his consent to review and retrieve the email exchange with his attorney. The employer contended that it reviewed the email by retrieving it from "storage" on the computer, via a software program that allowed employees to remotely access and control company computers. Conversely, plaintiff alleged that the company used his personal email sign-in credentials to retrieve the emails after his termination; there were dueling expert analyses as to the mechanism of access. In denying (in part) the parties' cross-motions for summary judgment, the court explained:

> Brooks agrees with AM Resorts' interpretation of the law. However, he strongly disagrees with AM Resorts portrayal of his allegations. While it is true that Brooks alleges that AM Resorts accessed his computer, Brooks has never alleged that AM Resorts obtained a downloaded copy of the privileged email exchange from his hard drive. Rather, **Brooks has maintained throughout this litigation that AM Resorts obtained the privileged email exchange by accessing his Microsoft Hotmail email account, an act that qualifies as a violation under the SCA**. Brooks has presented evidence that a genuine dispute of material fact exists as to whether AM Resorts accessed his email account. Therefore, I will deny AM Resorts' motion for summary judgment on Brooks' SCA claim.

Id. at 337 (emphasis added).

To this end, there is a distinction between "accessing" the information via "logging-in" to the employees email account, versus monitoring and saving information that is transmitted via a company server or internet connection during the employee's tenure (assuming the proper notice has been provided to the employee). In *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748 (N.D. Ohio 2013), a former employee of Verizon brought suit against her prior supervisor and employer, alleging that her prior supervisor utilized her company issued "Blackberry" to access her *personal* "Gmail" account and read roughly 48,000 emails in the 18 months *after* her termination. The personal "Gmail" account had been linked to her Blackberry during her ten years of employment. The plaintiff brought claims under the Federal Stored Communications Act, among other statutory and common law claims. Although the emails at issue were unquestionably "accessed" *after* her termination, the defendants argued, among other things, that no violation occurred, because plaintiff did not "expressly" tell her supervisor not to read her emails and, further, that she "implicitly" consented to the access by not deleting her Gmail account from the Blackberry. *Id.* at 754.

The court rejected the defendants' contentions, refusing to find that the plaintiff's "passive and ignorant failure to make certain that the blackberry could not access her future e-mail" bequeathed to consent to access her emails after she was no longer an employee. *Id*. at 757. Further, the court noted that consent is limited by its terms, and that "even if plaintiff were aware that her emails might be monitored, any such implied consent that the law might perceive in that knowledge would not be unlimited. Random monitoring is one thing; reading everything is another." *Id*. at 758.

2. Parameters of an Employee's "Reasonable" Expectation of Privacy.

Key to this issue is the scope of the employer's authorization to access and retrieve information from its employees' electronic activity. This scope of the employer's authority is, generally, inversely proportionate to the extent of an employee's reasonable expectation of privacy in his or her electronic activity. Like many things, this question lacks a straightforward answer, and the resolution in a particular case will generally fall on a continuum. Indeed, as recently as April 24, 2017, the United States District Court for the Eastern District of Pennsylvania observed that there is not a "consensus" of legal authority that would establish employees expectation of privacy and email communications exchanged on the employer's server. *See Walker v. Coffey*, 2017 WL 1477144, at *8 (E.D. Pa. 2017).

Many employee handbooks or manuals will contain language explicitly disclaiming any privacy rights as to online activity conducted on the employer's computer or internet connections. A predictable response from an aggrieved employee will be that, even if "boilerplate" language within an employee manual contradicts any right or expectation of privacy, the "operational reality" of the workplace was that most or all employees commingled business and personal use on company computers, thereby creating a de facto expectation of privacy. The California appellate court rejected that argument, succinctly explaining:

> And, even assuming the "operational reality" test applies, it is of no avail to Holmes because the company explicitly told employees that they did not have a right to privacy in personal e-mail sent by company computers, which e-mail the company could inspect at any time at its discretion, and the company never conveyed a conflicting policy. Absent a company communication to employees explicitly contradicting the company's warning to them that company computers are monitored to make sure employees are not using them to send personal e-mail, it is immaterial that the "operational reality" is the company does not actually do so. Just as it is unreasonable to say a person has a legitimate expectation that he or she can exceed with absolute impunity a posted speed limit on a lonely public roadway simply because the roadway is seldom patrolled, it was unreasonable for Holmes to believe that her personal e-mail sent

continued on page 8

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Watching

continued from page 6

> by company computer was private simply because, to her knowledge, the company had never enforced its computer monitoring policy.

Holmes v. Petrovich Dev. Co., LLC, 119 Cal. Rptr. 3d 878, 898 (Ct. App. 2011). *See also Miller v. Plattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009) ("Miller argues that the Allpax policy was not generally enforced and that **a subjective expectation of privacy was there for a reasonable**. However, this fact is not material. Where, as here, an employer has a rule prohibiting personal computer use and a published policy that emails on Allpax's computers were the property of Allpax, **an employee cannot reasonably expect privacy in their prohibited communications**.") (emphasis added); *but cf. In re High-Tech Employee Antitrust Litig*., 2013 WL 772668, at *7 (N.D. Cal. Feb. 28, 2013) ("But, as other courts have recognized, a company's failure to actually monitor employees' emails or to have an explicit policy of monitoring the emails may suggest to employees that their emails in fact remain confidential.").

As the foregoing passages disclose, the terms of the employer's written policy and explicitness of the warning as to company monitoring of online activity are crucial. A seminal test in this regard is articulated in the case of *In re Asia Global Crossing, LTD*, 2005 WL 646842 (S.D.N.Y. 2005). Therein, the court articulated four factors for courts to weigh in evaluating an employee's alleged expectation of privacy as to activity on company computer: 1) does the corporation maintain a policy banning personal or other objectionable use?; 2) does the company monitor the use of the employees computer or email?; 3) do third parties have a right of access to the computer or email?; and 4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies? *Id*.

The Supreme Court of New Jersey has concluded that an employee may have a reasonable expectation of privacy in personal emails sent via the employer's laptop computer. In *Stengart, supra*, 990 A.2d 663, the employee exchanged privileged emails with her attorney on a company issued laptop computer, using her personal email account. The employer forensically retrieved from the computer's hard drive during the discovery process in the employee's subsequent discrimination lawsuit. In part, the Court's analysis was performed by certain equivocal aspects of the employer's written computer-access policy:

> We start by examining the meaning and scope of the Policy itself. The Policy specifically reserves to Loving Care the right to review and access "all matters on the company's media systems and services at any time." In addition, e-mail messages are plainly "considered part of the company's business ... records."
>
> **It is not clear from that language whether the use of personal, password-protected, web-based e-mail accounts via company equipment is covered.** The Policy uses general language to refer to its "media systems and services" but does not define those terms. Elsewhere, the Policy prohibits certain uses of "the e-mail system," which appears to be a reference to company e-mail accounts. The Policy does not address personal accounts at all. **In other words, employees do not have express notice that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account.**
>
> The Policy also does not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read by Loving Care.

Id. at 659 (emphasis added). Accordingly, the Court concluded that the emails were protected by attorney-client privilege due to the employee's reasonable expectation that the emails would be private:

> Applying the above considerations to the facts before us, we find that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on Loving Care's laptop.
>
> Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In other words, she had a subjective expectation of privacy in messages to and from her lawyer discussing the subject of a future lawsuit.
>
> In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property.

Id. at 663.

In contrast, the Delaware Court of Chancery reached the opposite conclusion as to allegedly privileged emails exchanged via a work email account. In *In re Info. Mgmt. Servs., Inc. Derivative Litig*., 81 A.3d 278, 289 (Del. Ch. 2013), a derivative shareholder action, the company's policy stated: "You should assume files and Internet messages are open to access by IMS staff. After hours you may use IMS computers for personal use, but if you want the files kept private, please save them offline."[2] The Court compelled production of purportedly privileged emails, notwithstanding the employees' alleged belief that the emails were private because they subjectively knew that regular monitoring did not occur.

CONCLUSION

While it is clear that employers have the right to monitor and regulate their employees' internet usage, including

email activity, this right is bounded by federal and state statutory protections. Absent a categorical rule prohibiting any and all email activity on company computers (which, as a practical matter, would be difficult or impossible to sustain in most modern workplaces), employees will conduct personal activity on company electronic devices, including accessing their personal email accounts. In so doing, the employees may provide their employer with access to information that leads to an adverse employment action.

If, on the one hand, such information was detected via monitoring through the company server after a *clearly* written policy was communicated to the employee, liability for unauthorized access should not arise, given the lack of an expectation of privacy and corresponding consent to such monitoring.

If, on the other hand, the employer affirmatively accesses an employee's personal email account to retrieve information, the situation becomes more legally perilous. It is less clear that courts will be receptive to the argument that the employee consented to another individual actively "logging in" to his or her email account. Potentially, if the employee "auto saved" the log-in credentials to a company computer, this may bolster the employer's position. Nevertheless, in situations where the access is alleged to have been long after the termination of employment, the employer will have great difficulty persuading the court that the employee's consent continues in perpetuity.

In short, this is an underdeveloped area of law, with little appellate guidance from the state and federal courts. At a minimum, employers should promulgate detailed, explicit written policies regarding use of company computers and the company's right to monitor online activity, consistent with all applicable federal, state, and local laws and restrictions. Each employee should be required to acknowledge receipt of the policy so as to avoid any later argument that the employee was unaware of the policy and maintained an expectation of privacy. While this will certainly not prevent all types of claims, it will greatly assist in the defense of an unauthorized computer access claim brought in the context of an employment action.

ENDNOTES

[1]Shareholder, McCormick & Priore, P.C., Philadelphia, PA & Wilmington, DE. Special thanks to Philip D. Priore, Esquire for his assistance with finding the right title for this article.

[2]Notably, Delaware has a specific statutory provision setting forth an employer's obligation to notify employees that communications, including emails, may be monitored. *See* 19 Del. C. § 705. Essentially, Delaware employers must either provide electronic notice at least once on *each day* the employee accesses employer provided electronic services, *or* provide a one-time written notice. There are civil penalties associated with violations of §705, although this is not an aggrieved employee's exclusive remedy. *See* 19 Del. C. § 705(d).

Unanswered Question: What is the Relevant Scope of Discovery Post-*Tincher*?

By Daniel J. Kain, Esquire, Littleton Park Joyce Ughetta & Kelly, LLP

Four years have passed since the Pennsylvania Supreme Court published its groundbreaking decision overruling *Azzarello v. Black Bros. Co*., 391 A. 2d 1020, 1022 (Pa. 1978), and adopting a brand-new defect standard. *See Tincher v. Omega Flex, Inc*., 104 A.3d 328 (Pa. 2014). In the wake of *Tincher*, discovery disputes have arisen across the Commonwealth as attorneys and trial courts attempt to decipher the contours of relevant discovery under *Tincher's* composite method of proof: 1) risk-utility and/or 2) consumer expectations. *See, e.g*., Max Mitchell, *Toyota Discovery Dispute Sign of Things to Come Post-'Tincher'?*, The Legal Intelligencer (Mar. 24, 2017). To date, the relevant scope of discovery in Pennsylvania product liability litigation presents an issue of first impression as no Pennsylvania appellate court has issued an opinion on the topic following *Tincher*.

Did Tincher Change Anything?

Members of Pennsylvania's product liability bar have developed diametrically opposed interpretations of the scope of discovery and evidence under *Tincher*. These conflicting interpretations are reflected in scholarly commentary. The majority approach interprets the seminal *Tincher* decision for what it is, namely, a game changing opinion that overturned 30 years of *Azzarello* precedent and adopted an entirely new defect standard. *See* James M. Beck, *Rebooting Pennsylvania Product Liability Law: Tincher v. Omega Flex and the End of Azzarello Super-Strict Liability*, 26 Widener L.J. 91, 182 (2017) (stating that *Tincher* represents a sea-change in the course of Pennsylvania product liability jurisprudence and has thus been referred to as a new era). A minority faction of Pennsylvania's product liability bar follows an exceedingly narrow interpretation that *Tincher* did little – if anything – to change Pennsylvania's product liability framework. *See* Wertheimer & Rahdert, *The Force Awakens: Tincher, Section 402A, & the Third Restatement in Pennsylvania*, 27 Widener Com. L.R. 157 (2018) (article funded by the plaintiff-based organization Pennsylvania Association for Justice).

The express text of *Tincher* supports the position that a new defect standard necessarily impacts the relevant scope of discovery. The *Tincher* Court emphasized that its decision did not purport to foresee and account for the myriad of implications as yet unarticulated or unappreciated. *See Tincher*, 104 A.3d at 406. Thus, *Tincher* expected the common law to develop incrementally as Pennsylvania's appellate courts provide reasoned explications of principles pertinent to the various factual circumstances

continued on page 10

Unanswered Question

continued from page 9

of the cases that come before them. *Id*. As for the incremental issue of discovery, the Pennsylvania Supreme Court fully anticipated that application of a new defect standard would result in "*difficulties in the discovery process*." *See Tincher*, 104 A. 3d at 405 (emphasis added). *Tincher* also recognized that disputes over the scope of discovery would generate resulting decisional precedent. *Id*. As a guidepost for anticipated discovery disputes, *Tincher* instructed trial courts to liberally grant discovery and evidence relevant to the risk-utility test. *Id*. at 409.

While no Pennsylvania appellate court has provided direct guidance on the scope of discovery post-*Tincher*, the Pennsylvania Superior Court recognizes at a threshold level that "*Tincher* will affect every stage of future products liability cases[,]" including discovery. *See Webb v. Volvo Cars of N. Am., L.L.C.*, 148 A.3d 473, 483 (Pa. Super. 2016) (emphasis added). The Superior Court also directly admonishes any "narrow reading" of *Tincher*:

> Appellants take a very ***narrow*** reading of *Tincher*, seemingly concluding that it overruled *Azzarello* but did little else. Even a cursory reading of *Tincher* belies that argument. The *Tincher* Court did anticipate that its holding would have significant 'ripple effects' to be addressed case by case as they arise.

See Renninger v. A & R Mach. Shop, 163 A.3d 988 (Pa. Super. 2017) (emphasis added). The adoption of a brand-new defect standard necessarily casts "ripple effects" on the scope of discovery and evidence relevant to *Tincher's* composite method of proof. *Id*. Any suggestion to the contrary strains credibility – as if the Pennsylvania Supreme Court would write 138 pages on product liability (or, indeed, any subject), as it did in *Tincher*, without intending major changes.

Post-Tincher Discovery Disputes

A majority of *Tincher*-based discovery disputes center on the risk-utility method of proof as the consumer expectations test has been essentially eliminated from products cases post-*Tincher*. Given the risk of arbitrary jury verdicts when a lay jury evaluates a complex product design through a consumer expectations lens, most Pennsylvania courts have found the test inapplicable to such products. *See, e.g., DeJesus v. Knight Industry & Associates*, No. 10-07434, 2016 U.S. Dist. LEXIS 121697 (E.D. Pa. Sep. 8, 2016) (industrial lift table); *Yazdani v. BMW of North America*, No. 15-01427, 2016 U.S. Dist. LEXIS 75157 (E.D. Pa. May 25, 2016) (motorcycle engine); *Wright v. Ryobi Techs., Inc*., No. 15-cv-1100, 2016 U.S. Dist. LEXIS 42003 (E.D. Pa. Mar. 30, 2016) (table saw); *Punch v. Dollar Tree Stores, Inc*., No. 12-154, 2015 U.S. Dist. LEXIS 162174 (W.D. Pa. Nov. 5, 2015) (tweezers).

The alternative design and relative risk prongs of *Tincher's* risk-utility test have generated considerable discovery disputes over the past four years. Disputes are particularly common in subrogation cases (*Tincher* itself was a subrogation case) where a sophisticated subrogating insurer is oftentimes the named plaintiff and real party in interest. In articulating liability theories under *Tincher*, subrogating insurers often place relative risk and alternative design allegations directly at issue in the complaint. Subrogating plaintiffs will often allege that the subject product presents an ***unreasonable risk*** of harm and that the product's alleged dangers exceed any benefits or utility associated with the design. Further, subrogating plaintiffs will often allege that a certain alternative design would have better tolerated expected field conditions as compared to the subject product.

In lightning subrogation cases (like *Tincher*), defendant manufacturers frequently serve claims discovery addressed to the subrogating insurer seeking, *inter alia*, all lightning and gas explosion claims from the forum state over a five (5) year period. The claims data produced responsive to this discovery amounts to admissions of a party opponent. Conventional black iron piping serves as the plaintiff's proposed alternative design in essentially every lightning subrogation case ever filed, including *Tincher*. As leaks in the joints of black iron pipe systems often lead to gas explosions and fires, the subrogating insurer's own claims data involving black iron pipe explosions can directly discredit the viability of the insurer's proposed alternative design and the credibility of the plaintiff's liability expert. Similarly, the subrogating plaintiff's own lightning claims put into perspective the *exceedingly rare* nature of lightning induced flexible gas piping failure. Last, the insurer's own lightning claims show that any number of residential systems and products fail due to lightning insult and that such lightning induced failure does not render those products defective.

After *Tincher*, subrogating insurers have attempted to use pre-*Tincher* discovery opinions as a shield from responding to defendants' claims discovery. In their misguided effort to rely on *Azzarello*-based trial court discovery opinions, subrogators have incredibly argued that *Tincher* did nothing to change the scope of discovery. However, this position proves untenable as Pennsylvania's composite defect standard simply did not exist until the *Tincher* Court adopted it in 2014.

When faced with a plaintiff's confused effort to rely upon pre-*Tincher* trial court discovery rulings as binding precedent, remember the Superior Court's *Tincher II* opinion. *See Tincher v. Omega Flex, Inc*., 180 A.3d 386 (Pa. Super. 2018) ("*Tincher II*"). In *Tincher II*, the Superior Court found that the *Tincher* trial court's analysis of the governing law and refusal to grant Omega Flex a new trial under the operative legal standard "undervalues the importance of the Supreme Court's decision." *Id*. at 401. Any argument that *Tincher* did nothing to change the scope of relevant discovery in product liability cases also "undervalues the importance of the Supreme Court's decision." *See Tincher II*, 180 A.3d at 401. Just as an *Azzarello*-based jury charge fails to conform to applicable law, so too does any *Azzarello*-based discovery holding. *See Tincher II*, 180 A.3d at 398 (stating that a jury charge based on *Azzarello* "fail[s] to conform to the applicable law" and thus constitutes "fundamental error").

One of the first trial court opinions to evaluate the relevant scope of discovery

post-*Tincher* recognized the axiomatic importance of analyzing and applying the governing law: "any assessment of a discovery dispute must consider the substantive legal issues that give shape to the boundaries of relevance in a particular case, both at trial and in discovery." *See Horner v. Cummings*, No. 14-0639, 2015 U.S. Dist. LEXIS 99421, at *15-16 (M.D. Pa. July 29, 2015) (overruling relevance objections under *Tincher* where the requested discovery pertained directly to the viability of the plaintiff's alternative design).

The Discovery Road Ahead

Until one of Pennsylvania's appellate courts publishes an opinion on the topic, the relevant contours of post-*Tincher* discovery will remain an unsettled issue. The Pennsylvania Supreme Court envisioned the incremental development of *Tincher's* progeny to take place "against the background of targeted advocacy." *See Tincher*, 104 A. 3d at 410. Pennsylvania's product liability bar requires uniformity and predictability throughout the discovery process. When the appropriate case presents itself and against the background of targeted advocacy, Pennsylvania's product liability bar will benefit greatly from appellate guidance on the incremental issue of the relevant scope of discovery under *Tincher*.

THE PENNSYLVANIA BAD FAITH STATUTE IS NOT A SHIELD FOR MEDICAL PROVIDER FRAUD

By Wesley R. Payne, Esquire and Javier Puga, Esquire, White and Williams

I. INTRODUCTION

As we are all aware, advising insurance carriers with respect to medical providers' services rendered to motor vehicle accident victims can be tricky business. The Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) requires carriers to pay for reasonable and necessary medical treatment of individuals involved in motor vehicle accidents. However, due to the strict timelines for payment under the MVFRL, within thirty (30) days of receipt of the providers' invoices, the carriers are not provided a great deal of time to evaluate the reasonableness or necessity of the treatment. Some medical providers, therefore, have sought to use sophisticated billing software to make it more difficult to identify unnecessary treatment and take advantage of the medical repayment scheme by providing fraudulent bills to the carrier for payment for work which has not been performed. The carriers, with the knowledge that many of the individual bills are small and that failure to pay the bills if determined to be wanton or in bad faith may result in being sued for bad faith damages by the providers on behalf of the insured, are not quick to challenge the payment of the medical provider invoices.

This tension between the MVFRL's requirements on the carriers to promptly pay medical expenses and the potential sanction of bad faith damages if the carrier fails to do so is one that some medical providers have attempted to systematically exploit. However, in the case of *State Farm Mutual. Auto. Ins. Co. v. Stavropolskiy*, Nos. 15-805929, 16-01374, 2018 U.S. Dist. LEXIS 167425 (E.D. Pa. Sept. 25, ,2018), Judge J. Curtis Joyner evaluated one of these schemes and found that State Farm acted appropriately by refusing to pay the bills of the medical providers and denied the bad faith claim.

II. FACTS

The case arose from a complex scheme of medical insurance fraud to induce payment by the insurance carrier, State Farm, for treatments to insureds/patients involved in motor vehicle accidents which were not received by the insureds/patients from various providers. The providers included: Leonard Stavropolskiy, PT., D.C., Eastern Approach Rehabilitation, LLC and Aquatic Therapy of Chinatown, Inc., hereinafter "the providers". The time period the providers engaged in the scheme was from 2010 until 2015.

The scheme involved creating a series of records for numerous patients allegedly suffering from "moderate - to - severe joint dysfunction, pain, and muscle spasms across multiple regions of the spine." The supposed medical impressions were copied or "cut and pasted" from the initial examination impressions throughout the entirety of the treatment records. Further, the planned treatment records in the notes were predetermined, and not individually tailored to each patient. As a result, the providers were alleged to have failed to legitimately examine the patients; created records with pre-determined findings rather than properly recording what transpired during examinations; and, offered the same treatment for nearly every patient, regardless of whether or not it was medically necessary.

State Farm also alleged that defendants deliberately concealed the fraud by using a software product, "Write Pad", to randomize similar observations and diagnoses and make the providers alleged observations, diagnosis and treatment appear to vary from patient to patient. Finally, State Farm alleged statutory insurance fraud, common law fraud and unjust enrichment and sought declaratory judgment for the return of the funds previously paid to these medical providers.

Defendants denied all claims of fraud and alleged that any fraud which may have allegedly occurred on the older claims was discovered by State Farm prior to the expiration of the statute of limitations when State Farm referred several of the claims to its Special Investigation Unit ("SIU").

III. DISCUSSION

Judge Joyner, after reviewing both State Farms' and the providers' motions for summary judgment and the claims made therein, determined that State Farms'

continued on page 12

Pennsylvania Bad Faith

continued from page 11

decision not to pay the medical claims and to challenge the claims as fraudulent was appropriate. Further, he determined that the providers failed to provide any counter evidence. The Court reasoned as follows:

"We find Plaintiffs (State Farm) have met their burden in showing there is no genuine dispute that they stopped payment to Defendants (providers) for post-litigation bills out of a "bona fide belief that Defendants' (providers) bills were fraudulent," after "observing non-credible patterns in Defendants' (providers) records" indicating to Plaintiffs [State Farm] that the records had been falsified in order to induce payment. . . Since Defendants (providers) offer no competing evidence of Plaintiffs'(State Farm) alleged bad faith in denying their claims, no reasonable jury would be able to find that Plaintiffs' (State Farm) "wantonly" violated Pennsylvania's Motor Vehicle Financial Responsibility Law."

State Farm v. Stavropolskiy, Nos. 15-805929, 16-01374, 2018 U.S. Dist. LEXIS 167425 (E.D. Pa. Sept. 25, 2018) *25-26. Accordingly, Judge Joyner found that a 'bona fide belief', and not 'bona fide evidence', of fraudulent activity when observing what the Court felt were non-credible patterns in defendants' records was a reasonable basis to deny the defendants' Motion for bad faith and to grant State Farm's motion for partial summary judgment. *Id*.

The Court next turned its attention to the providers' motion for summary judgment which was divided into four stages and heavily argued that State Farm had the knowledge or should have known of the alleged fraud well before October 30, 2015, which is the date when the providers allege the statute of limitations expired. Judge Joyner reasoned in denying the providers' motion for summary judgment that the "discovery rule" and "fraudulent concealment issues," presented a question of material fact for a jury to determine as to when State Farm should have been aware of the allegedly fraudulent conduct. The basis for the ruling was State Farm's argument that it could not discover the complex fraud scheme until it had an opportunity to examine the totality of the providers' records and identify "evidence of the pervasive and fraudulent patterns" with the assistance of pre-suit medical experts and counsel. *Id* at *8.

Likewise, the providers' argued that State Farm knew that the providers used the Write Pad program for its billing entries and that was enough to put State Farm on notice of the alleged fraud. The providers also argued that State Farm's assigning the cases to the SIU unit was evidence that State Farm was aware of the alleged fraud prior to the running of the statute of limitations. Judge Joyner disagreed recognizing that the carrier's knowledge that the providers used Write Pad is not knowledge that the providers used the program for fraudulent purposes; and, assignment of the claims to the SIU unit is not tantamount to alleging provider fraud. These are also questions for the jury to determine.

IV. CONCLUSION

The *State Farm v. Stavropolskiy* case is still proceeding to the trial at which time State Farm will be allowed to put on its proofs of fraud by the providers. Thus far, the attempts by the providers to dismiss the case at the pleadings and motion stages have failed. Additionally, the providers attempt to use the Bad Faith Statute as a shield for their allegedly fraudulent activities has also failed. The Court determined that if the carrier has a bona fide belief and can demonstrate the belief is reasonably based; the carrier is not acting wantonly and may deny or withhold payments for suspicious medical bills without fear of a legitimate bad faith claim.

This case also demonstrates that if a carrier is suspicious of fraudulent billing activity that the carrier should not sit back and hope not to be sued for failure to promptly pay the medical bills. Instead, the carrier should proactively investigate the claims and the potential scheme and file its claims for declaratory judgment and/or fraud, if warranted, to resolve the issue as quickly as possible. Accordingly, the Pennsylvania Bad Faith Statute cannot be used as a shield by the medical providers to extort funds from insurance carriers, and carriers can take proactive steps to prevent and deter insurance fraud without fear of unreasonable threats of bad faith.

THE LATEST ON THE DISCOVERABILITY AND ADMISSIBILITY OF SOCIAL MEDIA EVIDENCE

By Daniel E. Cummins Esquire, Foley, Comerford & Cummins

Over the past year, the Pennsylvania state trial and appellate courts have continued to grapple with issues pertaining to social media discovery as well as the admissibility of social media evidence at trial.

Discoverability of Social Media Content

In *Kelter v. Flanagan*, No. 286-Civil-2017 (C.P. Monroe Co. Feb. 19, 2018) (Williamson, J.), Monroe County Judge David J. Williamson followed the developing common law that permits a party access to another party's private social media pages only when it has first been established that information relevant to the litigation can be seen on the public pages of that profile. In *Kelter*, Judge Williamson granted a defendant's motion to compel a plaintiff to provide defense counsel with her Instagram account log-in information in order to allow for further discovery of the information on that profile.

The *Kelter* case arose out of a motor vehicle accident. According to the opinion, the plaintiff initially testified at her deposition that she did not maintain any social media accounts. When confronted with proof to the contrary, the plaintiff admitted that she maintained an Instagram account and asserted that she misunderstood the question presented.

Defense counsel then reviewed posts from the plaintiff's Instagram account from the time period shortly after the accident that were available for public access on the plaintiff's Instagram account. As set forth in the *Kelter* opinion, those posts seemed to indicate that, despite the plaintiff's claims of limitations following the accident, the plaintiff had engaged in vigorous physical activity both before and after the accident—such as references to shoveling snow and going to the gym.

When the plaintiff declined to provide any additional Instagram account information, the defense filed a motion to compel, which, as noted, was granted. The court ruled in this fashion because the defense made the required threshold showing that the public pages on the plaintiff's profile suggested that more information may be found on the private pages of the same profile.

In granting the defense limited access to the private pages of the site for discovery purposes, the court directed the defense not to share this information with anyone not related to the case. The court's order further mandated that the plaintiff would not remove or delete any content from that account.

Confirming that there is a split of authority on this issue amongst the trial courts of Pennsylvania, a contrary result was handed down in the recent Northampton County Court of Common Pleas ruling in **Allen v. Sands Bethworks Gaming, LLC**, No. C-0048-CV-2017-2279 (C.P. North. Co. Aug. 6, 2018) (Dally, J.).

The *Allen* case arose out of a plaintiff's alleged slip and fall in a bathroom at the Sands Casino in Bethlehem, Pennsylvania. During the course of discovery, the plaintiff provided limited information in response to social media interrogatories seeking information regarding her online activity. The plaintiff confirmed in her responses that she used Facebook and Twitter, but declined to provide more detailed information other than to confirm that nothing had been deleted from her accounts since the date of the incident.

The defense responded with a motion to compel for more information, including information from the private portions of the plaintiff's social media profiles. In his detailed opinion, Judge Dally provided an excellent overview of the general rules of discovery pertinent to this issue as well as a review of the previous social media discovery decisions that have been handed down around the Commonwealth by various county courts of common pleas, as well as by courts from other jurisdictions.

No Pennsylvania appellate court decision was referenced in the *Allen* decision as there are apparently still no such decisions to date on this emerging issue. Judge Dally noted that the defense had pointed out discrepancies between the plaintiff's deposition testimony regarding her alleged limitations and accident-related injuries, and the photos available for review on the public pages of the plaintiff's Facebook profile depicting the plaintiff engaging in certain activities.

Nevertheless, after reviewing the record before the court, Judge Dally ruled that the defense failed to establish the factual predicate of showing sufficient information on the plaintiff's public pages to allow for discovery of information on the plaintiff's private pages. In a footnote, the court emphasized that such a factual predicate must be established with respect to each separate social media site the defendant wishes to access.

The court additionally noted that, in any event, "it would be disinclined to follow the line of Common Pleas cases that have granted parties **carte blanche** access to another party›s social medial account by requiring the responding party to to turn over their username and password, as requested by the Defendant in this case." The court found that this type of access would be overly intrusive, would cause unreasonable embarrassment and burden, and represented a request for discovery that was not properly tailored with reasonable particularity as required by the Rules of Civil Procedure pertaining to discovery efforts. In light of the above reasoning, the defendant's motion to compel was denied. It appears that Judge Dally was generally opposed to the notion that discovery should be allowed into the private areas of parties' social media sites and, as such, he tailored his opinion to secure this desired result.

The above recent trial court cases on the discoverability of social media information continues to confirm that,

continued on page 14

The Latest

continued from page 13

in the absence of appellate guidance on the issue, there will be uncertainty as to whether a particular Court of Common Pleas in a given county will allow for further access of a social media site in response to a motion to compel.

Admissibility of Social Media Content

This past year, a notable appellate decision was issued on the separate issue of the admissibility of social medial information during a criminal trial.

In the case of *Commonwealth v. Mangel*, 181 A.3d 1154 (Pa. Super. 2018), the Pennsylvania Superior Court ruled that social media posts are inadmissible in criminal cases unless prosecutors can present evidence of who actually authored the commentary. It is expected that this reasoning, rendered in the criminal context, will be applied in the context of a civil trial once the issue arises in that context.

The Superior Court in *Mangel* affirmed an Erie County trial court decision denying a prosecutor's motion in limine seeking to introduce into evidence Facebook posts and messages allegedly authored by the defendant. The Superior Court ruled in this fashion after noting that social media accounts can be easily hacked or faked. Both the trial court and the appellate court in *Mangel* found that merely presenting evidence that the posts and messages came from a social media account bearing the defendant's name was not enough to admit the evidence at trial.

The Superior Court reasoned that Facebook posts and messages must, instead, be authenticated under Pa.R.E. 901—in a manner similar to how text messages and email messages are authenticated. The Superior Court relied on its own 2011 decision in **Commonwealth v. Koch**, 39 A.3d 996 (Pa. Super. 2011), **affirmed by an equally divided court**, 106 A.3d 705 (Pa. 2014), which dealt with the separate but similar issue of the admissibility and authentication of cell phone text messages. In so doing, it noted that *Koch* held that "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." *Mangel*, 181 A.3d at 1160-61. In a case of first impression, the Superior Court in *Mangel* held that the same analysis should apply to social media posts. *Id.* at 1162. As stated, it can be expected that a similar ruling would be handed down in the context of a civil case should this issue resurface in the future.

Publication of New Social Media Decisions

To review a comprehensive compilation of social media discovery decisions handed down to date in Pennsylvania, one can freely access the Facebook Discovery Scorecard on the Tort Talk blog at www.TortTalk.com. Copies of the decisions found on the Scorecard can be downloaded by clicking on the case names.

While the Facebook Discovery Scorecard is comprehensive, it is not represented to be complete. There may be other decisions out there that have not been publicized.

Continuing publication and widespread dissemination of the trial court decisions on these still novel social media issues is important and beneficial to the bench and the bar as a whole. Should you happen to have or come across a Social Media decision, please send a copy to dancummins@comcast.net in order that the Facebook Discovery Scorecard can be continually updated as the common law develops.

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Berg v. Nationwide Mut. Ins. Co.: Its Back and Forth Journey through Pennsylvania's Court System

By Brooks R. Foland, Esq. and Allison L. Krupp, Esq., Marshall, Dennehey, Warner, Coleman & Goggin

The case of *Berg v. Nationwide Mut. Ins. Co.* has had a long and turbulent history through Pennsylvania's trial and appellate court systems, and that journey is not over yet. It stems from a motor vehicle accident that occurred in 1996, when Bill Clinton was still in office, O.J. was on trial, and Braveheart had just won the Oscar for Best Picture. Berg's journey began in the Court of Common Pleas of Berks County, then proceeded to the Pennsylvania Superior Court, the Pennsylvania Supreme Court, back to the Superior Court, back to Berks County for another trial, and then up again to the Superior Court, which issued two separate opinions. Berg has now filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, making it unclear where the chips will ultimately fall on this two-decade old case. A review of the case's history and the Superior Court's thorough and well-reasoned opinion may, however, shed some light on whether the Supreme Court will grant allocator and, if so, the likely resolution of this case which has ping-ponged through our court system.

In 1996, Sharon Berg was involved in a motor vehicle accident, which did not result in injury, and subsequently made a claim for property damage to her vehicle with her insurer, Nationwide Mutual Insurance Company. Nationwide's first damage estimate concluded that the vehicle should be totaled. The trial court determined that Nationwide "vetoed this appraisal" and that a second estimate found that the vehicle could be repaired. The repair process took four months, and the car was then returned to Berg. After Berg had paid all of the lease payments, the trial court found that Nationwide "suddenly changed its mind, totaled the car, and paid Summit Bank $18,000 to settle the claim and obtain ownership of the Jeep." Berg subsequently filed suit for breach of contract, negligence, fraud, conspiracy, violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL), and statutory bad faith; amending her original complaint a total of eight times. That litigation continued for 16 years and, ultimately, proceeded to a jury trial on the fraud, conspiracy, and UTPCPL claims. The jury rendered a verdict in favor of Nationwide on everything except the catch-all provision of the UTPCPL, for which it awarded Berg $295.

Trial Judge Albert Stallone then held a bench trial on the claim for treble damages under the UTPCPL and the bad faith claim. Judge Stallone entered a directed verdict in favor of Nationwide on the bad faith claim and denied Berg's request for treble damages. Berg appealed, and the Superior Court initially determined that she had waived all appellate issues by failing to serve the trial court with a copy of her Pa. R.A.P. 1925(a) statement. A divided Supreme Court later reversed and remanded the case. After remand, the Superior Court concluded that the trial court had erred by entering a directed verdict in favor of Nationwide on the bad faith claim and remanded the case back to the trial court, where a second trial was held on the bad faith claim, this time before Judge Jeffrey Sprecher. Judge Sprecher heard testimony from four damage witnesses but otherwise relied on transcripts from the prior proceedings. In 2014, he found in favor of Berg on the bad faith claim and ordered Nationwide to pay $18 million in punitive damages and $3 million in attorneys' fees.

Nationwide appealed to the Superior Court, which vacated the trial court's verdict and remanded the case for entry of judgment in favor of Nationwide on April 9, 2018. Judge Stabile drafted the Majority Opinion and Judge Ott joined; Judge Stevens dissented.

On appeal, Berg argued—and the trial court found—that Nationwide had acted in bad faith by repairing the vehicle rather than declaring it a total loss. While the parties agreed that the repair shop had performed poor work on the vehicle, they disputed Nationwide's role in and knowledge of that repair work. In its April 9, 2018 Opinion, the Superior Court conducted a thorough review and provided a detailed summary of the underlying record, concluding that: (1) the record does not support the trial court's finding that the repair shop issued a repair estimate only after Nationwide vetoed its total loss appraisal; (2) the record contains no evidence that the vehicle was damaged beyond repair; (3) the record contains no evidence that Nationwide had actual knowledge of the vehicle's condition upon its return to Berg; and (4) Nationwide's conduct subsequent to its knowledge of the vehicle's condition—including its conduct during the subject litigation—was not a bad faith effort to cover up its alleged prior misdeeds. The Superior Court considered that the trial court had engaged in a limited and "highly selective analysis" of the facts and "drew the most malignant possible inferences from the facts it chose to consider." It also considered that the trial court had ignored pertinent claim log entries, speculated on certain matters, erroneously characterized the evidence, and inappropriately considered the length of the litigation and amount of attorneys' fees expended by Nationwide. The Superior Court noted that Berg had the right to zealously prosecute her case, just as Nationwide had the right to defend itself if it believed its employees had not acted in bad faith, and that a court "cannot arbitrarily impose a time limit on the time and resources an insurer spends in defending a bad faith action."

Finally, the Superior Court devoted a considerable portion of its opinion to discussing the trial court's "failure to limit [its] analysis to the facts of this case and applicable law." The trial court's opinion included multiple sections regarding the insurance industry in general, the psychology of choosing an insurer and insurance policy, insurers' cost containment concerns, advertisements used by insurers, and the relative wealth and power of an insurer when compared to its insured. The Superior

continued on page 16

Berg v. Nationwide Mut. Ins. Co. *continued from page 14*

Court noted that a court must base its decisions on the facts and merit of the case before it, not its general perception of a party or industry. The Superior Court acknowledged the high standard governing its review and commented that it had not reached its decision lightly.

On May 31, 2018, the Superior Court granted Berg's Petition for Reconsideration and withdrew its Majority and Dissenting Opinions. The Superior Court issued its substituted opinion on June 5, 2018, again vacating the trial court's order and remanding the case for entry of judgment in favor of Nationwide. Judge Stabile again wrote for the Majority, and Judge Ott joined the Opinion. Judge Stevens once against dissented. Comparing the June 5, 2018 Opinion to the April 9, 2018 Opinion, they are nearly identical.

On August 8, 2018, the Superior Court denied Berg's Petition for Reargument, and on September 7, 2018, Berg filed a Petition for Allowance of Appeal, which is currently pending before the Pennsylvania Supreme Court. Whether the Supreme Court will grant that Petition, and, if so, whether it will affirm or reverse the Superior Court's thorough decision is unclear at this point. What is clear, however, is that parties and counsel on both sides of the "v" will continue to follow the saga of this case closely.

Playing a Workers' Compensation Game: Accept the Challenge of Predicting the Judicial Outcomes of Challenging Recent Course of Workers' Compensation Decisions

By William R. Corkery, Esquire and Thomas R. Bond, Esquire, O'Hagan Meyer

Introduction:

With considerable frequency in workers' compensation litigation, the question of whether the injured worker was in the course of his or her employment at the time of injury arises.

During the past several years, a number of appellate opinions have been issued where this issue was present. The judicial reasoning reflected in these case dispositions provides us with important guidelines in dealing with matters involving the course of employment questions.

In several very recent cases that will be covered in this article the Commonwealth Court seems to be suggesting a new way, or new perspective, if you will, in dealing with course of employment questions arising when the workers' injury occurs on property not owned by the employer, but nonetheless, considered by our courts to fall within the judicially crafted scope of the employers' premises.

Rather than taking the more traditional approach in simply constructing case summaries, let's have a little fun with the topic at hand and see whether we can predict from the fact pattern of each of these cases what the course of employment ruling will be. If you like, jot down your predicted outcomes. Once done, we then can proceed to read the second part of my article to see how the Commonwealth Court ruled in each case. **Don't peek!**

Before we proceed, let's take a close look at the applicable statutory framework within which our course of employment analysis must take place:

Pursuant to Section 301(c) (1) of the Workers' Compensation Act ("Act") the term "injury" refers to:

> …all injuries sustained while the employee is actually engaged in the furtherance of business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employee, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employee's presence thereon being required by the nature of his employment.

Part I: Fact Patterns

Case No. 1 Fact Pattern

Piedmont Airlines, Inc. and New Hampshire Insurance Company C/O Sedgwick Claims Management Services, Inc., Inc. v. Workers' Compensation Appeal Board (Watson), No. 468 C.D. 2018; Filed: August 20, 2018; Opinion by Senior Judge Pellegrini

Claimant worked as a training supervisor for Piedmont Airlines, Inc. ("Employer"), training new employees to be gate agents. He was provided with a badge granting him access to certain areas of the Philadelphia International Airport (Airport), including employee parking lots. The Department of Aviation (DOA) issued a badge to Claimant in exchange for a one-time administrative fee to process the background check necessary for an employee to receive the badge.

On the date of injury, Claimant was scheduled to work from 8 AM to 6:30 PM. His wife drove him to the Bartram Avenue employee parking lot, which is one of two parking lots that are designated for employee parking. The DOA owns, operates, and maintains both lots. As Claimant walked through the parking lot towards a shelter to catch an employee shuttle, he slipped and fell on a pile of snow. Unfortunately, his right hand was at an awkward angle causing him to sustain a fracture of his right ring finger.

Employer denied the claim filed by Claimant maintaining that he was not

continued on page 18

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Playing the Workers' Compensation Game

continued from page 16

required by Employer to use the Bartram Avenue parking lot and, therefore, was not in the course of his employment at the time of his injury. Employer also presented evidence showing that Claimant's presence on the parking lot was not required because he did not drive to work, or park a car in the parking lot.

Fact Pattern No. 2
US Airways, Inc. and Sedgwick Claims Management Services, Inc. v. WCAB (Bockelman), No. 612 C.D. 2017; Filed: February 22, 2018; Opinion by Judge Brobson

Claimant, a Philadelphia-based flight attendant for Employer, was injured as result of a fall she took on an employee shuttlebus heading back to a parking lot where her car was located. Both the shuttle bus and the parking lot were owned, operated, and maintained by the City of Philadelphia/Division of Aviation (DOSA), for the use of all airport employees, not just those of Employer. For Employees of Employer who chose to drive to work, use of the shuttle bus was required.

Fact Pattern No. 3:
J.M.Kush v. WCAB (Power Contracting Company), No.1688 C.D. 2017; Filed: May 17, 2018; Opinion by judge McCullough

Claimant, a union electrical worker, sustained disabling injuries on January 12, 2015 as the result of an automobile accident occurring while he was on his way to a job site.

Claimant testified that, over the last three years leading up to the date of the automobile accident, he had been employed by Vantage Corporation (Vantage) and Employer as an electrical foreman. He stated that he managed numerous different jobs for each of these employers, often at the same time. Claimant testified that he often moved from one job to another. He stated that it was common for him to switch between Vantage and Employer, explaining that "everybody just pretty much moved fluidly through from company to company." Claimant related that Vantage provided him with a truck, and that he used this vehicle to travel to jobs for both Vantage and Employer. Fuel costs for his travel using this truck were paid by these entities based on the records Claimant was required to keep. Claimant testified that, on the date of injury, he was managing four different jobs for Employer, and five for Vantage. However, Claimant stated that, from December 22, 2014 to January 12, 2015, he worked exclusively for Employer.

Claimant was not paid for his travel time by Employer.

Fact Pattern No.4:
Mandeep Rana v. Workers' Compensation Appeal Board (Asha Corporation), No. 1401 2016; Filed: September 29, 2017; Opinion by Judge Cosgrove

The surviving parents (Claimants) of the deceased employee (Decedent) filed a Fatal Claim Petition as surviving dependents of Decedent.

Employer, a franchisee of Dunkin Donuts, had three operations located in Wyncote, Horsham, and Hatfield, all in Pennsylvania. Decedent, a store manager, was assigned primarily to the Wyncote store with the expectation that he would respond to operational issues at the other locations. Such operational issues would include delivering products among the three locations, and covering for sick employees.

On November 12, 2010, Employer called Decedent around 10 PM and left a message informing him that a kitchen employee at the Hatfield location had fallen ill while completing his scheduled shift. Decedent called Employer back and said he would investigate the situation. Decedent, and another employee accompanying him, was involved in a motor vehicle accident on route to the Hatfield location. Two days later, Decedent died due to injuries sustained in the accident.

Employer maintained that Decedent, under the commuting to and from work exception, was not in the course and scope of his employment at the time of the fatal automobile accident. Claimants contended that Decedent had no fixed place of employment and that his injuries sustained while in route to the Hatfield location were compensable.

Fact Pattern No. 5
Wilgro Services, Inc. v. *Workers' Compensation Appeal Board (Mentusky),* No. 1932 C.D. 2016; Filed: June 28, 2017; Opinion by Judge McCullough

Claimant, considered a traveling employee by the Court, decided to jump off a two-story roof he was working on as a HVAC mechanic at the end of his work day with resulting serious heel injuries and back injuries. Employer issued a notice of compensation denial maintaining that Claimant's decision to jump from the roof constituted a deliberate and intentional act taking Claimant out of the course of his employment. Up until the date of injury, Claimant had been ascending and descending from the roof he was working on using a ladder placed there by roofers who also were working on this building. The roofers had unexpectedly removed their ladder, which previously they had left there overnight, leaving Claimant in a position where he had to find an alternate way to come down from the area where he was working at the conclusion of his workday. Before he decided it to jump from the roof, Claimant tried unsuccessfully to contact Employer by phone. He also tried to access a roof hatch, but found it was locked. Claimant further testified that he never considered calling 911, or an emergency number. Further, he did he call out for help, bang on the hatch, or walk the perimeter of the roof to look for anyone else. He stated that he proceeded towards the employees' entrance, where the roof was lower and waited about 30 minutes to see someone entering or exiting the building, but he saw no one. Claimant testified that the roof at that point was between 16 and 20 feet off the ground, and because he has successfully made similar jumps in the past, and the ground was covered with mulch, he thought he could jump without injury. Claimant agreed that, if he had waited longer, the odds were that someone would enter or leave the building, but he felt he could safely make the jump without injuring himself. In retrospect, Claimant testified that decision was not smart, but he said he never thought he would get hurt.

Fact Pattern No. 6

Starr Aviation v. Workers' Compensation Appeal Board (Colquitt), No. 659 C.D. 2016; Decision filed: March 7, 2017; Opinion by Judge McCullough

Claimant, whose job entailed the transport of bags in an airport sustained serious injuries when, with the consent of her supervisor to go to a location in the airport to meet her mother, who had brought some personal items, including her wallet and feminine products for her daughter. While in route to the location, she was involved in an accident. Claimant had started her menstrual period after leaving home for work.

The WCJ found that Claimant's menstrual cycle would have adversely affected her job performance and ability to finish her shift. Employer presented testimony to establish that feminine products were available in the restroom and break room and that one of her co-workers offered her food and, therefore, there was no need for Claimant to have taken the temporary departure from her work to meet her mother.

Applying the personal comfort doctrine, the Court held that Claimant was in the course of her employment at the time of her injury.

Part II: The Answers

Case No. 1 Outcome (Injured on Airport Parking Lot):

Holdings on Course of Employment Issue:

WCJ: Yes

WCAB: Affirmed

Commonwealth Court: Affirmed

Court's Rationale:

The Court rejected the argument advanced by Employer that Claimant's injuries did not occur on Employer's premises in that the parking lot was owned by DOA. As stressed by the Court the determinative question is not who owns or controls the property, but whether it is such an integral part Employer's business as to be considered part of the employer's business.

In response to the argument advanced by Employer that Claimant was not required to use the premises, the Court noted that the parking lot where Claimant fell was customarily used by employees for ingress and egress. Under the circumstances, the parking lot became such an integral part of Employee's business as to be considered part of the Employer's premises. The Court pointed out that, when Claimant was dropped off at the parking lot to board a shuttle bus to arrive at work, he had to walk through the employee parking lot using his security badge granting him clearance to enter the lot.

In fact Claimant's presence in the parking lot to get to the employee shuttle bus was so connected with his employment relationship that it was required by the nature of his employment.

Case No. 2 Outcome (Injured on Airport Shuttle Bus)

Holdings on Course of Employment Issue:

WCJ: Yes

WCAB: Yes

Commonwealth Court: Affirmed

The Court pointed out that for those employees of Employer who chose to drive to work use of the shuttle box bus was required. This fact underpinned the legal conclusion reached by the Court to consider the shuttle bus as such an integral part of Employer's business as to be part of its premises.

The Court, while noting that Employer did not require Claimant or other employees drive to work, held that it constituted a reasonable means of ingress and egress to her workplace as to be considered part of Claimant's employment.

Special Note: On October 3, 2018, the Supreme Court of Pennsylvania Granted the Petition for Allowance of Appeal filed by the Employer in this case in order to determine if the Commonwealth Court's order was contrary to long – standing case law from the Commonwealth Court holding that an employee is not in the course and scope of employment while traveling between a parking lot and the workplace unless the employer mandates how an employee commutes to work and/or where the employee must park his/her vehicle.

Fact Pattern No. 3 Outcome (Union Electrician on his way to a job site):

Holdings on Course of Employment Question:

WCJ: No (Claimant's injury occurred during his commute to a fixed job location).

WCAB: Affirmed

Commonwealth Court: No

Rationale Underpinning Commonwealth Court's Holding:

The Court noted that, in contrast to most fixed places of employment, the job site to which Claimant was traveling on the date of injury was of discrete and limited duration. However, noting that Claimant was working exclusively at this particular job site for about a month, the Court concluded that Claimant was not a traveling employee at the time of his injury. Accordingly, the Court found that recovery under the Act by Claimant was barred by application of the "Coming and Going rule" where the Courts have consistently held that an employee traveling to or from work is not in the course of his employment.

The Court further noted that in that there was no evidence that Employer provided or controlled Claimant's means of commute. Given this fact, and the fact Claimant failed to establish that Employer compensated him for his travel time, the Court held there was no employment contract exception to the "coming and going "rule.

Fact Pattern No. 4 Outcome (Store Manager with Dunkin' Donuts injured while traveling to another store to address a problem)

Course of Employment Rulings:

WCJ: Yes

WCAB: No

Commonwealth Court: Yes

Rationale Underpinning the Commonwealth Court's Opinion in Favor of Claimant:

The Court noted that there was no dispute that Decedent was a manager of the Wyncote store and concluded that, as to that location, Decedent was a

continued on page 20

Playing the Workers' Compensation Game

continued from page 19

stationary employee. With regard to the other stores, the Court found insufficient evidence to support a conclusion that Decedent was a stationary employee with respect to Employer's locations in Hatfield and Horsham. The Court pointed out that there was no evidence of record to support a finding that Decedent had ever been to the Horsham location during the six weeks of his renewed employment with Employer. Accordingly, the Court concluded Decedent was a traveling employee on a "special mission" for Employer entitled to the presumption that he was working for Employer during the drive from his home to the Hatfield location. As a result, the Court held that Decedent's injuries and death were sustained in the scope and course of his employment and were compensable under the Act.

Fact Pattern No. 5 Outcome (Employee jumping from a roof at the end of workday)

Course of Employment Rulings:

WCJ: Yes (Claimant was a traveling employee when he jumped from the roof.)

WCAB: Yes

Commonwealth Court: Yes

Rationale Underpinning the Commonwealth Court's Opinion in Favor of Claimant:

The Court, noting that Claimant was a traveling employee, stated that he was entitled to a presumption that he was furthering Employer's business when he was injured. The Court opined that Employer had the burden of proving that Claimant's actions were so foreign to and removed from his or her usual employment as to constitute abandonment thereof. The Court held that Employer had not successfully rebutted the presumption of Claimant furthering Employer's business or affairs, pointing out that, while Claiming's decision to jump was not advisable, may not have been a smart move, and may have been misguided, it could not be said that it was so unreasonable a decision as to make the action so foreign and removed from Claimant's job as to constitute an abandonment of his job.

Fact Pattern No.6 Outcome (Claimant meets mother in area of airport where she worked to take personal supplies she had asked her to bring):

Course of Employment Determinations:

WCJ: Yes

WCAB: Yes

Commonwealth Court: Yes

Rationale Underpinning Court's Determination:

Applying the personal comfort doctrine, the Court held that Claimant was in the course of her employment at the time of her injury. The Court rejected the argument advanced by Employer that Claimant did not use good judgment, or was negligent in having her mother bring the feminine products to her rather than obtaining them at work. The Court stressed that workers' compensation is a no-fault law and, accordingly, lack of judgment or negligence do not constitute valid defenses for claims under the Act.

Conclusion:

We hope you enjoyed playing the workers' compensation game. Who said that workers' compensation is a boring field of law! Clearly, course of employment determinations are very fact-specific. It is imperative that defense counsel work very closely with the employer and insurer to develop a comprehensive picture of the scope of the injured workers work duties, procedures and policies of the employer that may be relevant, and exactly what transpired when the injury occurred.

AUTOMOBILE CASE LAW UPDATE

By Thomas McDonnell, Esquire, Summers, McDonnell, Hudock, Guthrie & Rauch, P.C.

PENNSYLVANIA SUPREME COURT UPHOLDS COMMONWEALTH COURT DECISION THAT EMPLOYER HAS NO SUBROGATION CLAIM AGAINST EMPLOYEES' THIRD PARTY RECOVERY WHERE BENEFITS PROVIDED PURSUANT TO THE HEART AND LUNG ACT

PENNSYLVANIA STATE POLICE V. W.C.A.B. (BUSHTA), ____ A. 3d ____ (Pa. 2018)

Joseph Bushta was injured while within the course and scope of his employment as a Pennsylvania State Police Trooper when his police vehicle was hit by a tractor trailer. He suffered various cervical and lumbar injuries and was off work for approximately sixteen months. The Pennsylvania State Police issued a "Notice of Compensation Payable" noting that Trooper Bushta was to be paid salary continuation benefits under the Pennsylvania Heart and Lung Act. Bushta settled his third party claim for $1,007,000. He then entered into a stipulation whereby he agreed to repay almost $57,000 in wage loss payments received under the Pennsylvania Workers' Compensation Act even though he did not directly receive the compensation benefits as he was paid pursuant to the Heart and Lung Act. There was also an agreement to pay back almost $9,000 in medical expenses.

The stipulation was approved by the Workers' Compensation Judge (WCJ). However, approximately one week before the stipulation was approved, the Pennsylvania Commonwealth Court handed down its decision in Stermel v. WCAB (City of Philadelphia) wherein the Commonwealth Court held that Philadelphia Police Department was not entitled to a subrogation lien against an officer's third party recovery as the anti-subrogation provisions of §1720 of the Pa. MVFRL continued to apply to Heart and Lung Act benefits. As a result, Bushta appealed the WCJ's Order to the Workers' Compensation Appeal Board which agreed that the State Police had no lien on the third party recovery as Stermel was controlling at the time of the Order entered by the WCJ.

The State Police appealed to the Commonwealth Court which held that the WCAB did not err in its decision as Stermel was controlling precedent when the stipulation was executed. The court agreed that the State Police could not subrogate for wage loss payments made to Mr. Bushta as they were technically made under the Heath and Lung Act, not the Workers' Compensation Act. The court further held that the State Police could not recover medical expenses paid on behalf of Mr. Bushta as they too were paid pursuant to the Heart and Lung Act.

The State Police then appealed to the Supreme Court contending that it had a right of subrogation as workers' compensation benefits had been extended, even if not directly received by the injured employee. Trooper Bushta argued that the State Police argument ignores the plain language of the Heart and Lung Act as well as controlling precedent.

The Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court finding that all benefits received were paid pursuant to the Heart and Lung Act and that the anti-subrogation provisions of the Pa. MVFRL had not been removed with respect to such payments. Further, the Court found that the issuance of a "Notice of Compensation Payable" did not remove the subrogation issue from the Heart and Lung Act.

BERKS COUNTY TRIAL COURT ALLOWS UIM INSURER TO TAKE 'CREDIT' FOR AUTO TORTFEASOR'S LIABILITY LIMITS AND AMOUNT OF SETTLEMENT WITH NON-AUTOMOBILE TORTFEASOR

ADAMS V. GEICO GENERAL INSURANCE COMPANY, No. 15-18880(C.C.P. Berks Co., 2018)

Leroy Adams sustained a severe foot injury when struck by a motor vehicle while working as part of a roadway construction crew. Adams settled with the tortfeasor's insurer for the policy limits of $100,000. He had also sued Traffic Control Services/Flagger Force which carried $2,000,000 in liability coverage. Plaintiff's claims against that entity were settled for $75,000.

Adams then filed a UIM action against GEICO, his personal automobile insurer. GEICO denied the claim contending that it should receive a credit in the amount of 2.1 million, the aggregate of available liability coverage from both the automobile and non-automobile tortfeasors. Plaintiff contended that GEICO could only take credit for auto-related policies.

The GEICO policy set forth that "the amount payable under this coverage (UIM) would be reduced by all amounts:

> (a) paid by or for all persons or organizations liable for injury…

Relying upon the Pennsylvania Supreme Court's 2014 decision in AAA Mid-Atlantic v. Ryan and other precedent, the court found that the Pa. MVFRL does not allow a double recovery. However, nothing in the Act lends credence to GEICO's contention that a general liability policy needs to be exhausted prior to a UIM claim being made. As a result, the court gave GEICO a "credit" for the primary tortfeasor's liability limits and the amount of the insured's settlement with the non-automotive tortfeasor. As such, the credit received by GEICO was $175,000.

FIRST PARTY INSURER COMPELLED TO PRODUCE INTERNAL DOCUMENTS ADDRESSING REFERRAL OF CHIROPRACTIC BILLS FOR PEER REVIEW WITHOUT CONFIDENTIALITY AGREEMENT

DR. MICHAEL BENNESE t/d/b/a SYNCHRONY CHIROCARE (ALO) V. ERIE INSURANCE EXCHANGE, 2017-cv-2865 (Dauphin Co. 2018)

TURNPAUGH CHIROPRACTIC

continued on page 22

Automobile Case Law Update *continued from page 21*

HEALTH AND WELLNESS CENTER, P.C. (COX) V. ERIE INSURANCE EXCHANGE, 2017-cv-7437 (Dauphin Co. 2018)

These two cases involve discovery disputes between chiropractors seeking to recover bills denied subsequent to a peer review and Erie Insurance Exchange. The issue in both cases was whether or not Erie should be compelled to produce its internal guidelines, protocols, criteria and policy manuals with respect to its procedure for referring chiropractic bills to peer review without plaintiff's counsel having to sign a confidentiality agreement.

Erie had resisted producing the materials in questions without a confidentiality agreement as the information at issue was proprietary in nature and could constitute a "trade secret." The court ordered a hearing on this issue wherein a representative of Erie testified concerning the material contained therein and the harm that Erie would suffer if its competitors or the general public had access to this information.

Taking the designee's testimony into account, the court held that Erie did not meet its burden of showing that the information in question constituted a trade secret as there was no "substantial secrecy and competitive value to the owner." The subject of the hearing was limited to five pages setting forth Erie's procedure for sending a file for an independent medical examination and/or peer review in Pennsylvania.

In denying Erie's request for a protective order, the court held that given the fact that all insurance companies operating in Pennsylvania have to follow the relevant code sections and that Erie was unable to demonstrate the extent of any harm if the competitors had access to the information, Erie did not meet its burden that the subject materials constituted "trade secrets."

PHILADELPHIA TRIAL COURT ALLOWS PLAINTIFF ACCESS TO INTERVIEWS WITH CURRENT AND FORMER EMPLOYEES

NEWSUAN V. REPUBLIC SERVICES, (C.C.P. Philadelphia Co., No. 00528, 2018)

Plaintiff, Karen Newsuan, was injured while working as an independent recycler at Republic's premises in August 2015. After filing suit, she conducted discovery wherein her counsel asked the defendant for information about any former employees who may have been witnesses to the accident.

The defendant did not provide the information but instead contacted the potential witnesses and interviewed them. Defendant's counsel also offered to represent the current and former employees at no cost even though the witnesses had no liability exposure.

Plaintiff filed a motion to compel the information about the potential witnesses objecting to the alleged attorney-client privilege. The court held that the defendant must provide the contact information of any current or former employees of Republic Services who are not employed in a supervisory capacity. Plaintiff's counsel was allowed to contact said witnesses who had not sought representation.

The court also held that the defendant was to turn over any pre-representation writings, including witness interviews, as any activity prior to any representation was not protected by the attorney-client privilege.

The court felt that the defendant's actions foreclosed fair access of the plaintiff to interview witnesses. As such, the defendant was further ordered to advise any contacted witnesses of any potential conflicts of interest.

NORTHAMPTON TRIAL COURT REFUSES FURTHER ACCESS TO PLAINTIFF'S SOCIAL MEDIA ACCOUNTS AS DEFENDANT FAILS TO MEET BURDEN OF SHOWING RELEVANCE

ALLAN V. SANDS BETHWORKS GAMING, C-0048-CV-2017 (C.C.P. Northampton Co., 2018)

Plaintiff alleged personal injuries as a result of a slip and fall on a bathroom floor in the defendant casino. After suit was filed, the defendant served upon plaintiff social media discovery wherein the plaintiff admitted that she was a member of Facebook and Twitter. The defendant then filed a motion to compel the user names and passwords for these two social media accounts in order to obtain private content.

In a detailed analysis, the court found that the issue of disclosure of the private content in this case turns on whether the information would reasonably lead to the discovery of relevant evidence. The court found that to obtain private information, a party must demonstrate that the evidence was relevant and controverts the account holder's claims or defenses in the underlying action.

In this case, defendant contended that the information contained on the plaintiff's public portions of her social media accounts showed that she traveled and attended football games which contradicted her deposition testimony. However, the court held that this alone did not demonstrate relevance as the information did not show that the plaintiff acted inconsistently with her injury claims. Had she done so, then the private information would be relevant.

NORTHAMPTON COUNTY TRIAL COURT REFUSES TO STRIKE ALLEGATIONS OF RECKLESSNESS WHERE DEFENDANT WAS ALLEGEDLY SPEEDING AND RAN A RED LIGHT

NOLEN v. SKEN, No. C-48-CV-2018-0385 (C.C.P. Northampton Co. 2018).

Plaintiff and defendant were involved in an intersectional collision in Northampton County in which plaintiff alleged that defendant was speeding and ran a red light. Plaintiff filed a Complaint seeking compensatory damages and pled that defendant's actions were "reckless." Defendant filed Preliminary Objections and argued that there were insufficient factual averments in the Complaint to support a claim for recklessness. Plaintiff was not requesting any punitive damages but revealed that they pled recklessness in order to preclude defendant from asserting a defense based on comparative negligence. The

court denied the Preliminary Objections and noted that defendant would not be prejudiced.

MONROE COUNTY TRIAL COURT DENIES PLAINTIFF'S POST-TRIAL MOTIONS WHERE JURY FINDS DEFENDANT DRIVER NEGLIGENT BUT FINDS NO FACTUAL CAUSE

STEUDLER v. KEATING, No. 8795 Civil 2013 (C.C.P. Monroe Co. 2018).

Plaintiffs Erika Steudler and Victor Resto were walking along a country road in Monroe County at night when a vehicle driven by the defendant struck Resto and killed him. Resto's estate filed a lawsuit against defendant, and Ms. Steudler filed her own lawsuit alleging that the vehicle did not strike her but contended that she was entitled to bring a claim because Resto's body brushed against her as he was thrown through the air. Liability was vigorously disputed, and at the conclusion of the case the jury found that defendant was negligent but that his negligence was not a factual cause of the harm.

Plaintiff filed post-trial motions which the trial court denied. In its opinion, the trial court explained that it was not against the weight of the evidence for the jury to find that the defendant was negligent but that his negligence did not cause the accident. The jury could reasonably have believed that the plaintiffs were walking in the road at night while wearing dark clothing and were therefore not visible for a sufficient period of time for the defendant to have seen and avoided them.

NORTHAMPTON COUNTY TRIAL COURT PRECLUDES UNINSURED NEW JERSEY PLAINTIFF FROM PLEADING, PROVING OR RECOVERING ANY MEDICAL EXPENSES OR NON-ECONOMIC DAMAGES

WILLIAMS v. RECZYNSKI, C-0048-CV-2016-3019 (C.C.P. Northampton Co. 2017).

Plaintiff was a resident of New Jersey who was operating an uninsured motor vehicle on I-78 in Northampton County when she was involved in an accident with defendant's truck. The truck and its owner were both residents of other states.

At trial, defendant filed a Motion in Limine to preclude evidence of plaintiff's medical expenses and non-economic damages. The court noted that there was a conflict of law between Pennsylvania and New Jersey on this issue. In Pennsylvania, an uninsured motorist is still able to recover economic loss from the tortfeasor, whereas in New Jersey an uninsured motorist is precluded from seeking damages for economic and non-economic losses. After going through a choice of law analysis, the court found that New Jersey law applied and that New Jersey law barred plaintiff's claim for economic and non-economic damages.

PLAINTIFF FAILS TO PROVE "FRAUDULENT CONCEALMENT" ON PART OF RENTAL AGENCY IN ORDER TO TOLL STATUTE OF LIMITATIONS

VIDRA V. HERTZ CORPORATION, 2018 U.S. Dist. LEXIS 172161(E.D. Pa. 2018)

Plaintiff, George Vidra, was responsible for causing a motor vehicle accident in April of 2012 in which two people were killed. Vidra complained at the scene, and thereafter, that the motor vehicle accident was caused by a defect in his rental vehicle which caused sudden acceleration. Mr. Vidra was given a twenty year sentence for homicide by vehicle.

In 2018, while in prison, plaintiff sued Hertz, General Motors and various component manufacturers alleging a prior defect which led to the accident and his subsequent jail sentence. The action was clearly filed after the expiration of the two year statute of limitations for personal injury actions in Pennsylvania.

In response to Hertz's Motion to Dismiss, the plaintiff contended that the statute of limitations should be tolled as Hertz "fraudulently concealed" relevant information concerning the rental vehicle by not responding to plaintiff's inquiries. The plaintiff also contended that Hertz's conduct was misleading as it did not disclose a 2012 recall which arguably covered the vehicle in question.

In dismissing the action the Federal District Court held that there must be an affirmative act of concealment which would mislead the plaintiff from discovering any injury in order to toll the statute of limitations under a theory of "fraudulent concealment." The court also held that silence can only constitute fraudulent concealment if there is an affirmative duty to disclose information to someone due to a relationship which did not exist in this instance.

FEDERAL DISTRICT COURT DENIES INSURER'S MOTION TO DISMISS WHERE CLAIM REPRESENTATIVE HANDLED BOTH THIRD PARTY AND UIM CLAIMS

VELLA v. STATE FARM MUT. AUTO. INS. CO., No. 1:17-cv-1900 (M.D. Pa. 2018).

Anthony Vella was involved in a motor vehicle accident with Carol Hopkins on September 6, 2015. Both parties were insured by State Farm. Shortly after the accident, Mr. Vella provided notice to State Farm that he was making a liability claim under Ms. Hopkins' policy and a UIM claim under his own policy. State Farm assigned one claim representative to handle both claims. The parties engaged in settlement negotiations, and State Farm ultimately tendered its liability limits but denied payment under the UIM policy.

Mr. Vella sued State Farm for breach of contract and bad faith and alleged that having the same claim representative handle both the third party liability claim and the UIM claim was a conflict of interest which amounted to bad faith. State Farm filed a Motion to Dismiss. The court granted the Motion to Dismiss insofar as it related to State Farm's handling of plaintiff's third party claim since the law in Pennsylvania is clear that a third party claimant cannot bring an action for bad faith. However, with respect to the UIM claim, the court denied the Motion to Dismiss.

continued on page 24

Automobile Case Law Update *continued from page 23*

FEDERAL DISTRICT COURT DISMISSES BAD FAITH CLAIM BASED ON CONCLUSORY ALLEGATIONS

KOSMALSKI v. PROGRESSIVE PREFERRED INS., No. 17-5726 (E.D. Pa. 2018).

Plaintiff was injured in a motorcycle accident on June 14, 2017 which he alleged was caused by an underinsured motorist. He made a demand for the $25,000 limits of UIM coverage under his policy with Progressive and, when Progressive did not pay the claim, he filed an action for breach of contract and bad faith.

In his Complaint, plaintiff set forth boilerplate allegations to the effect that Progressive failed to evaluate his claim objectively and fairly, that it failed to conduct a fair investigation of the claim, that it failed to pay the loss in a timely manner, that it failed to reasonably and adequately evaluate the medical documentation and that it failed to keep him fairly and adequately advised as to the status of his claim. Progressive filed a Motion to Dismiss, arguing that the allegations were insufficiently specific. The court agreed and noted that plaintiff was required to plead more specific facts if he wished to pursue a claim for bad faith. Accordingly, the court granted plaintiff leave to file an Amended Complaint.

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POST-KOKEN UPDATE

By Daniel E. Cummins Esquire, Foley, Comerford & Cummins

Motion to Sever Denied in Lehigh County

In the Post-Koken Lehigh County Court of Common Pleas case of *Holland v. Yankauskas and Erie Insurance Exchange*, No. 2015-C-1866 (C.P. Lehigh Co. Nov. 2, 2017 Reichley, J.), the court denied the UIM carrier's Motion for Severance in which the carrier requested a separate trial. The Motion was denied without prejudice to the carrier's right to restate the Motion closer to trial.

While noting that it had the power under Pa.R.C.P. 213 to order separate trials of any parties or issues in furtherance of convenience or to avoid prejudice, the court felt, at this early juncture of the case (which was still in the discovery phase), that it was not established that there was a need to bifurcate the trial at that point.

In so ruling, the court noted that it recognized the "additional challenges posed by presenting both issues concurrently to one jury." However, the court also noted that appropriate jury instructions could be provided if necessary in a joint trial to clarify and distinguish the issues with respect to each Defendant.

In the end, the court denied the Motion without prejudice to the carrier's right to restate the Motion at the conclusion of discovery.

Anyone wishing to review a copy of this detailed Order may click this LINK.

Motion to Sever and Stay Bad Faith Claim Granted in Luzerne County

In the post-Koken case of *Denisco v. USAA*, No. 2248-CV-2018 (C.P. Luz. Co. May 21, 2018 Amesbury, J.), the court granted a UIM carrier's Motion to Sever and Stay a Plaintiffs' Bad Faith Claims from the Plaintiffs' Breach of Contract Claims.

The court further ordered that discovery and trial on the breach of contract claims would proceed separately and conclude before the commencement of any discovery with respect to the separate bad faith claims.

The court additionally ordered that, upon completion or settlement of the breach of contract claims, a scheduling conference would be held to discuss a schedule for discovery, dispositive motions, and trial with respect to the bad faith claims.

Anyone wishing to review a copy of this Court Order without Opinion may click this LINK.

Motion To Sever Bad Faith Claim Granted in Luzerne County; Stay Order Denied

In her recent Order in the case of *McLaughlin v. State Auto Property and Cas. Ins. Co.*, No. 2017-CV-08471 (Aug. 29, 2018 Gartley, J.), Judge Tina Polachek Gartley of the Luzerne County

Court of Common Pleas granted in part and denied in part the UIM carrier's Motion to Sever and Stay the Plaintiffs' statutory and common law bad faith claims in a Post-Koken litigation.

The Court agreed to sever the bad faith claims from the breach of contract claims for trial purposes, but denied the motion for a stay of any bad faith discovery.

The Order additionally noted that any bad faith discovery disputes should be submitted to the court for a determination as to whether the information at issue is protected from discovery or warrants a redaction until the breach of contract/UIM claims have been submitted to the jury for final disposition.

The court further ordered that the UIM carrier shall deliver any and all unredacted or withheld copies of bad faith discovery when the case is sent to the jury for deliberations on the breach of contract/UIM case.

The court additionally noted that, upon receipt and review of the bad faith discovery, the Plaintiff may request an immediate non-jury trial on the bad faith claim or seek a continuance to conduct pre-trial preparation of that bad faith claim.

Anyone wishing to review this Order by Judge Gartley may click this LINK.

Allegations of Improper Claims Handling Dismissed From UIM Claim

In the case of *Swientisky v. American States Insurance Company*, No. 3:18-cv-1159 (M.D. Pa. Aug. 8, 2018 Caputo, J.), the court granted in part and denied in part the UIM carrier's Motion to Dismiss relative to a UIM claim asserted by the Plaintiff.

According to the Opinion, this matter involved a UIM claim in which bad faith was not pled. Rather, this was a breach of contract claim that included allegations of generic violations of the Motor Vehicle Responsibility Law in support of a claim for UIM benefits.

The UIM carrier filed a Motion to Dismiss asserting that allegations of improper claim handling should be stricken from the Complaint because such alleged improper claim handling was not relevant to a cause of action in which bad faith has not been pled.

The court disagreed and found that improper claim handling could be relevant to a contract claim, even in the absence of bad faith, because the decision-making during the claims handling could go to the reasoning behind the denial of the contract claim.

On another issue, the UIM carrier asserted that the court should dismiss, or order a more definite statement, with respect to the insured's unidentified statutory violations given that the Plaintiff had failed to allege any bad faith violation or identify the provisions of the MVFRL that the carrier allegedly violated.

Judge Caputo dismissed this statutory count in the Complaint given that the Plaintiff had failed to plead an alleged statutory violation with any detail and given that the facts pled did not set forth such alleged wrongdoing.

Anyone wishing to review a copy of this Opinion may click this LINK. The companion Order can be viewed HERE.

Deposition of Claims Rep Allowed

In her recent Order in the case of *Simonetti v. Lalko and Depositors Ins. Co.*, No. 2018-CV-02421 (C.P. Luz. Co. Aug. 27, 2018 Gelb, J.), the court denied the carrier's Motion for a Protective and to Stay a Deposition of its Adjuster but confirmed that the Plaintiff may not inquire into areas of the adjuster's mental impressions or conclusions or opinions respecting the value or merit of the claim or with respect to defenses of the claim or strategy or tactics in the defense of the claim by the carrier.

Anyone wishing to review a copy of this decision may click this LINK.

Motion to Sever and Stay Bad Faith Claim Denied in Blair County

In the case of Blair County case of *Fisher v. Erie Insurance Exchange*, No. 2016-GN-298 (C.P. Blair Co. May 9, 2018 Bernard, J.), the trial court denied the insurance company's Motion to Sever the UIM and bad faith claims and further denied the carrier's Motion to Stay the bad faith case.

This matter arose out of a motor vehicle accident and a UIM claim pursued by the injured party Plaintiff.

In its decision, the court reviewed the split of authority and case law in the various state and federal courts on the issues of severance and stay of bad faith claims in post-Koken matters. The courts noted that the federal courts in Pennsylvania tend to deny such motions and that the state trial courts have varying results, including conflicts within some same counties.

In Blair County, where this case is pending, there were previous decisions in which such motions to sever were denied and bad faith discovery was allowed to proceed. In this regard, the court cited the case of *Swan v. Moorefield*, No. 2014-GN-2606 (C.P. Blair Co. Nov. 9, 2017).

Anyone wishing to review a copy of this decision may click this LINK.

Older Non-Precedential Superior Court Post-Koken Decision Noted

A notable, non-precedential, post-Koken decision was handed down by the Pennsylvania Superior Court back in 2016 entitled *Zellat v. McCulloch*, No. 1610 W.D. 2014, 2016 W.L. 312486 (Pa. Super. Jan. 26, 2016) (Bowes, Olson, and Stabile, J.J.) (Mem. Op. by Bowes, J.) (Non-precedential).

Unfortunately, this post-Koken decision on notable issues was not published by the Pennsylvania Superior Court and was, instead, listed as a non-precedential decision.

The case of *Zellat* involved a post-Koken lawsuit in which the Plaintiff sued both the third party tortfeasor on a negligence claim and her own underinsured motorist carrier on a UIM claim.

At the trial level, the Allegheny Court of Common Pleas allowed the case to proceed in front of a jury without the UIM insurance company Defendant being mentioned. Nor was the type of insurance involved mentioned.

At trial, the jury found that the tortfeasor's negligence was not the factual cause of any harm. The Plaintiff appealed.

continued on page 26

Post-Koken Update

continued from page 25

Among the many arguments listed on appeal by the Plaintiff was that she was denied due process because the UIM carrier was not mentioned or identified at trial. In this regard, the Plaintiff relied upon the prior decision of *Stepanovich v. State Farm*, 78 A.3d 1147 (Pa. Super. 2013).

Similar to its previous decision in the *Stepanovich* case, the Superior Court held in *Zellat* that it was not per se reversible error not to identify the insurance company when the insurance company Defendant is in a joint trial with the third party tortfeasor.

The court in *Zellat* found this *Stepanovich* decision to be on point on the issue of whether a Plaintiff is able to establish prejudice when the to the *Stepanovich* decision, prejudice was not established by the failure to identify the UIM carrier at trial.

As such, the *Zellat* court found that the trial court did not abuse its discretion in not identifying the UIM carrier during the joint trial with the tortfeasor.

In this appeal, the Plaintiff also presented a secondary contention that she was unfairly "tagged-teamed" by the participation of two (2) defense lawyers, one of whom represented the tortfeasor and the other who defended the case for the UIM carrier.

This argument was rejected by the Superior Court in *Zellat* given that the Plaintiff did not request a new trial as part of her appeal process with respect to the participation of both defense counsel at trial. As such, this argument was rejected.

Anyone wishing to read this case, may click this LINK.

Daniel E. Cummins is a partner in the Scranton, PA insurance defense firm of Foley, Comerford & Cummins where he focuses his practice on the defense of car and/or trucking accident matters, UM/UIM matters, premises liability cases, and products liability litigation. He is the sole creator and writer of the Tort Talk blog (www.TortTalk.com) and also offers mediation services through Cummins Mediation Services.

PREMISES LIABILITY UPDATE

By Stephen T. Kopko, Esquire and Daniel E. Cummins, Esquire, Foley, Comerford & Cummins

PENNSYLVANIA SUPERIOR COURT REAFFIRMS PRINCIPAL THAT BUSINESSES ARE NOT REQUIRED TO ACT AS POLICEMAN DURING ONGOING ASSAULT

Reason v. Kathryn's Corner Thrift Shop, 169 A.3d 96 (Pa. Super.2017)

In the case of Reason v. Kathryn's Corner Thrift Shop, the Pennsylvania Superior Court ruled that the trial court properly entered summary judgment in favor of the Defendant in a matter arising out of a case in which the Plaintiff was involved in a fight with a third party in the Defendant's store.

The appellate court agreed with the trial court that there was no evidence of any past violence or issues with or by the third party in the store. The court also noted that the store satisfied its duties under the law to aid the Plaintiff by calling the police.

In so ruling, the appellate court noted that the Pennsylvania Courts have held that a business is not required to act as policeman in the face of an ongoing assault within its store and that the store satisfied its duty to aid its business invitee by calling 911 or other professional assistance.

The records reveal that, in addition to calling 911, an employee in the store eventually broke up the fight outside the store where a crowd had gathered.

Anyone wishing to review this decision may click this LINK.

PENNSYLVANIA SUPERIOR COURT REAFFIRMS HILLS AND RIDGES DOCTRINE AND HOLDS THAT LANDLORDS DO NOT HAVE DUTY TO PRE-TREAT SURFACES PRIOR TO SNOWSTORM.

Collins v. Phila. Sub. Devel., 179 A.3d 69 (Pa. Super. 2018)

In the case of Collins v. Phila. Sub. Devel, the Pennsylvania Superior Court affirmed the entry of summary judgment in favor of a premises liability Defendant under the Hills and Ridges Doctrine where the evidence before the trial court confirmed that the winter storm, described in the record as a blizzard, was still active at the time of the Plaintiff's alleged slip and fall on ice and/or snow.

According to the Opinion, there was a video of the Plaintiff's slip and fall in which it could be seen that it was still snowing at the time of the incident. The trial court had concluded that no reasonable person viewing the video could conclude that the weather conditions at the time of the fall were anything other than a blizzard.

As generally slippery conditions were being created at the time of the Plaintiff's fall, the Superior Court agreed with the trial court's decision that the Hills and Ridges Doctrine defeated the Plaintiff's claim.

The decision is also notable for the court's ruling that the Defendant's alleged failure to pretreat a walking surface was not a basis upon which to impose liability under Pennsylvania law.

The court rejected the Plaintiff's efforts to assert that, under an exception to the Hills and Ridges Doctrine, the dangerous condition was created by the negligence of the landowner in failing to pretreat the surface with ice melt products prior to the anticipated storm. The court found that this theory did not fall within the neglect of the defendant exception to the Hills and Ridges Doctrine.

The Collins Court referenced a prior Superior Court decision noting that there is no duty imposed to salt an area during a snowstorm or even immediately thereafter; rather, the landowner is entitled to a reasonable time to take action. As such, the court found that Pennsylvania law does not impose any duty on landowners to pretreat surfaces in anticipation of an impending winter storm.

Anyone wishing to review this decision online, may click this LINK.

LACKAWANNA COUNTY TRIAL COURT DENIES DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER HILLS AND RIDGES

Evans v. Simrell, No. 14-CV-2483 (C. C.P. Lacka. Co. 2018)

In the recent hills and ridges decision in the case of Evans v. Simrell, the court denied the Defendant's Motion for Summary Judgment after finding that genuine issues of material fact existed to be determined by a jury.

According to the Opinion, the Plaintiff alleged that he fell on ice that was in front of the Defendant's home on the sidewalk. The Defendants filed a Motion for Summary Judgment asserting that the Plaintiff could not sustain his burden of proving that he slipped and fell on hills and ridges of ice situated on the sidewalk.

In opposing the summary judgment motion, the Plaintiffs asserted that there was a genuine issue of material fact as to whether the Plaintiff was caused to fall on a localized patch of ice as opposed to as a result of generally slippery conditions existing in the area.

In this regard, the court noted that there were triable issues of fact as to whether general slippery conditions existed throughout the community.

More specifically, both the Plaintiff and his mother testified that other areas of sidewalk near the Defendant's property were shoveled and free of snow and ice. According to the record, one of the responding paramedics also noted that there was no ice present on the abutting road and adjacent grass, and that he only observed ice on the Defendant's sidewalk.

Judge Nealon ruled that it was within the sole province of the jury to resolve this conflicting testimony and to determine the weight, if any, to be accorded to these varying accounts.

Anyone wishing to review a copy of this decision may click this LINK.

PENNSYLVANIA SUPERIOR COURT HOLDS THAT RESIDENTS OF A COMMUNITY ARE LICENSEES WHILE IN THE COMMON AREA OF THE COMMUNITY

Hackett v. Indian King Residents Ass'n., No. 3600 EDA 2017 (Pa. Super. 2018)

In its recent decision in the case of Hackett v. Indian King Residents Ass'n., the Superior Court affirmed the denial of a Plaintiff's post-trial motions after a defense verdict in a slip or trip and fall case.

In this matter, the Plaintiff alleges she tripped and fell in a common area of a community. One of the main issues in this case was whether the Plaintiff should be deemed to be a licensee or an invitee.

The Plaintiff asserted that, since she had paid common area maintenance fees to the residents' association, she should be considered to be a business invitee.

The Superior Court disagreed and found that the mere paying of common area maintenance fees did not create invitee status under Pennsylvania law. Rather, the Plaintiff was deemed to be licensee since, as a resident of the community, she used the common areas by permission, and not by the Defendant's invitation.

The court also noted that an invitation must be more than mere permission to access common areas in order to make one a business invitee in this context.

Anyone wishing to review a copy of this case may click this LINK.

PENNSYLVANIA SUPERIOR COURT AFFIRMS TRIAL COURT GRANT OF SUMMARY JUDGMENT HOLDING THAT ONE POSSESSOR OF LAND OWES NO DUTY OF CARE TO ANOTHER POSSESSOR OF THE LAND ON THE SAME PREMISES

Cholewka v. Gelso, 2018 Pa.Super. 216 (Pa. Super. 2018)

In the case of Cholewka v. Gelso, the Superior Court affirmed a trial court's entry of summary judgment in favor of a Defendant in a slip and fall case after finding that one possessor of land owes no duty of care to another possessor of land on the same premises.

The Plaintiffs and the Defendants at issue leased a residential property together from the Defendant-owner of the premises.

More specifically, the leased property was rented by the Dawn and Ronald Cholewka, as well as their daughter, Heather, and the daughter's boyfriend. All four (4) tenants signed the Lease and had agreed to rent the property as is and agreed to make all necessary repairs.

At some point during the course of the Lease, the boyfriend-tenant installed a gravel parking pad next to an existing asphalt driveway so that he would have a place to park his work truck.

One night, Dawn Cholewka was walking around the premises and tripped in the area of the driveway and the parking pad.

The Plaintiff sued the Defendant landlords and later joined the Defendant boyfriend-tenant and his landscaping company as Additional Defendants.

The boyfriend-tenant filed a Motion for Summary Judgment and the trial court granted that motion after finding that the boyfriend-tenant owed no duty of care to the Plaintiff because all of the parties were co-possessors of the same land.

The Superior Court affirmed noting that its "research has uncovered no decision in which one possessor of land owed a duty of care to another possessor of land under premises liability principles."

Anyone wishing to review a copy of this decision may click this LINK.

FEDERAL COURT FOR MIDDLE DISTRICT OF PENNSYLVANIA GRANTS MOTION TO DISMISS FOR SKI RESORT HOLDING THAT SKI RESORT DID NOT OWE DUTY OF CARE

continued on page 28

Premises Liability Update *continued from page 27*

Cole v. Camelback Mountain Ski Resort, No. 3:16-CV-1959 (M.D. Pa. Oct. 16, 2017)

In the case of Cole v. Camelback Mountain Ski Resort, the court granted a Motion to Dismiss in a downhill skiing injury case.

In so ruling, Judge Mariani noted that a ski resort owes no duty of care to a skier for any in inherent risk of downhill skiing. The court noted that accidentally striking an object while skiing down a slope is an inherent danger of downhill skiing. The exact nature of the objects struck is not material.

The court also noted that the fact that the ski resort added padding to the object that the Plaintiff struck did not give rise to liability for a negligent undertaking. To rule otherwise would deter voluntary safety efforts on the part of a ski resort.

Anyone wishing to review a copy of this decision may click HERE.

FEDERAL COURT FOR EASTERN DISTRICT GRANTS MOTION FOR SUMMARY JUDGMENT HOLDING THAT SIDEWALK CURB WAS AN OPEN AND OBVIOUS CONDITION

Slappy-Sutton v. Speedway, LLC, No. 16-CV-4765 (E.D. Pa. June 22, 2018)

In the case of Slappy-Sutton v. Speedway, LLC, Judge DuBois of the Federal Court of the Eastern District of Pennsylvania granted a Defendant's Motion for Summary Judgment in a trip and fall case involving a curb after the court found that the curb presented an open and obvious condition.

The Plaintiff tripped and fell after misjudging the step down from a curb while exiting a Convenient Store and attempting to go back to his car in the parking lot after refueling his vehicle. The Plaintiff alleged that the Defendant's negligence included a failure to make the curb a different color in order for patrons to distinguish the curb from a nearby cement strip.

After reviewing pictures and expert testimonies provided by the parties, the court noted that local township code provisions did not require a landowner to distinguish between the color of a curb and the pavement below. The court found that the curb was not a dangerous condition and one that a pedestrian should ordinarily expect to encounter

Anyone wishing to review a copy of this case may click this LINK.

EASTERN DISTRICT FEDERAL COURT GRANTS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT HOLDING PLAINTIFF PRODUCED NO EVIDENCE OF ACTUAL OR CONSTRUCTIVE NOTICE.

Pace v. Wal-Mart Stores, No. 17-1829 (E.D. Pa. Sept. 18, 2018)

In the case of Pace v. Wal-Mart Stores, Judge Baylson granted summary judgment to the Defendant as the Plaintiff was unable to show that the Defendant had actual or constructive notice of a hazardous condition in an alleged slip and fall on grapes or grape juice.

Notably, where the Defendant produced an affidavit confirming that there was no video of the location where the Plaintiff fell and that no videos had been destroyed, the Plaintiff's request for an adverse inference of spoliation of evidence was denied.

Anyone wishing to review a copy of this decision may click this LINK.

LACKAWANNA COUNTY TRIAL GRANTS SUMMARY JUDGMENT TO DEFENDANT WHERE PLAINTIFF PRODUCED NO EVIDENCE OF ALLEGED SLIPPERY CONDITION

Wasnetsky v. Quinn's Market, No. 14-CV-4437 (C.C.P. Lacka. Co.2018)

Summary Judgment was granted by the trial court in a fatal slip and fall case of Wasnetsky v. Quinn's Market, No. 14-CV-4437 (C.P. Lacka. Co. June 15, 2018 Nealon, J.).

According to the Opinion, the Plaintiff allegedly slipped and fell as result of stepping on a liquid on the floor in the market. The Plaintiff's decedent struck his head on the linoleum floor and allegedly tragically died from his head injuries.

In his Opinion, Judge Terrence R. Nealon thoroughly reviewed the current status of premises liability law in Pennsylvania and reaffirmed that the law requires a plaintiff to show that a he or she was caused to fall by a dangerous condition on the premises that the landowner knew or should have known about and failed to remedy. The court additionally reviewed the law of those cases where summary judgment was granted where a Plaintiff could not point to the cause of his or her fall.

The court more specifically pointed out that the only witness to the accident was another customer in the store who confirmed that she witnessed the Plaintiff's decedent fall and that there was no liquid on the floor where the Plaintiff fell as alleged in the Plaintiff's Complaint. This witness also confirmed that the Plaintiff was wearing loafer-like shoes with a smooth bottom that looked like a "slippery type of shoe."

The record also revealed that the store manager who reported to the scene while the Plaintiff's decedent was still on the floor also noted that there was no liquid on the floor in that area. A produce manager also reported to the scene and likewise confirmed that there was no liquid on the floor in the area of the Plaintiff's decedent's fall.

The court also noted that liability expert testimony offered by the Plaintiff from two experts was not sufficiently based in fact in terms of how the accident occurred. As such, the court found that this expert testimony was incompetent to defeat the summary judgment motion.

Based upon the record before the court in this matter, the court held that, even when the case was viewed in a light most favorable to the Plaintiff as required by the summary judgment standard of review, there was no admissible evidence presented of any liquid, substance, or any other dangerous condition on the floor that ostensibly caused the Plaintiff to fall.

The court additionally noted that the Plaintiff also failed to offer evidence to show actual or constructive notice on the

part of the Defendants of any allegedly dangerous condition on the premises.

Based on these failures by the Plaintiffs to sustain their burden of proof, summary judgment was granted by the court

Anyone wishing to review a copy of this decision may click this LINK.

LACKAWANNA COUNTY TRIAL COURT HOLDS THAT RESIDENTIAL PROPERTY OWNER NOT LIABLE FOR CRIMINAL ACTS OF ANOTHER BEYOND GEOGRAPHIC BOUNDARY OF LEASED PREMISES

Bonacci v. Pal, No 15-CV-4501, (C.C.P. Lackawanna Co., Aug. 25, 2017)

In the case of Bonacci v. Pal, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas granted a residential landowner's demurrer in a wrongful death case on the issue of whether such a landlord may be found liable under Pennsylvania law for a fatal shooting that involved his tenant as an accomplice, but which shooting occurred miles away from the leased premises.

In his Opinion, Judge Nealon reviewed the law that holds that a landowner in the Commonwealth of Pennsylvania has a duty to protect tenants and third parties from foreseeable criminal attacks on the leased property if the owner had promised or undertaken to provide certain security as an additional precaution. However, a residential property owner can be liable for physical harm to others outside of the land only if the harm was caused by the dilapidated condition of the structure or a dangerous artificial condition upon it.

In his research, Judge Nealon found no Pennsylvania case which has imposed liability upon a residential landowner for criminal conduct that causes harm well beyond the geographic boundaries of the leased premises.

Accordingly, since the fatal shooting at issue in this case occurred more than a mile away from the leased premises, and since the Plaintiff did not allege that the incident resulted from any physical defect in the residential structure or any artificial condition thereon, the court agreed that the Complaint failed to state a cause of action against the Defendant-landowner in this regard, and as such, the Defendant-landowner's demurrer was granted.

Anyone wishing to review this decision, may click this LINK.

LACKAWANNA COUNTY TRIAL COURT DENIES SUMMARY JUDGMENT TO LANDOWNER AND EXPLAINS "RETAINED CONTROL" THEORY OF LIABILITY BETWEEN LANDOWNER AND INDEPENDENT CONTRACTOR

Santiago v. Wegmans Food Markets, Inc., 16-CV-1529 (C. C.P. Lacka. Co.2018)

In his recent decision in the case of Santiago v. Wegmans Food Markets, Inc., Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas denied a property owner's Motion for Summary Judgment in a slip and fall action.

According to the Opinion, the Plaintiff was an employee of an independent contractor that was retained by the property owner to provide janitorial services. The Plaintiff was allegedly injured in a slip and fall event on the premises.

The Defendant-owner filed a Motion for Summary Judgment on the basis that it allegedly owed no duty of care to the employee of the independent contractor. The landowner Defendant argued that a landowner who retains an independent contractor cannot be vicariously liable for the negligence of an independent contractor or its employees.

However, Judge Nealon denied the Motion for Summary Judgment under the "retained control" exception to that theory of non-liability. Under the exception, a property owner who entrusts work to an independent contractor remains subject to liability if its contract with the independent contractor grants the landowner control over the manner, method, and operative details of the independent contractor's work.

Judge Nealon found that there were issues of fact in this regard that required the court to deny the Motion for Summary Judgment filed.

Anyone wishing to read this Opinion may click this LINK.

SCHUYLKILL COUNTY TRIAL COURT DENIES PROPERTY OWNER'S PRELIMINARY OBJECTIONS PERTAINING TO DUTY OF CARE TO INVITEES AND THE DANGER OF ADJOINING ROADWAYS

Zurick v. Basile Italian Delight Restaurant and Pizzeria, S-1571-2016 (C. C.P. Schuylkill Co. 2017)

In its decision in the case of Zurick v. Basile Italian Delight Restaurant and Pizzeria, the court denied Preliminary Objections filed by a landowner Defendant who asserted that it owed no duty to a Plaintiff injured in a motor vehicle accident that occurred after a vehicle left the parking lot area of the Defendant's restaurant and was involved in an accident with a vehicle on the adjoining roadway.

The Defendant landowner had asserted that no duty was owned to the Plaintiff under the case of Newell v. Montana West, Inc., 154 A.3d 819 (Pa. Super. 2017), in which the Superior Court ruled, in a case of first impression, that a business does not have a duty to protect its invitees against the dangers associated with adjoining roadways. The Newell case involved a pedestrian who was struck and killed by a car after he left a show at the defendant's premises.

The court in Zurick limited the Newell holding to accidents involving pedestrians and ruled that the driveway immunity provisions of the Construction Code Act, 35 P.S. §7210 502 (b)(4)(1) and/or the Municipalities Planning Code, 53 P.S. §10508(6), give rise to a statutory duty upon landowner Defendants related to the creation of a driveway on its premises and/or the failure to maintain such driveway so as not to interfere with the safe travel on the abutting roadway.

Anyone wishing to review a copy of this decision may click this LINK.

MONROE COUNTY TRIAL COURT DENIES DEFENDANT WATER PARK MOTION FOR SUMMARY JUDGMENT HOLDING THAT

continued on page 30

Premises Liability Update *continued from page 29*

THERE WERE GENUINE ISSUES OF FACT REGARDING HOW THE PLAINTIFF WAS INJURED.

Deleon v. MHC Timothy Lake N. Ltd. Partnership, 8652 - CV - 2014 (C.C. P. Monroe Co. 2017)

In the case of Deleon v. MHC Timothy Lake N. Ltd. Partnership, Judge David J. Williamson of the Monroe County Court of Common Pleas denied a Defendant's Motion for Summary Judgment in a case involving injuries allegedly sustained by a minor Plaintiff while riding down a water slide at the Defendant's water park. The court essentially found that genuine issues of material fact existed to allow the case to proceed to a jury.

According to the Opinion, the Defendant operated a water park at which the Plaintiff visited with her family and friends. The Plaintiff made several trips down a water slide. On the last trip, the Plaintiff emerged with a forehead laceration.

The Plaintiff's Complaint alleged that the laceration was caused by a jagged edge on the water slide. However, deposition testimony indicated that the injury may have occurred instead when the Plaintiff hit her head on the water slide.

The Defendant moved for summary judgment, asserting that the Plaintiff admitted in discovery that the alleged jagged edge on the water slide did not exist. In the alternative, the defense asserted that there was no evidence of actual or constructive knowledge on the part of the Defendant of the allegedly defective condition. The Defendant also maintained that the Plaintiff's claim under res ipsa loquitur was not substantiated, as injuries on water slides were common.

The court rejected the defense argument relative to the res ipsa loquitur argument by noting that there were genuine issues of fact to be considered by a jury.

The court additionally found that the inconsistent allegations by the Plaintiff as to how the laceration occurred were not enough to warrant summary judgment as the factual determination in that regard should be left to the jury.

The court also rejected the defense argument that summary judgment was warranted given that the slide had been formally inspected three (3) days prior to the Plaintiff's alleged incident. The court noted that, even if the Defendant had passed the inspection, that did not eliminate the possibility that the inspector had missed a defect or that some other condition had occurred between the inspection and the Plaintiff's accident that could have caused the injury. Again, since there were issues of fact in this regard, the court denied the Motion for Summary Judgment and allowed the case to proceed.

Anyone wishing to review a copy of this decision may click this LINK.

LACKAWANNA COUNTY TRIAL COURT OVERRULES DEFENDANT'S PRELIMINARY OBJECTIONS HOLDING THAT A HIGH POLISHED FLOOR IS SUFFICIENT TO SUSTAIN A CLAIM OF NEGLIGENCE.

Gordner v. McIntosh, No. 2017-CV-6468 (C. C.P. Lacka. Co. 2018)

In his recent decision in the decision of Gordner v. McIntosh, Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas denied Defendant Owners' Preliminary Objections to the Plaintiff's Com-plaint, including a demurrer to the Plaintiff's negligence cause of action stated in this slip and fall case.

In addressing the demurrer to the Complaint, the court provided a detailed description of the current status of Pennsylvania law pertaining to slip and fall matters. In reviewing that law, the court noted that, although there are Pennsylvania cases that stand for the proposition that mere evidence of a highly polished floor, standing alone, is sufficient to sustain a negligence claim, other cases confirm that the manner in which the polish or wax was applied and maintained could give rise to a cause of action for negligence in slip and fall matters.

The court found that the Plaintiff stated a valid cause of action when the Plaintiff alleged that the landowners' high gloss treatment of their hardwood stairs amounted to a negligent creation and maintenance of a hazardous condition. The Plaintiff had additionally alleged that the Defendants had failed to provide adequate lighting for the slippery stairs and/or to warn all invitees of the hazardous condition of the stairs.

The Plaintiffs additionally asserted in the Complaint that one owner stated after the fall that "[w]e usually tell people these stairs are slippery."

The court found that, accepting the Plaintiff's allegations as true as required by the standard of review for a demurrer, the Plaintiff's Complaint stated a cognizable negligence claim.

Anyone wishing to review a copy of this decision by Judge Nealon may click this LINK.

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Pennsylvania Workers' Compensation Updates

By Francis X. Wickersham, Esquire, Marshall Dennehey Warner Coleman & Goggin

A flight attendant was in the scope of her employment when she was injured on a shuttle bus for airport employees she was using for transport to the employee parking lot.

US Airways, Inc. and Sedgwick Claims Management Services, Inc. V. WCAB (Bockelman); 612 C.D. 2017; Filed Feb. 22, 2018; Judge Brobson

The claimant worked as a flight attendant. She drove her own vehicle to the airport and parked in one of two designated employee parking lots for all airport employees. After doing so, she would use a shuttle bus for transport to and from the airport terminal. The employer did not control the shuttle buses, did not require use of the airport employee parking lot, and did not direct employees on how they should commute to work.

On the date of injury, the claimant parked her car in the employee parking lot and rode the shuttle bus to the terminal. At the end of her work day, she departed the terminal to the employee shuttle bus stop. After boarding the shuttle bus, while attempting to lift her suitcase on the luggage racks, she stepped in water on the floor, causing her to slip and fall, injuring her left foot. The claimant filed a claim petition. In its answer, the employer denied that that claimant was in the scope of her employment at the time of the injury.

The Workers' Compensation Judge granted the claim petition, concluding that the injury occurred on the employer's premises, the claimant's presence on the shuttle bus was required by the nature of her employment, and the injury was caused by the condition of the premises. The Workers' Compensation Appeal Board affirmed on appeal.

In its appeal to the Commonwealth Court, the employer argued that the injury did not occur on its premises in that the employer did not own, lease, or control the shuttle bus and parking lot, they were not integral to the employer's business. Additionally, the employer argued that the claimant was never required to use the shuttle bus.

The Commonwealth Court rejected the employer's arguments and affirmed the decisions of the Workers' Compensation Judge and Appeal Board. The court concluded that, although the employer did not own or exercise control over the parking and shuttle services, the claimant used the shuttle bus as a customary means of ingress and egress, which the employer understood was part of doing airport business. The court found that the shuttle bus was such an integral part of the employer's business that it was part of the employer's premises. Additionally, the court held that the claimant's presence on the bus was necessary and required by the nature of her employment because it was the means by which she traversed between her work station and the parking lot for airport employees. The absence of a directive by the employer instructing the claimant to utilize the shuttle bus was not a factor in the court's analysis.

A self-insured employer is not entitled to subrogation against claimant's third party settlement for those benefits claimant received during time he was receiving his full salary under the Heart and Lung Act.

Commonwealth of Pennsylvania v. WCAB (Piree); 995 C.D. 2017; Filed Apr. 4, 2018; Judge Cohn Jubelirer

The claimant worked as an agent for the Office of Attorney General, the employer, and sustained injuries in a work-related motor vehicle accident. The employer accepted the claimant's injuries by Notice of Compensation Payable. The claimant also received his full salary pursuant to the Heart and Lung Act. After the claimant's Heart and Lung benefits ended, he began receiving workers' compensation benefits. Eventually, the claimant took a disability retirement from his position.

Later, the claimant settled a third party case and entered into a Third Party Settlement Agreement with the employer. The claimant and the employer filed Petitions to Review Compensation Benefits, seeking a determination on whether the employer was entitled to reimbursement of the net lien amount under §319 of the Workers' Compensation Act. The claimant requested that the payments made under to the Heart and Lung Act be excluded from the Third Party Settlement Agreement. The employer responded that the amounts in the Third Party Settlement Agreement were all amounts payable under the Act.

The Workers' Compensation Judge concluded that the claimant did not prove that the amounts identified as the lien in the Third Party Settlement Agreement were anything other than compensation payable under the Act. The judge found in favor of the employer, and the claimant appealed to the Appeal Board. The Board reversed, holding that, because the employer was self insured and the claimant was entitled to Heart and Lung benefits concurrently with workers' compensation benefits from the date of injury until his retirement, the employer was not entitled to subrogation of the lien for workers' compensation. The Board did conclude, however, that the employer was entitled to subrogation from the date the claimant's Heart and Lung benefits ended into the future.

In its appeal to the Commonwealth Court, the employer maintained that it was entitled to subrogation to the extent of the compensation payable under the Act notwithstanding the claimant's concurrent receipt of Heart and Lung benefits. The employers' third party administrator paid the claimant's weekly workers' compensation benefits from the employer's workers' compensation fund, directly to the employer's payroll fund. According to the employer, workers' compensation benefits were still payable, even though not directly to the claimant while he received Heart and Lung benefits. Therefore, they were entitled to subrogate against the third party settlement by the amount its workers' compensation fund reimbursed its payroll fund.

The Commonwealth Court rejected this

continued on page 32

Pennsylvanai Workers' Compensation Update

continued from page 31

argument and affirmed the Appeal Board. Guided by legal precedent, the court held that a self-insured employer cannot subrogate that portion of the benefits paid to a claimant pursuant to the Heart and Lung Act. The court remanded the case for a determination regarding the employer's entitlement to subrogation for benefits paid solely while the claimant was entitled to benefits under the Workers' Compensation Act.

A routine office examination by a chiropractor does not constitute "a significant and separately identifiable service" for which a chiropractor may be paid under § 127.105(e) of the Medical Cost Containment Regulations.

Sedgwick Claims Management Services, Inc. v. Bureau of Workers' Compensation, Fee Review Hearing Office (Piszel and Bucks County Pain Center); 1033 C.D. 2017; Filed Apr. 11, 2018; Sr. Judge Colins

After the claimant sustained a work injury with his employer, the parties entered into a Compromise and Release Agreement (C&R). However, under the terms of the C&R, the employer remained responsible for payment of reasonable and necessary medical expenses for the work injury. The claimant received chiropractic treatment for shoulder and neck pain approximately three times per week, and this provider sent bills that included charges of $78 per office visit and other treatments given at those visits. The insurance carrier denied payment for the office visits charges, but paid for the other treatments. The provider filed fee review applications, challenging the denials of payment for 39 office visit charges. The Bureau of Workers' Compensation denied the provider's claim for the office visit charges. The provider then filed a request for a hearing with a Fee Review Hearing Officer.

The Hearing Officer vacated the Bureau's administrative determinations and ordered payment for all the office visit charges. The insurance company appealed to the Commonwealth Court, arguing that § 127.105(e) of the Medical Cost Containment Regulations prohibits payment of office visit charges for routine physical examinations and evaluations on the same day as other treatments when there is no new medical condition.

According to § 127.105(e) of the Medical Cost Containment Regulations, payment shall be made for an office visit provided on the same day as another procedure, only when the office visit represents a "significant and separately identifiable services performed in addition to the other procedure." The Commonwealth Court noted that the phrase "significant and separately identifiable service" was undefined and that this was a case of first impression. Citing federal Medicare case law and decisions, the court noted that an examination on the same date as a catheter placement or minor surgical procedure does not constitute a "significant and separately identifiable service" unless it is above and beyond the usual evaluation performed in conjunction with that procedure or is unrelated to the procedure that was performed on the same day.

Therefore, the Commonwealth Court concluded that an examination involving no new medical condition, change in medical condition, or other circumstances that require an examination and assessment above and beyond the usual examination and evaluation for treatment performed on the same date does not constitute "a significant and separately identifiable service" for which a chiropractor may be paid under § 127.105(e) of the Medical Cost Containment Regulations.

An electrician's motor vehicle accident en route to work was not in the course and scope of employment because he was not a traveling employee.

Kush v. WCAB (Power Contracting Company); 1688 C.D. 2017; Filed May 17, 2018; Judge McCullough

The claimant worked as an electrician and suffered serious injuries in a motor vehicle accident while driving to work. After the accident, he filed a claim petition, alleging that at the time of the injury, he was a traveling employee for the employer or was on a special mission for the employer.

The claimant testified that he worked as a union electrical worker for both the employer and V Corporation for the past three years. He also moved from one job to the other, sometimes working at different job sites on the same day. V Corporation provided the claimant with a company truck that he used to travel to jobs for both V Corporation and the employer. Typically, he drove directly from his home to an assigned job site. On the date of the accident, he left his home at about 4:30 A.M. On the way to the job, he struck a patch of ice and crashed into a guardrail. At the time of the accident, he worked almost exclusively for the employer and almost exclusively at a Shaler job site. The claimant did not receive compensation for travel time unless he needed to pick up a piece of equipment on his way to a job or was traveling from the job of one employer to another.

The Workers Compensation Judge dismissed the claim petition, finding no exception to the "coming and going." The judge concluded that the claimant had a fixed job location. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that he had no fixed place of work and was a traveling employee. Additionally, he said that his employment agreement included the time spent for transportation to and/or from work.

The Commonwealth Court affirmed the decisions of the Workers' Compensation Judge and the Appeal Board below. The court concluded that the "fixed place of work" exception to the "coming and going" rule did not apply. The court noted that the claimant said that he moved equipment to the Shaler job site when it began, anticipated working only at the Shaler job site on the date of the accident, and worked exclusively at the Shaler job site for several weeks before the accident. According to the court, the fact that a job has a discrete and limited duration does not make the employee who holds it a traveling employee. The court also held that travel was not

included in the claimant's employment contract with the employer.

The Supreme Court holds that Heart and Lung benefits are not subrogable against an injured worker's recovery from a third party tortfeasor.

Pennsylvania State Police v. WCAB (Bushta); 14 WAP 2017; Filed May 29, 2018; Justice Todd

The claimant was a Pennsylvania State Trooper who suffered multiple injuries when his state vehicle was struck by a tractor trailer. The employer issued a Notice of Compensation Payable (NCP) acknowledging the injury. The NCP stated that the claimant would be paid salary continuation Heart and Lung benefits by the employer.

The claimant later settled a third party case for $1,070,000. The employer filed a petition seeking subrogation against the settlement proceeds. In connection with that petition, the employer and the claimant entered into a stipulation in which it was agreed that the claimant had been paid $56,873.13 in workers' compensation benefits. However, the claimant never directly received them because he was being paid Heart and Lung benefits. The workers' compensation benefits were paid directly to the employer in order to avoid the need for the claimant to remit those benefits back, pursuant to the Heart and Lung Act. The stipulation set forth an amount the employer was entitled to as reimbursement of their net lien, based on the amount of workers' compensation benefits the employer paid. The lien did not include the benefits paid under the Heart and Lung Act. The Workers' Compensation Judge approved the stipulation and adopted it as a final order.

One week prior to signing the stipulation, the Commonwealth Court issued its decision in *Stermel v. WCAB (City of Philadelphia)*, 103 A.3d. 870 (Pa. Cmwlth. 2014), in which it held that the employer was precluded from subrogation for its payment of the claimant's medical bills and wage loss benefits due to the anti-subrogation provision in §1720 of the Motor Vehicle Financial Responsibility Law for Heart and Lung benefits. The court noted that, while Act 44 of the Workers' Compensation Act repealed §§ 1720 and 1722 of the MVFRL—permitting subrogation of benefits under the Act—the Legislature did not eliminate the prohibition against subrogation of Heart and Lung benefits.

Consequently, the claimant appealed the judge's decision. Because all of the benefits he received were pursuant to the Heart and Lung Act, the claimant argued they were not subrogable. The Workers' Compensation Appeal Board held that because *Stermel* was law at the time the stipulation was signed, the claimant was not bound by the concessions in it and voided the stipulation. The Commonwealth Court affirmed.

On appeal to the Supreme Court, the employer argued that, because the claimant was entitled to benefits under the Workers' Compensation Act and the Heart and Lung Act, the benefits to which the employee was entitled to under the Act are subject to subrogation. According to the employer, the right of subrogation to compensation payable under the Act applies whether the employer actually pays workers' compensation benefits to the claimant.

The Supreme Court disagreed and affirmed the decision of the Commonwealth Court. The court noted that the Heart and Lung Act requires the employee to turn over to the employer all workers' compensation benefits "received or collected." It follows that, in cases where the employee does not actually receive or collect workers' compensation benefits, there is no basis for subrogation. The Supreme Court further rejected the employer's argument that the mere acknowledgment of a work injury in a NCP and a specification of the amount of benefits an injured employee would be entitled to under the Act do not serve to transform an injured employee's Heart and Lung benefits into workers' compensation benefits under the MVFRL.

A firefighter gave timely notice to the employer that her cancer was work related; therefore, benefits were payable from the date of disability in 2004, not as of the date the claim petition was filed in 2011.

City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Flaherty); 29 C.D. 2018; Filed Jun. 1, 2018; Sr. Judge Pellegrini

The claimant worked as a firefighter for the employer for 16 years. In August of 2004, a diagnosis of breast cancer was made and a mastectomy performed. The claimant stopped working on September 9, 2004. In July of 2011, the Workers' Compensation Act was amended to create a new occupational disease provision that grants a new presumption of compensable disability for firefighters who suffer cancer. Sometime after that, the claimant received a letter from her union, informing her of the new firefighter cancer presumption law. This caused the claimant to question whether there was a connection between her job and her cancer. As a result, on September 23, 2011, she filed a claim petition. The claimant did not receive actual confirmation of the link between her cancer and work until several months after the petition was filed.

In granting the claim petition, the Workers' Compensation Judge found that the claimant filed her petition within 300 weeks and was entitled to the presumption under §301(f) Act. The judge further concluded that, even in the absence of the presumption, the claimant met her burden of proving that her cancer was caused by her occupational exposure as a firefighter. The judge awarded benefits commencing September 9, 2004. The employer appealed to the Appeal Board, which reversed the judge's decision in part. The Appeal Board concluded that the claim petition was filed 367 weeks after her last date of employment. They also held that the claimant was not entitled to the presumption. The Board nevertheless agreed that the claimant did meet her burden of proving that her cancer and disability were caused by occupational exposure. The Board remanded the matter for a determination as to when the claimant first discovered her cancer was possibly related to her work as a firefighter and when notice of the possible connection was given.

On remand, the Workers' Compensation Judge found that the claimant failed to

continued on page 34

Pennsylvanai Workers' Compensation Update

continued from page 33

show that she provided notice within 21 days of discovering her cancer was possibly related to occupational exposure. According to the judge, the claimant should have filed her claim petition within 21 days from the day she received the union's letter. Instead, she waited 120 days to do so. Consequently, the judge awarded benefits as of the date the claimant filed her claim petition. The employer appealed, and the Appeal Board partially reversed, concluding that the notice began once the claimant received the medical report establishing causation.

The employer appealed to the Commonwealth Court. The issue was whether the claimant filed her claim petition within 21 days of knowing her cancer was possibly work related, thereby entitling her to compensation from the date of disability as opposed to the date her claim petition was filed. According to the court, a claimant must have more than just a suspicion about causation for the clock to start on notice under § 311 of the Act. A claimant does not know of the possible relationship between a disease and work until informed by a medical expert. In this case, the claimant did not obtain medical confirmation until after she filed her claim petition. Although she did not file her petition within 21 days of her receipt of the letter from the union, the court nevertheless concluded that by filing her claim petition within 120 days of receipt of the letter, she complied with the "reasonable diligence" requirement of § 311 of the Act.

The Commonwealth Court analyzes the retroactive effect of *Protz II*.

Paulette Whitfield v. WCAB (Tenet Health System Hahnemann LLC); 608 C.D. 2017; Filed Jun. 6, 2018; Judge Cohn Jubilerer

The claimant suffered a work injury in 2002, requiring her to undergo low back surgery. In 2006, an IRE was performed using the Fifth Edition of the AMA Guides. The IRE physician concluded the claimant had an impairment rating of 44%, and the Workers' Compensation Judge modified the claimant to partial disability status as of the date of the IRE. The Appeal Board affirmed the judge's decision on June 1, 2009. At no time did the claimant challenge the constitutionality of the IRE before the judge or the Board. The claimant last received benefits at her total disability rate in mid July of 2015.

One month after the Commonwealth Court's decision in *Protz v. WCAB (Derry Area Sch. Dist.)*, 124 A.3d 406 (Pa. Cmwlth. 2015) (*Protz I*), the claimant filed a petition in which she requested reinstatement to total disability status. The request was contested by the employer, who argued that: *Protz I* did not have retroactive effect; the claimant waived the constitutional issue; and the claimant's partial disability status had already been fully decided. The claimant's petition was denied by the Workers' Compensation Judge, and the Appeal Board affirmed on appeal. The claimant appealed to the Commonwealth Court, arguing that the *Protz* decisions applied, entitling her to restoration of her disability status from partial to total due to an unconstitutional and invalid IRE. The claimant also argued that reinstatement petitions may be filed within three years of the date of last payment, which she did.

The Commonwealth Court held that, because the claimant filed her petition within three years from the date of her last payment, as permitted by § 413(a) of the Act, she was entitled to seek modification of her disability status based upon the *Protz* decisions, which found the IRE provision unconstitutional. In the court's view, permitting claimants to seek modification under these circumstances does not prejudice employers or insurers by upsetting their expectation of finality. Such determinations are not truly "final" until three years have passed since the date of last payment. The court remanded this case for a determination as to whether the claimant continues to be totally disabled, despite the partial disability status she had pursuant to the IRE.

The Supreme Court holds that the Construction Workplace Misclassification Act only applies to individuals who work for a business entity that performs construction services, not to an employer that is not in the business of construction.

Department of Labor and Industry, Uninsured Employer's Guaranty Fund v. WCAB (Lin and Eastern Taste); 27 E.A.P. 2017; Decided June 26, 2018; by Justice Wecht

The claimant was hired by a restaurant, Eastern Taste, to perform remodeling work. There was no expectation that the claimant would work at the restaurant after it opened. While repairing a chimney, the claimant fell from a beam and landed on a cement floor, rendering him paraplegic. The claimant filed a claim petition against the restaurant and, later, the Uninsured Employer's Guaranty Fund (Fund). Both the restaurant and the Fund filed answers, denying the existence of an employment relationship.

The Workers' Compensation Judge dismissed the claim petition, concluding that the claimant failed to prove he was an employee of the restaurant and, therefore, is ineligible for benefits. According to the judge, the claimant's work was not conducted in the regular course of the restaurant's business and his employment was casual. The judge also noted that the Construction Workplace Misclassification Act did not apply and, therefore, it was not improper to classify the claimant as an independent contractor.

The claimant appealed to the Workers' Compensation Appeal Board, which reversed the judge, concluding that the claimant was an employee for purposes of workers' compensation. The Appeal Board, though, did not consider the Construction Workplace Misclassification Act.

The Fund appealed the Board's decision to the Commonwealth Court. In reversing the Board's decision, the court noted that the dispositive issue was whether the claimant was an employee or an independent contractor. The court noted that the employer was a restaurant, not a construction business, and the claimant was hired to perform remodeling work,

not to work in the restaurant. In the court's view, these factors demonstrated that the claimant was an independent contractor.

The court engaged in a separate inquiry as to whether the claimant was an employee under the CWMA and concluded that the CWMA did not apply. The court held that when determining whether the CWMA is applicable, the construction activity must be analyzed and considered in the context of the putative employer's industry or business.

The Supreme Court of Pennsylvania agreed with the Commonwealth Court's interpretation and affirmed their decision. The claimant argued that the applicability of the CWMA turned upon the nature of the work performed, not the employer's business purpose. He argued he was performing services in the construction industry for remuneration and, therefore, could not be classified as an independent contractor for purposes of workers' compensation. The Supreme Court rejected these arguments, finding that the claimant's interpretation of the CWMA would lead to absurd results, such as classifying a homeowner as an "employer" simply by hiring a kitchen remodeler and possibly subjecting the homeowner to administrative and criminal penalties. According to the court, the CWMA refers only to those individuals who work for a business entity that performs construction services and is inapplicable where the putative employer is not in the business of construction.

A claimant's credible testimony, that he was not fully recovered from a work injury, will not alter a judge's decision terminating benefits based on testimony from employer's medical expert that the claimant was fully recovered.

Carmelo Olivares Hernandez v. WCAB (F&P Holding Co.); 1820 C.D. 2017; Filed July 19, 2018; Judge Covey

The employer issued a medical-only Notice of Compensation Payable after the claimant sustained an injury to his upper back while working modified duty from a prior work injury to the low back. Later, the employer laid the claimant off, and the claimant filed a reinstatement petition. The employer then had the claimant seen for an IME and, thereafter, filed a termination petition based on the IME physician's opinion that the claimant was fully recovered.

The Workers' Compensation Judge granted both the reinstatement and termination petitions, finding the claimant totally disabled, but only through the date of the IME, at which time the claimant was fully recovered.

On appeal, the Workers' Compensation Appeal Board reversed the Workers' Compensation Judge's decision, remanding the case for the judge to consider the deposition testimony given by the claimant's medical expert. On remand, the judge again granted both petitions. The Board again reversed the decision that granted the reinstatement petition but affirmed the decision granting the termination petition.

On appeal to the Commonwealth Court, the claimant argued that the granting of the termination petition was inconsistent with the judge's finding credible the claimant's testimony that he was not fully recovered. The Commonwealth Court rejected this argument and concluded that, although the claimant credibly testified that he continued to experience pain from the work injury after the IME, the Workers' Compensation Judge also credited the testimony of the employer's medical expert that the claimant had fully recovered from the work injury. The expert's testimony showed that the claimant's examination was objectively normal and any pain the claimant was having resulted from degenerative changes not related to the work injury. The Workers' Compensation Judge, as a fact finder, had the sole authority to weigh the evidence and properly terminated the claimant's benefits.

An employer's issuance of Supplemental Agreements to a claimant during a period that the claimant is receiving benefits pursuant to a Notice of Temporary Compensation Payable is not an admission of liability for the alleged work injury.

LifeQuest Nursing Center v. WCAB (Tisdale); 1250 C.D. 2017; Filed Jul. 19, 2018; Judge Covey

The employer issued a Notice of Temporary Compensation Payable for an alleged work injury. During the time the claimant was receiving temporary compensation benefits, the employer filed two Supplemental Agreements with the Bureau based on the claimant's release to work and hours made available to her by the employer. The claimant later stopped working, and the employer then filed a Notice Stopping Temporary Compensation and a Notice of Denial. The claimant filed claim and penalty petitions, alleging the employer violated the Act by using Bureau documents in an inappropriate manner and unilaterally stopping partial benefits.

The Workers' Compensation Judge granted the claim petition, but also terminated benefits as of October 9, 2014. In addition, the judge dismissed the penalty petition, finding that the employer was not bound by the Supplemental Agreements since the Notice of Temporary Compensation Payments was properly stopped in accordance with the Act.

On appeal, the Appeal Board modified the Workers' Compensation Judge's decision as to the description of injury, reversed the denial of the penalty petition as well as the termination of the claimant's benefits, and remanded the case to the judge to decide the amount of the penalty. The Workers' Compensation Judge then issued a decision awarding no penalties to the claimant. The Board affirmed, and the employer appealed to the Commonwealth Court.

The Commonwealth Court agreed with the employer that issuing Supplemental Agreements during the time the employer was paying temporary benefits to the claimant was not an admission of liability. According to the court, the agreements were filed merely to document a change in benefits based on a return to work. Additionally, the court held that the employer was not bound by the injury descriptions contained in the agreements. The court further held that the Board was wrong to conclude that, because the two agreements were filed after the Notice of Temporary

continued on page 36

Pennsylvanai Workers' Compensation Update

continued from page 35

Compensation Payable, the Notice of Temporary Compensation Payable converted to a Notice of Compensation Payable. The court concluded that the employer had retained all of its rights and defenses with respect to the underlying claim by timely filing the Notice of Temporary Compensation Payable and Notice of Compensation. Finally, the court found that there was substantial evidence to support the Workers' Compensation Judge's termination of benefits.

A C&R Agreement cannot be used to set aside a fee review determination. Rather, a determination in favor of a provider may be set aside only by following the proper procedure set forth in the Act.

Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (National Fire Insurance Company of Hartford); 1613 C.D. 2017; Filed Aug. 7, 2018; President Judge Leavitt

Following a 1999 work injury, the claimant and the employer entered into a C&R Agreement in 2000, settling the claimant's wage loss benefits, but leaving medical treatment open. In 2015, the employer requested Utilization Review of a topical compound pain cream. A Utilization Review Organization determined that the cream was reasonable and necessary, and the employer did not file a Utilization Review Petition. Later, an identical cream was prescribed for the claimant, and the employer denied payment "based on a Utilization Review." The billing pharmacy filed a timely Fee Review. It was determined that the employer owed the pharmacy $6,644.30 plus 10% interest.

The employer timely requested a hearing to contest the Fee Review Determination. At the hearing, the employer presented the Hearing Officer with a copy of a C&R Agreement approved by a Workers' Compensation Judge just three weeks before. The C&R Agreement included language stating: "No past, present or future benefits shall be paid for any compounded prescription cream, including but not limited to compound prescription creams prescribed by physician Dr. Jason Bundy. (See Addendum)."

The C&R Agreement also said there was "a belief" that the physician had a financial interest in the pharmacy and that neither the physician nor the pharmacy would hold the claimant responsible for charges related to the compounding prescription cream.

In light of the C&R Agreement, the Hearing Officer concluded that the Medical Fee Review Determination could not stand. The pharmacy then appealed to the Commonwealth Court, which held the C&R Agreement could not be used to set aside a Fee Review Determination which concludes that an employer owes reimbursement to a provider for a particular course of treatment. According to the court, paragraph 10 of the C&R Agreement—stating that the employer would pay reasonable, necessary and related medical expenses incurred before the hearing date—obligated the employer to pay for the compound creams dispensed by the pharmacy in 2016 since the expense had already been incurred. The court further noted that a valid C&R Agreement is binding upon the parties, but the pharmacy was not a party to the agreement. Consequently, the court held that a C&R Agreement to which a provider is not a party cannot be used to deprive that provider of the fee review procedures or to excuse the employer from paying the provider. To do so would violate the Act and due process.

Filing a reinstatement petition within three years of the date of the most recent payment of compensation entitles a claimant to seek a modification of disability status based on *Protz*, which struck the IRE process from the Act.

E.J. Timcho Jr. v. WCAB (City of Philadelphia); 158 C.D. 2017; Filed Aug. 17, 2018; President Judge Levitt

The facts of this case are similar to those presented to the Commonwealth Court in a case from June of this year, *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC)*, (Pa. Cmwlth., No. 608 C.D. 2017, filed June 6, 2018). Here, following a 2008 work injury, the employer asked the claimant to undergo an IRE on July 25, 2011. The IRE was performed pursuant to the 6th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The IRE physician concluded that the claimant had a 32 percent impairment rating. The employer then filed a modification petition, and on July 23, 2013, a Workers' Compensation Judge granted the petition. The claimant appealed to the Workers' Compensation Appeal Board, and the Board affirmed. The claimant then appealed to the Commonwealth Court. On appeal to the court, the claimant's sole argument was that the IRE physician did not comply with the AMA Guides. The claimant did not raise a constitutional challenge to § 306(a.2) (the IRE provisions of the Act). The Commonwealth Court affirmed the modification of the claimant's benefits, and the claimant filed no further appeals.

On January 5, 2016, following the Commonwealth Court's decision in *Protz v. WCAB (Dairy Area School District)*, 124 A.3d 406 (Pa Cmwlth. 2015) (*Protz I*), the claimant filed a reinstatement petition, asserting his total disability status should be reinstated because the *Protz I* court found § 306(a.2) of the Act unconstitutional. The employer then moved to dismiss the petition, arguing the claimant waived a constitutional challenge since he did not preserve that issue in his appeal to the Commonwealth Court. The employer's motion was granted, and the Board affirmed.

While the case was on appeal with the Commonwealth Court, the Pennsylvania Supreme Court issued its decision in *Protz II*, holding all of § 306(a.2) of the Act to be unconstitutional and striking it from the Act.

In light of *Protz II*, as well as the Commonwealth Court's decision in *Whitfield*, the court held that because the claimant filed his reinstatement petition within three years of the date of his most recent payment of compensation, he was entitled, as a matter of law, to seek modification of his disability status based on the *Protz* decisions.

According to the court, the claimant did not waive the constitutional issue. The constitutional issue was not barred by the doctrine of administrative finality since the reinstatement petition was filed within three years of the date of most recent payment of compensation. The court remanded the case to determine whether the claimant continues to be disabled by his work injury.

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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