COUNTERPOINT

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WINNING THE "SAFETY SWEEP-STAKES": THE IMPACT OF INSPECTION PROTOCOLS ON RETAILER SLIP-AND-FALL LITIGATION

By Wendy R.S. O'Connor, Esquire, Marshall Dennehey Warner Coleman & Goggin

I. INTRODUCTION AND OVERVIEW

As long as there have been grocery stores, customers have been falling in them,[1] and over the last several decades, as lawsuits against retailers continue to comprise a significant percentage of tort litigation, and as retailers have become more savvy, most chain stores and outlets have established internal protocols for inspections aimed at detecting and addressing potential hazards, as well as documenting the company's efforts to maintain a safe facility. As these protocols become the norm for supermarkets and other "big box" stores, those policies – and whether or not they are properly carried out – have begun to play a role in the overall liability analysis, including the issues of notice, duty, and breach. As will be discussed herein, for the most part, the fact that a retailer has implemented maintenance and inspection guidelines is largely beneficial when litigation arises, and such policies do not tend to negatively impact the defense of slip and fall cases unless there is clear evidence of either spoliation inspection records or a deviation from actual policy.

II. PLAINTIFF'S BURDEN OF PROOF IN A RETAIL SLIP-AND-FALL CASE

Under Pennsylvania law, a plaintiff seeking to recover for personal injuries related to a slip-and-fall in a retail store must initially establish all components of a traditional negligence action, namely, the existence of a duty owed by Defendants to Plaintiff; a breach of that duty by defendant; a causal connection between the alleged breach and the resulting injury; and actual loss or damage to the plaintiff.[2] In a retail premises liability action, the owner or proprietor is liable to business invitees with respect to conditions of the premises if it:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that the invitees will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.[3]

Pennsylvania law further holds that a retailer is not an insurer of the safety of its customers.[4] As well, the "mere existence of a harmful condition in a public place of business, or the mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor's duty of care to his invitees, nor raises a presumption of negligence."[5] Thus, a business invitee asserting a claim for a fall in a store must demonstrate a failure to exercise reasonable care.[6] In order to show that a defendant breached its duty of care to keep its premises free from hazardous conditions, a plaintiff must show that the the landowner either caused or created the alleged hazardous condition or had actual or constructive notice thereof.[7]

Indeed, in a premises liability action, "[t]he threshold of establishing a breach of duty is notice" of a dangerous condition.[8] A plaintiff is rarely able to establish actual notice on the part of the defendant or that the defendant caused or contributed to the creation of an allegedly dangerous condition. Thus, most plaintiffs assert that a defendant had constructive notice of said condition, proof of which

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We encourage comments from our readers
Write: Pennsylvania Defense Institute
P.O. Box 6099
Harrisburg, PA 17120
Phone: 800-734-0737 FAX: 800-734-0732
Email: cwasilefski@padefense.org or lgamby@padefense.org
Carol A. VanderWoude, Esquire . . . . . Co-Editor
Tiffany Turner, Esquire . . . . . Co-Editor

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generally requires some evidence as to the duration of the alleged condition.[9] "What constitutes constructive notice must depend on the circumstances of each case, but one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident."[10] Thus, when a plaintiff cannot adduce evidence as to the temporal duration of an alleged dangerous condition, their case will likely be dismissed.[11]

III. HOW INSPECTION PROTOCOLS MAY AFFECT A SLIP AND FALL ACTION

A. Notice

1. Failure to conduct an inspection in accordance with company policy is generally not evidence of constructive notice and is not probative as to the duration of an alleged dangerous condition.

Because it is often difficult to establish how long a particular condition existed prior to a slip-and-fall incident, plaintiffs often attempt to use a defendant's inspection policies – including evidence that they were not followed on the day in question – as proof of a condition's duration. Thus, it is not uncommon for a plaintiff to allege that, had a retailer observed its inspection guidelines, the alleged defect would have been discovered and addressed, thereby establishing constructive notice on the part of the retailer. The court in *Hower v. Wal-Mart Stores, supra* – the seminal case on this issue – flatly rejected this argument, stating:

> [T]he argument conflates evidence of Defendant's inspection practices with evidence of the duration of the spill. Defendant's alleged failure to perform a safety sweep says nothing about how long the spill was present.

Id. at 19.[12] Moreover, a plaintiff must *first* establish the existence of a duty on the part of the defendant retailer before the reasonableness of its conduct becomes relevant:

> [A] genuine issue of material fact exists as to when [defendant's employee] conducted what she described as hourly protective sweeps on the date of the accident, that defendants did not record the timing of the safety sweeps, and that no spill station was located in the aisle where plaintiff fell. Nonetheless, these issues are immaterial to a finding of constructive notice (i.e., how long the spill was on the floor). Instead, these issues help establish the alleged unreasonableness of defendant's behavior in failing to protect plaintiff from a pre-existing spill. In other words, **although these factual disputes are material in showing a breach of duty, they become relevant only after plaintiff makes an evidentiary showing of the existence of such a duty (i.e., that the spill lingered for a sufficient period of time so that defendant should have discovered the spill), which plaintiff has not done.** For instance, even if [defendant's employee] or a grocery associate conducted a protective sweep one hour before the accident, and then recorded this negative finding in a log, a jury would still have no factual basis from which to infer the duration of the spill. Indeed, the spill could have happened merely seconds before plaintiffs fall, thereby making it impossible for defendant to have notice as a matter of law.[13]

Similarly, the fact that a defendant had no regular policy for the monitoring of spills is not probative to establish constructive notice: In granting summary judgment in favor of the defendant, one court reasoned:

> Plaintiff also asserts that Defendant-GMS's failure to monitor for spills is sufficient to defeat summary judgement. Specifically, Plaintiff argues that Defendant-GMS did not have a policy in place to monitor for spills at set intervals. Moreover, there was no evidence that anyone monitored for spills that day. Such evidence, according to Plaintiff, is sufficient to defeat Defendants' motions because it illustrates Defendant-GMS's failure to use reasonable care with respect to its duty to business invitees….Plaintiff's argument as to whether Defendant-GMS's actions were reasonable does not concern the Court at present.
>
> Indeed, Plaintiff's argument as to Defendant-GMS's lack of hazard monitoring skips a step within the negligence framework. In order for Defendants to fail to exercise reasonable care with respect to a duty, Defendants must owe a duty in the first place. Defendants do not owe such a duty unless there was sufficient constructive notice of the hazardous condition. Thus, the inquiry into the sufficiency of Defendant-GMS's store policy is only relevant after establishment that Defendant had notice of a hazardous condition.[14]

Although myriad other Pennsylvania courts have arrived at the same conclusion that a retailer's failure to comply with its own inspection protocols does not establish constructive notice,[15] at least one court reached a different conclusion,[16] denying the defendant's motion for summary judgment where the plaintiff fell on liquid on the floor of the defendant's supermarket that had begun

to solidify and which originated from an earlier spill that defendant's employees had not completely cleaned. The court based its decision in part upon the failure of the defendant to conduct the hourly "sweeps" required by company protocols:

> Admissions from deposed employees show that hourly sweeps are supposed to be noted on sweep logs, which are a high priority for Wegman's, and that the sweep logs reflect no hourly sweeps the entire week preceding plaintiff's fall….The defendant's policy of performing hourly sweeps in the exercise of reasonable care to discover spills, along with evidence that no such sweeps were done, indicates that store owner defendant deviated from its duty of care to look for slippery substances. These facts also demonstrate that the defendant in the exercise of reasonable care should have known of the existence of the harmful condition.[17]

In short, evidence that a retailer may have had inspection policies but did not adhere to them – or even that it did – will generally not be probative for purposes of establishing constructive notice absent other evidence as to the issue of duration.

2. <u>Spoliation of a company's inspection records may permit a finding of constructive notice</u>.

As a general rule, the fact that a retailer has established a protocol for inspecting its premises but has no evidence as to inspections does not necessarily establish that no inspections occurred.[18] Evidence that a defendant may have spoliated maintenance and inspection records, however, may provide grounds for deviating from the principles set out in *Hower* and its progeny: In *Rodriguez v. Kravco Simon Co*., 111 A.3d 1191 (Pa. Super. 2015), the plaintiff slipped and fell on a puddle of brown liquid at a shopping mall. The trial court granted summary judgment based upon the lack of evidence that defendant had constructive notice of the puddle. On appeal, the court found that there was a genuine issue of material fact as to whether defendants had constructive notice of the liquid given plaintiff's allegations of spoliation. Indeed, although the defendant produced maintenance records, including inspection records, for the month of the subject incident, it did not produce records for the day in question. Thus, the court concluded:

> [Plaintiff] has come forth with evidence that at least casts a doubt as to the existence of a question of material fact. With the open possibility that the [defendant's maintenance subcontractor] employees failed to check the floors as scheduled prior to [Plaintiff's] fall, it is not clear that Defendants' are entitled to judgment as a matter of law.[19]

Thus, where there is a *lack* of records which might be probative as to the issue of notice, and some indication of possible spoliation, the *Hower* rationale does not apply.

Relying upon *Rodriguez,* the court in *Falcone v. Speedway LLC*, 2017 U.S. Dist. LEXIS 7324 (E.D. Pa. January 19, 2017) came to a similar conclusion. In that case, the court denied the motion for summary judgment of the defendant gas station in a case in which the plaintiff claimed to have fallen on spilled diesel fuel while filling his tank. First, it determined that there was a genuine issue of material fact as to the issue of actual notice based on, *inter alia,* evidence that defendant's employees were required to complete a "Monthly Site Safety Checklists" that noted the incidence of gasoline spills and to check fuel pumps and the parking lot for gas spills at the beginning of and throughout each shift. The court thus concluded that a jury could infer that the defendant was on notice of and failed to address the fuel spill which caused the plaintiff's accident. In so finding, the court stated:

> Defendant's emphasis on [its] inspection procedures hurts—not helps—its argument. This is because defendant has conceded that Mr. Falcone slipped and fell on diesel fuel in its parking lot. Therefore, a jury is entitled to decide whether or not defendant's parking-lot inspection procedures were properly followed the day of Mr. Falcone's incident. One could fairly conclude they were not since—if they had been followed—then Mr. Falcone would not have slipped and fallen on a diesel fuel spill.[20]

The court next considered whether defendant had demonstrated the lack of any genuine issue of material fact with respect to the issue of constructive notice and rejected defendant's contention that plaintiff had failed to establish the duration of the gas spill. Keeping in mind that employees were required to check for gas spills at the beginning of their shifts and considering evidence as to when employees clocked in on the day in question, the court concluded that there was a "coherent timeline from which both parties could argue how long the spill was on the ground." *Id*. at *13. Relying instead on *Rodriguez,* the court declined to follow *Hower* because of the possibility of spoliation of evidence which might be probative as to the issue of notice. Thus, the court concluded that "even without actual or constructive notice, there was still a disputed question as to whether the defendant acted affirmatively to inspect the premises to ensure invitees' safety." *Falcone* at *15 - *16.

B. <u>Duty</u>

Initially, although a retailer's internal inspection policies may have no bearing on the issue of notice, once notice is established, those protocols may impact the issue of reasonableness, or breach. Such policies, however, do not establish the applicable duty of care:

> Defendant's policies are not the equivalent of its duty of care. For a variety of reasons, a store owner like Defendant may adopt safety policies that exceed the duty of care and provide greater protection to invitees. A store owner like Defendant should not be faced with a lawsuit for negligence by failing to live up to a heightened, self-imposed duty of care.[21]

Similarly, maintenance and inspection guidelines do not by their very existence give rise to a separate duty independent of the provisions of Section Section 343 of the Restatement (Second) of Torts[22] or establish a breach of duty when a patron

slips and falls absent evidence of a deviation from such guidelines.[23]

1. Evidence that a Defendant *did* Comply with Company Inspection Protocols May Defeat a Finding of Negligence.

While not dispositive, a defendant retailer may be able to avoid liability where there is evidence that it complied with its internal policies governing safety inspections. One court granted summary judgment in favor of the defendant shopping mall where the plaintiff fell on an unknown substance at mall entrance because the defendant was able to establish that that area of the premises was inspected by mall employees every 20 minutes.[24] In *McCarthy v. Target Corp*., 2006 Pa. Dist. & Cnty. Dec. LEXIS 534 (Monroe C.P. November 8, 2006), moreover, the plaintiff claimed to have fallen on a "sticky patch" which she believed formed from a spilled liquid. The defendant sought summary judgment based upon lack of notice; in response, the plaintiff argued that the defendant was on constructive notice of the alleged hazard but failed to exercise reasonable care to discover and address it. The court found no evidence of notice on the part of the defendant and further determined that there was no evidence that Target had not acted reasonably in identifying potential defects, stating:

> [Plaintiffs] presented no evidence of the store's failure to exercise reasonable care in discovering spills. Mrs. McCarthy had no knowledge regarding the store's inspections of its aisles. Target took the deposition of its clerk, Edward A. Achiron, who testified that he had inspected the aisle where Mrs. McCarthy fell "approximately 20 to 26 minutes previously." At that time he saw no evidence of a spill. Plaintiffs did not offer any evidence on this point to support their claim of negligence.[25]

2. Evidence that a defendant *did not* comply with company inspection protocols does not necessarily establish negligence.

The seminal case involving a failure to comply guidelines concerning maintenance and inspection may be found in *Estate of Swift v. Northeastern Hospital of Philadelphia,* 690 A.2d 719 (Pa. Super. 1997). In that case, the plaintiff slipped on a puddle of water while being treated in the defendant hospital's emergency department. The plaintiff filed suit alleging, *inter alia,* negligence sounding in premises liability, but the court granted the defendant's motion for summary judgment due to a lack of notice. In affirming the trial court, the Superior Court stated:

> [A]lthough Appellants have presented evidence in the form of multiple admissible medical reports which contain Decedent's statements that her fall was caused by water on the floor, Appellants have failed to show in the record that Appellee had notice of the condition. Appellants present no evidence as to how the water arrived on the floor. Nor is there evidence as to how long the condition existed. Instead, Appellants cite Appellee's janitorial maintenance records which indicate that the person charged with maintaining the area where Decedent fell had left the hospital property four hours prior to the accident. From this fact, Appellants infer that Appellee was negligent in not replacing the missing maintenance person and, therefore, caused the condition to exist. **However, there is no evidence that the area was not monitored or maintained by other members of Appellee's staff.** Without such proof, Appellants cannot establish a breach of the legal duty owed to Decedent by Appellee which is a condition precedent to a finding of negligence.[26]

The argument that compliance with a store's inspection protocols would have prevented a slip-and-fall incident has been rejected as too speculative and too dependent upon "split second timing,"[27] but where a plaintiff can establish the element of notice *and* that a company's maintenance directives were not followed, however, a breach of duty *may* be found.[28]

IV. CONCLUSION

A robust store inspection protocol can go a long way to minimizing potential hazards and therefore reducing claims based upon slip-and-falls. Strict adherence to those policies, together with a formal record-keeping and retention protocol, can be persuasive when claims do arise, and such practices will not only assist in developing defense strategy when there is litigation but may also provide the basis for case-dispositive relief at an early stage.

ENDNOTES

[1]*See, e.g., Gorman v. Simon Brahm's Sons, Inc*., 148 A. 40 (Pa. Super. 1929)(plaintiff falls on spinach while entering defendant's store).

[2]*Krentz v. Consol. Rail Corp.,* 910 A.2d 20, 27 (Pa. 2006); *R. W. v. Manzek,* 888 A.2d 740 (Pa. 2005).

[3]*Carrender v. Fitterer,* 469 A.2d 120, 123 (Pa. 1983)(citing Section 343 of the Restatement (Second) of Torts).

[4]*See Moultrey v. Great Atl. & Pac. Tea Co.,* 422 A.2d 593, 596 (Pa. Super. 1980).

[5]*Myers v. Penn Traffic Co.,* 606 A.2d 926, 928 (Pa. Super. 1992).

[6]*Neve v. Insalaco's, 771* A.2d 786, 790 - 791 (Pa. Super. 2001).

[7]*Pace v. Wal-Mart Stores E., LP*, 337 F. Supp. 3d 513, 519 (E.D. Pa. 2018).

[8]*Hower v. Wal-Mart Stores, Inc., 2009 U.S. Dist. LEXIS 51557 at *3* (E.D. Pa. June 16, 2009)(*quoting Scruggs v. Retail Ventures, Inc.,* No. 06-1148, 2008 U.S. Dist. LEXIS 52130 (W.D. Pa. July 8, 2008)). *And see Loeb v. Allegheny County,* 147 A.2d 336, 338 (Pa. 1959).

[9]*See, e.g., Cox v. Wal-Mart Stores E., L.P*., 2008 U.S. Dist. LEXIS 66035 at *4 (E.D. Pa. Aug. 26, 2008).

[10]*Neve v. Insalaco's*, 2001 PA Super 71, 771 A.2d 786, 791 (Pa.Super. 2001).

[11]*See, e.g., Larkin v. Super Fresh Food Markets, Inc*., 291 Fed. Appx. 483, 485 (3d Cir. 2008)("without evidence about when the mat became buckled, a fact-finder could only speculate about whether Super Fresh should have discovered and corrected the problem"); *Hower, supra* (summary judgment granted where plaintiff could not establish how long spill of bubble bath in Wal-Mart store had existed, where there was no tracking, footprints, or shopping cart marks in or near spill); *Murray v. Dollar Tree Stores, Inc.,* 2009 WL 2902323 (E.D. Pa. Sept. 10, 2009)(summary judgment granted where plaintiff had no evidence as to length of time liquid was on floor; testimony that she had been in the store for 15 minutes prior to spill was not sufficient evidence of duration, especially where there was no evidence of tracking of the liquid or accumulation of dirt near the spill); *Craig v. Franklin Mills Assocs., L.P*., 555 F. Supp. 2d 547 (E.D. Pa. 2008), aff'd, 350 Fed. Appx. 714 (3d Cir. 2009)(finding that defendant was entitled to summary judgment where the plaintiff failed to prove constructive notice because she was unable to establish how long the hazardous condition caused by the soda spill existed before she slipped on it); *Viccharelli v. The Home Depot USA, Inc*., 2007 U.S. Dist LEXIS 89344 (E.D. Pa. 2007)(plaintiff could not prove constructive notice where there was no evidence as to the duration of the wet substance on the floor); *Read v. Sam's Club,* 2005 U.S.

Dist. LEXIS 37579 (E.D. Pa. September 23, 2005) (summary judgment granted where a plaintiff fails to establish duration of spill on small puddle of clear liquid in frozen foods aisle); *Flocco v. Super Fresh Markets, Inc.,* 1998 U.S. Dist. LEXIS 20266, 1998 WL 961971, at *2-3 (E.D. Pa. Dec. 29, 1998) (granting summary judgment for defendant in slip and fall case because plaintiff failed to produce evidence as to length of time gravy was on floor, despite plaintiffs' testimony that they did not hear sound of breaking glass during half-hour they spent shopping in store and observed no one in the aisle at time of fall); *Clark v. Fuchs,* 1994 U.S. Dist. LEXIS 406, 1994 WL 13847, at *3 (E.D. Pa. Jan. 14, 1994)(granting summary judgment for defendant in slip and fall case because plaintiff failed to present evidence to indicate how long the paper on which plaintiff slipped was on the stairs); *Estate of Swift v. Northeastern Hosp.,* 690 A.2d 719 (Pa. Super. 1997)(constructive notice not found, and summary judgment properly granted, where plaintiff presents no evidence as to how water arrived on floor or how long condition existed, even where maintenance records indicate that person charged with maintaining area left four hours prior to accident); *Myers v. Perm Traffic Co*., 606 A.2d 926, 928 (Pa. Super. 1992), *appeal denied*, 620 A.2d 491 (Pa. 1993)(the presence of a grape on the floor of the produce section due to an unknown cause for an unknown period of time was not sufficient to establish constructive notice); *Moultrey, supra* (affirming grant of compulsory non-suit to defendant in slip and fall case because plaintiff failed to present any evidence of how long cherry on which plaintiff slipped had been on floor); *Rogers v. Horn & Hardart Baking Co*., 127 A.2d 762 (Pa. Super. 1956)(plaintiff unable to establish constructive notice where he fell near the cashier of a restaurant and, at that time, did not see any stew on the floor, but later found it on the coat he was wearing at the time of the fall); *Loeb v. Allegheny County*, 147 A.2d 336 (Pa. 1959)(finding that plaintiff failed to prove constructive notice where he slipped on a spot of liquid on the defendant's steps, but failed to establish how long the liquid was present there); *Lanni v. Pennsylvania R.R. Co*., 88 A.2d 887 (Pa. 1952)(finding that the plaintiff failed to present sufficient proof of constructive notice where there was no evidence as to how long the grease spot was on the driveway prior to plaintiff's slip and fall); *Kovnat v. Shop Rite Supermarket*, 2007 Phila. Ct. Com. Pl. LEXIS 144 (C.P. Phila. Cty.), *aff'd without op*., 943 A.2d 329 (Pa. Super. 2007)(plaintiff did not establish constructive notice where she could not establish how long the floor had been slippery before she fell).

[12]Note, however, that records of routine inspections *may* be probative to establish a lack of *actual notice*. *Slater v. Genuardi's Family Mkts*., 2014 U.S. Dist. LEXIS 135052 (E.D. Pa. September 24, 2014)("There is no evidence of actual notice here. Indeed, a report of sweeps of the store fails to note any ice or water on the ground prior to the incident"); *Ketchum v. Giant Food Stores LLC*, 2014 Pa. Super. Unpub. LEXIS 2873 (Pa. Super. September 30, 2014)(same).

[13]*Read v. Sam's Club, supra,* at 9 (emphasis added).

[14]*Felix v. GMS Zallie Holdings, Inc*., 827 F. Supp. 2d 430 (E.D. Pa. 2011), *aff'd*, 2012 U.S. App. LEXIS 21075 (3d Cir. Oct. 11, 2012).

[15]*And see Boukassi v. Wal-Mart Stores, Inc*., 2019 Pa. Super. Unpub. LEXIS 2917 (Pa. Super. August 1, 2019)("Appellant's reference to the existence of the 'Slip, Trip and Fall Guidelines' does not raise an issue of fact that precluded the entry of summary judgment in favor of Appellees. As stated above, the record lacked any evidence to show how long the spill was in existence"); *Thomas v. Family Dollar Stores of Pa., LLC,* 2018 U.S. Dist. LEXIS 196569 (E.D. Pa. Nov, 19, 2018) ("without any evidence regarding the length of time the spill existed, it is immaterial when Family Dollar conducted an inspection"); *Pace v. Wal-Mart Stores E., LP*, 337 F. Supp. 3d 513 (E.D. Pa. 2018)("While the fact that employees overlooked the piece of white debris may suggest that Defendant's policies regarding safety sweeps were not honored, it does not in any way show how long the grape or grapes were on the floor. This evidence cannot charge Defendant with constructive knowledge of the grape or grapes that caused Plaintiff's fall"); *Harrell v. Pathmark*, 2015 U.S. Dist. LEXIS 23154 (E.D. Pa. February 26, 2015)("The mere fact in this case that there was not a set schedule for routine inspections or documentation of them is not sufficient evidence that Pathmark had constructive notice of the condition"); *Regaolo v. Save-A-Lot*, 2014 U.S. Dist. LEXIS 114216 (E.D. Pa. August 14, 2014)(Sweep Log showing inspection two hours and twenty minutes prior to incident too speculative to permit jury to determine duration of presence of grapes on floor); *Sheil v. Regal Entertainment Group*, 2013 U.S. Dist. LEXIS 70847 (E.D. Pa. May 20, 2013), *vacated and remanded on other grounds*, 2014 U.S. App. LEXIS 6980 (3d Cir. Pa., Apr. 15, 2014)(evidence as to lack of proper inspections of movie theatre bathroom potentially relevant to issue of reasonableness of conduct but did not establish constructive notice to trigger a finding of duty); *Lal v. Target Corp*., 2013 U.S. Dist. LEXIS 47380 (E.D. Pa. April 2, 2013)("Plaintiff appears to claim that because Target employees regularly patrolled the aisles and the store was equipped with "spill stations," Target should have known about the spill that caused her fall. This is simply incorrect. Such evidence might well relate to whether Target acted reasonably, but does not show that Target knew or should have known of the spill"); *Katz v. Genuardi's Family Mkts., Inc*., 2010 U.S. Dist. LEXIS 67976 (E.D. Pa. July 8, 2010)("Defendants' allegedly deficient safety inspection system says nothing about how long the spill was present"); *Murray v. Dollar Tree Stores, Inc*., 2009 U.S. Dist. LEXIS 82487 (E.D. Pa. September 10, 2009)(rejecting argument that lack of evidence as to defendant's inspection policies has bearing upon issue of contructive notice because "inspection and maintenance issues are 'immaterial to a finding of constructive notice,'" especially where plaintiff did not conduct any discovery as to this issue); *Henderson v. J.C. Penney, Corp., Inc.,* No. 08-177, 2009 WL 426180, at *5 (E.D. Pa. Feb. 20, 2009)(finding that business invitees must demonstrate actual or constructive notice of a transitory hazard regardless of whether inspections were performed); *Kujawski v. Wal-Mart Stores, Inc*., 2007 U.S. Dist LEXIS 71261 (E.D. Pa. 2007)("[t]he evidence that store employees were under a responsibility to constantly monitor their departments for potential hazards or that a specific maintenance associate is responsible for constantly cleaning the floors throughout the store is not adequate to establish constructive notice . . . A jury would be asked to engage in pure speculation if this case were allowed to go forward"); *Toro v. Fitness Int'l LLC*, 150 A.3d 968 (Pa. Super. 2016)(affirming trial court grant of summary judgment where there were no reports from fitness facility staff as to how long floor was wet prior to incident and rejecting as speculative plaintiff's argument that facility's failure to maintain accurate inspection logs established that "condition could have existed for a long period of time"); *Davis v. Target Corp*., 2013 Pa. Super. Unpub. LEXIS 1219 (Pa. Super. March 19, 2013)(denial of defendant's motion for JNOV reversed where constructive notice of beanbags in store aisle was not established despite fact that company protocols requiring an assigned employee to conduct inspections of store were not followed); *Newell v. Giant Food Stores*, 49 Pa. D. & C.4th 429 (C.P. Lehigh Cty. 2000)(finding that it would be improper to apply the "missing witness rule" to establish notice of a hazardous condition where there was no support for same in the record). *But see Johnson v. Gabriel Bros., Inc*., 2017 Pa. Super. Unpub. LEXIS 3920 (Pa. Super. October 20, 2017)("[Defendant's] policy was to conduct inspections, and Johnson did not present sufficient evidence to create a genuine issue of material fact that those inspections did not occur or were insufficient such that Gabriel would otherwise have had constructive notice of the hanger").

[16]*Thakrar v. Wegman's Food Mkt*., 75 Pa. D. & C. 4th 437 (C.P. Northampton Cty. November 19, 2004).

[17]*Id*. at 442 – 43. *And see Johnson v. Gabriel Bros., Inc*., 2017 Pa. Super. Unpub. LEXIS 3920 (Pa. Super. October 20, 2017)("[Defendant's] policy was to conduct inspections, and Johnson did not present sufficient evidence to create a genuine issue of material fact that those inspections did not occur or were insufficient such that Gabriel would otherwise have had constructive notice of the hanger").

[18]*Hower, supra* ("[T]he argument incorrectly equates a *lack of evidence* that Defendant inspected the aisle with proffer that Defendant did not inspect the aisle. Plaintiff bears the burden of proof and must point to evidence to show a genuine issue of material fact for trial"). *And see Thomas v. Family Dollar Stores of Pa., LLC,* 2018 U.S. Dist. LEXIS 196569 (E.D. Pa. Nov, 19, 2018)(rejecting plaintiff's argument that "'lack of evidence' that Family Dollar inspected the aisle is proof that Family dollar did not inspect the aisle," especially in light of testimony by the retailer's employee detailing inspection protocols.)

[19]*Id.* at 1196 – 1197.

[20]*Id*. at *9 - *10.

[21]*Hower, supra at* *18. *And see Greene v. Wal-Mart Stores East, LP,* 2018 U.S. Dist. LEXIS 132111 (E.D. Pa. August 6, 2018)("[A] a retail store's self-imposed policy is not the same as a legal duty nor does a failure to follow that policy creates a breach of a legal duty").

[22]*Rodgers v. Supervalu, Inc*., 2017 U.S. Dist. LEXIS 31907 (E.D. Pa. March 6, 2017), *aff'd*, 2018 U.S. App. LEXIS 10545 (3d Cir. Pa., Apr. 26, 2018)("[E]vidence that defendant violated its own policy of cleaning the store every two hours does not support a finding that defendant owed plaintiff a duty to protect her from the spill).

[23]*Boukassi v. Wal-Mart Stores, Inc*., *supra.*

[24]*Pearsall v. Plymouth Meeting Prop., LLC*, 2007 Phila. Ct. Com. Pl. LEXIS 32 (C.P. Phila. Cty. January 24, 2007).

[25]*Id*. at *8 - *9. *And see Breen v. Millard Group, Inc.,* 2016 U.S. Dist. LEXIS 156045 (E.D. Pa. November 9, 2016)(where defendant mall produced records showing inspections at half-hour intervals throughout the day of plaintiff's fall, in accordance with company protocols, the fact that records did not indicate a finding of liquid in the area of the subject incident did not constitute evidence that no inspections were actually performed); *Hessman v. Super Fresh Food Mkts., Inc*., 2007 Phila. Ct. Com. Pl. LEXIS 333 (C.P. Phila. Cty. December 17, 2007)(jury's conclusion that defendant store

owned did not breach duty to plaintiff who fell on water in store supported by evidence, including defendant's policy requiring workers to continuously walk around store to ensure premises were safe).

[26]*Id.* at 722 (emphasis added).

[27]*Id.* at *7 - *8. *And see Dimino v. Wal-mart Stores*, 83 Pa. D. & C. 4th 169, 175-76 (C.P. Monroe Cty. 2007)(refusing to find negligence where there was no evidence presented that routine inspections would have turned up the defect in question).

[28]*Boukassi v. Wal-Mart Stores, Inc, supra* ("Appellant's reference to the existence of the 'Slip, Trip and Fall Guidelines' does not raise an issue of fact that precluded the entry of summary judgment in favor of Appellees. As stated above, the record lacked any evidence to show how long the spill was in existence. Without further circumstantial evidence to infer that Appellees' employees deviated from the Guidelines, the mere existence of the spill did not establish a breach of Appellees' standard of care.")

Pennsylvania Courts Continue to Grapple with the Extent to Which Damages Arising Out of Faulty Work Constitute an "Occurrence" Under CGL Policies

By Brandon McCullough, Esquire and Christopher M. Jacobs, Esquire, Houston Harbaugh. P.C.

In the seminal decision in *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), the Supreme Court of Pennsylvania held that damages arising out of an insured's faulty or defective workmanship are not covered under a commercial general liability insurance policy because they do not constitute an "occurrence," i.e., "an accident." Subsequent decisions have extended the reasoning of *Kvaerner* to hold that damages that are a reasonably foreseeable result of faulty or defective workmanship are also not a covered "occurrence." *See, e.g.*, *Millers Capital Ins. Co. v. Gambone Bros. Devel. Co., Inc.*, 941 A.2d 706 (Pa. Super. 2007); *Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 562 F.3d 591 (3d Cir. 2009); *Specialty Surfaces Int'l, Inc. v. Continental Ins. Co.*, 609 F.3d 223 (3d Cir. 2010). Despite repeated attempts to erode the reach of *Kvaerner* and its progeny, Pennsylvania courts have generally continued to apply *Kvaerner* to preclude coverage for claims premised on claims of defective or faulty workmanship, even where the faulty workmanship results in foreseeable damage to property other than the insured's work product. In 2019, the Superior Court of Pennsylvania and the United States Court of Appeals for the Third Circuit each addressed the range of *Kvaerner's* reach.

Pottstown: Not All Property Damage Is Equal

In *Pennsylvania Mfr. Indem. Co. v. Pottstown Industrial Complex LP*, 215 A.3d 1010 (Pa. Super. July 22, 2019), the Superior Court of Pennsylvania considered whether *Kvaerner* and its progeny applied to preclude coverage for a suit by a tenant against an insured-landlord for damage to the tenant's inventory stored at the premises caused by flooding resulting from the insured-landlord's alleged failure to properly maintain and repair a roof.

The Pride Group, Inc. ("Pride Group") filed suit against its landlord, Pottstown Industrial Complex LP ("Pottstown"), alleging that the leased premises was flooded during rainstorms on multiple occasions and that the floods caused over $700,000 in damage to inventory that Pride Group stored on the premises. Pride Group alleged that the water entered the premises due to roof leaks caused by poor caulking of the roof, gaps and separations in the roofing membrane, undersized drain openings and accumulated debris and clogged drains. Pride Group asserted a single cause of action for breach of contract against Pottstown asserting that the insured was responsible under the lease for maintaining and repairing the roof. However, the complaint also specifically pled that Pottstown was negligent in its maintenance of and repairs to the roof.

Pennsylvania Manufacturers Indemnity Company ("PMA") insured Pottstown under a commercial general liability ("CGL") policy which was in effect during the period in which one of the flooding events occurred. The CGL policy covered "property damage" caused by an "occurrence." The CGL policy contained the standard ISO "Occurrence" definition—i.e., "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

PMA filed a declaratory judgment action seeking a declaration that it had no duty to indemnify the insured-landlord on the ground that the underlying lawsuit did not allege an "occurrence." The trial court agreed with PMA and held that the allegations of inadequate roof repairs are claims for faulty workmanship which do not constitute an occurrence under *Kvaerner* and *Gambone Bros*.

On appeal, the Superior Court reversed. In doing so, it recognized that pursuant to *Kvaerner* and its progeny, "faulty workmanship itself does not constitute an 'occurrence,'" nor does "a claim for damages from the insured's improper performance of contractual obligations … where the only property damaged is the product or property that the insured supplied or on which it worked or where the damages sought are for the insured's failure to deliver the product or perform the service it contracted to provide." However, the Court held that *Kvaerner* and its progeny do not hold that there is no "occurrence" where "the claim is for damage to property not supplied by the insured and unrelated to what the insured contracted to provide." Because the underlying complaint alleged damage to something other than what the insured supplied and unrelated to what the insured contracted to provide (that is, Pride Group's inventory stored on the premises) and was caused by a distinct event (flooding) rather than damage for the cost of repairing or replacing the defective item that the insured supplied (i.e., the inadequate roof), the court

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held that the underlying complaint alleged "property damage" caused by an "occurrence," which triggered PMA's obligation to defend Pottstown.

That the underlying complaint asserted only a cause of action for breach of contract did not change the court's analysis, as the court reasoned that the factual allegations of the complaint, and not the label of the cause of action, determines whether the claims trigger coverage. The underlying complaint pled that Pottstown was negligent in its maintenance of and repairs to the roof. Moreover, the court reasoned that its holding was not based on treating Pottstown's contractual performance as an "occurrence." Instead, it reasoned that the "occurrence" (i.e., the accident) that was alleged to have caused the property damage was a flood.

Sapa Extrusions: Not All Definitions of "Occurrence" Are Equal

In *Sapa Extrusions, Inc. v. Liberty Mut. Ins. Co.*, 939 F.3d 243 (3d Cir. Sept. 13, 2019), the United States Court of Appeals for the Third Circuit analyzed the application of *Kvaerner* and its progeny under three differing definitions of "occurrence" contained in multiple policies.

Sapa Extrusions, Inc. ("Sapa") manufactured aluminum extruded profiles, formed by pushing a hot billet of aluminum alloy through a metal die with a hydraulic press. The metal extrusions were then pre-treated with a primer and topcoat prior to delivery to users. One user, a window/door manufacturer (Marvin) had a decades-long arrangement whereby Sapa supplied coated extrusions to be used as a component part that was incorporated into Marvin's aluminum clad windows and doors. The incorporation process was permanent such that if an extrusion were defective, it could not be extracted and replaced; rather, an entirely new window or door would have to be replaced.

Sapa agreed to certain coating specifications in its contract with Marvin. After an increase in complaints from Marvin customers that the aluminum parts of their windows or doors would oxidize or corrode, Marvin initiated an action against Sapa in Minnesota federal court in 2010, alleging a failure to meet Marvin's coating specifications. Marvin's Complaint included claims for breach of contract and warranty, as well as negligent misrepresentation, unlawful trade practices, and fraud. After the district court denied cross motions for summary judgment, Sapa and Marvin settled for a large sum.

Sapa had maintained twenty-eight "occurrence" based CGL policies with various insurers. Each insurer to whom Sapa tendered the underlying lawsuit disclaimed coverage based on the lack of an "occurrence." Sapa then commenced suit in Pennsylvania federal court seeking to recover the costs of the underlying settlement. The district court granted summary judgment in favor of the insurers, holding that Marvin's claims of faulty workmanship against the insured did not involve an "occurrence" triggering a duty to indemnify for the settlement.

On appeal, the Third Circuit observed that because the duty to defend is broader than the duty to indemnify under Pennsylvania law, the insurers would necessarily have no duty to indemnify for the insured's settlement with Marvin if they had no duty to defend in the first instance based on the allegations contained in Marvin's Complaint. The Court reinforced Pennsylvania law dictating strict application of the "four corners" rule in evaluating the duty to defend, permitting consideration of only the factual allegations contained in the underlying Complaint against the insured and terms of the insurance policy. Accordingly, the Court rejected Sapa's attempt to inject extrinsic evidence pertaining to "the parties' knowledge at the time of settlement."

Applying the "four corners" rule, the Court was faced with three different phrasings of the term "occurrence": the "Accident Definition" defining "occurrence" as "an accident"; and two definitions, one referred to as the "Expected/Intended Definition" and the other referred to as the "Injurious Exposure Definition," both of which qualified that the "occurrence" must result in injury or damage "neither expected nor intended from the standpoint of the insured." With regard to those policies containing the "Accident Definition" of "occurrence," the Court relied upon *Kvaerner* as well as the Third Circuit cases of *CPB Int'l* and *Specialty Surfaces*, each of which addressed the "Accident Definition" of occurrence, for the proposition that the claims of faulty workmanship are not accidental and fortuitous. The Court reasoned that both *CPB Int'l* and *Specialty Surfaces* held that "any distinction between damage to the work product alone versus damage to other property is irrelevant so long as both foreseeably flow from faulty workmanship." Because the factual allegations contained in the Marvin Complaint at their core related to faulty workmanship and damages foreseeably flowing from faulty workmanship, the Court held that no "occurrence" was established so as to trigger those policies and affirmed the district court's ruling that those policies were not required to cover the underlying settlement.

However, the Court reasoned that unlike the "Accident Definition," the "Expected/Intended Definition" and "Injurious Exposure Definition" of "occurrence" injected a subjective intent standard requiring the injury or damage to have been neither expected nor intended from the standpoint of the insured, a distinction the district court had not analyzed. The Third Circuit predicted that the Pennsylvania Supreme Court would follow *United Services Auto. Assoc. v. Elitzky*, 517 A.2d 982 (Pa. Super. 1986) and find those definitions of "occurrence" to be ambiguous, and further would find that the analysis of *Elitzky* requiring proof that the injury or damage was of "the same general type which the insured intended to cause" would govern coverage rather than the *Kvaerner* analysis. The Third Circuit vacated the district court's decision and remanded for further consideration with respect to the policies containing the "Expected/Intended" and "Injurious Exposure Definition" of "occurrence."

Takeaways

The holding in *Pottstown Industrial* makes clear that the reach of *Kvaerner* is not infinite and will not serve as a

panacea relative to all property damage. Indeed, claims for third-party property damage unrelated to the insured's work or product may be a covered "occurrence."

The decision in *Sapa Extrusions* demonstrates that insurers and policyholders must be mindful of the specific definition of "occurrence" in the policies at issue when determining whether the *Kvaerner* analysis applies. The Third Circuit reaffirmed that under policies with an accident-based definition of "occurrence," *Kvaerner* continues to apply to preclude coverage for foreseeable damages resulting from faulty workmanship. However, under policies with other definitions of "occurrence," the application of *Kvaerner* is less clear.

Recent Changes to PA's Statute of Limitations Sparks Coverage Questions

By Robert J. Cosgrove, Esquire and Lauren Berenbaum, Esquire[1]*, Wade Clark Mulcahy, LLP*

In July 2018, the Pennsylvania Office of Attorney General issued Report I of the 40th Statewide Investigating Grand Jury ("Report") detailing its investigation into sexual abuse and molestation allegations involving the Roman Catholic Church in fifty-four of Pennsylvania's sixty-seven counties. The Report exposed decades of allegations of sexual abuse in the dioceses of Pittsburgh, Erie, Allentown, Greensburg, Harrisburg, and Scranton ("Diocese") committed by over 300 priests. In doing so, the Report revealed the Diocese's decisions and actions (or lack of action) in handling the allegations of sexual abuse. The Report further exposed hurdles faced by victims in bringing civil lawsuits in Pennsylvania for alleged sexual abuse and molestation. Pennsylvania's statute of limitations ("SOL") is consistently one of those hurdles. However, the SOL's utility as a defense may be about to end.

New Legislation

On November 26, 2019, Pennsylvania Governor Tom Wolf signed new legislation amending Title 42 of Pennsylvania's Judicial Code. First, Wolf executed Act No. 87[2], which, in pertinent part, affords victims of childhood sexual abuse[3] more time to file civil lawsuits. Section 5533(b)(2) of Title 42 (now) provides: (i) individuals under 18 years of age at the time of the sexual abuse, have until they attain 55 years of age to commence an action for damages; and (ii) individuals at least 18 years of age and less than 24 years of age at the time of the sexual abuse have until they attain 30 years of age to commence an action for damages.[3]

Second, Wolf executed Act No. 89[4], which, in part, deems any "provision of an agreement, contract, settlement or similar instrument that" prevents victims of childhood sexual abuse from talking to law enforcement, prohibits/attempts to prohibit disclosure of any suspects of childhood sexual abuse, suppresses/attempts to suppress information relevant to a criminal investigation, or impairs/attempts to impair one's ability to report a claim of childhood sexual abuse" as void and unenforceable. *See* 42 Pa.C.R.P. § 8316.2.

Changing Landscape of Litigation

Although Act 87 provides more time for victims of childhood sexual abuse to commence litigation, Pennsylvania, unlike many other states, has not enacted legislation providing a universal civil window of two years to revive previously expired claims due to the statute of limitations. However, the courts in Pennsylvania may, in fact, be filling that void.

In August 2019, the Superior Court of Pennsylvania denied an application for re-argument regarding a June 2019 decision permitting the plaintiff, Renee Rice ("Rice"), to move forward with her claims against the Diocese of Altoona-Johnstown, bishop, monsignor, and reverend for, *inter alia*, fraud, constructive fraud, and civil conspiracy. *See Rice v. Diocese of Altoona-Johnstown*, 212 A.3d 1055 (Pa. Super. 2019), *reargument denied* (Aug. 14, 2019). By way of background, in 2016, Rice, after reviewing the 37th Investigative Grand Jury Report "detailing a systematic cover-up of pedophile clergy in the Diocese of Altoona-Johnstown", commenced the action based on alleged abuse she sustained during the 1970s and 1980s. *See id.* at 1059.

Following the trial court's dismissal of her lawsuit based on the applicable statute of limitations, Rice appealed arguing the court misapplied the law. In reliance on the Supreme Court of Pennsylvania's holding in *Nicolaou v. Martin*[5], which determined the plaintiff's efforts to investigate a defendant for alleged abuse was sufficiently reasonable to toll the applicable statute of limitations, the Superior Court reversed the trial court's decision, thereby allowing Rice to continue with her claims, even though she filed the lawsuit some 35 years after the traditional statute of limitations[6]. *See Rice*, 212 A.3d at 1076.

The Court's decision in *Rice*[7] opens the door for claims, which would otherwise be time-barred, to proceed against the Diocese. Accordingly, civil lawsuits sounding in alleged fraudulent conspiracy – stemming from alleged abuse – are likely on the horizon.

What Does This All Mean?

Based on the changing statute of limitations in Pennsylvania and the *Rice* decision, it seems likely more victims will come forward to commence litigation against, *inter alia*, the Diocese, bishops, and its priests. In fact, it also appears that the Diocese is no longer immunized by the once clear statute of limitations. This raises other questions – that is, how will the Diocese (or other similarly situated defendants) defend themselves? Will the Diocese be able to

turn to its commercial general liability ("CGL") policies for defense and indemnity? And if so, are claims for sexual abuse and molestation covered? What about claims alleging fraud or civil conspiracy?

Under Pennsylvania Law, "[a]n insurer is obligated to defend the insured against any suit arising under the policy 'even if the suit is groundless, false, or fraudulent.'"[8] Consequently, whenever a complaint is filed that potentially falls within the policy's coverage, an insurer's duty to defend is triggered.[9] The keystone of that determination depends on the plain language of the policy.[10] If the language of the policy is clear, courts in Pennsylvania give effect to that language.[11] If, however, a provision of the policy is ambiguous, "the policy is to be construed in favor of the insured to further the contract['s] prime purpose of indemnification and against the insurer, as the insurer drafts the policy and controls the coverage."[12]

So, are the foregoing claims covered by CGL policies? It depends. Recent CGL policies contain Abuse or Molestation Exclusions, which preclude coverage for "injury or damage" arising out of:

> **(a)** The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured; or **(b)** The negligent: **(1)** Employment; **(2)** Investigation; **(3)** Supervision; **(4)** Reporting to the proper authorities, or failure to so report; or **(5)** Retention; of a person for who any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph **a.** above.

It is well-established in Pennsylvania that Abuse or Molestation Exclusions bar coverage for sexual misconduct.[13] In addition, the District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, held an Abuse or Molestation Exclusion barred coverage for an action arising out of alleged child sexual abuse. *See Natl. Cas. Co. v. Young*, 2009 WL 2170105, at *6 (E.D. Pa. July 17, 2009).

What about Expected or Intended Injury or Harm Exclusions? Generally, CGL policies do not cover intentional torts and/or criminal acts.[14] If an insured is sued for a tort containing intent as an element, there is no duty to defend.[15] Under Pennsylvania law, injury to a child in sexual abuse cases constitutes intentional conduct, regardless of whether allegations of sexual abuse in a complaint are pled as resulting from intentional or negligent acts. *See e.g.*, *Gen. Acc. Ins. Co. of Am. V. Allen*, 708 A.2d 828, 830 (Pa. Super. 1998); *Aetna Casualty & Surety Co. v. Roe,* 650 A.2d 94 (Pa. Super. 1994) ("harm to children in sexual molestation cases is inherent in the very act of sexual assault committed on a child, regardless of the motivation for or nature of such assault, and the resulting injuries are, as a matter of law, intentional").

Moreover, it is against Pennsylvania public policy to afford liability coverage in connection with an insured's willful and intentionally injurious criminal acts.[16] So long as the alleged conduct in a complaint describes sexual abuse of a minor, such allegations give rise to an irrebuttable presumption of intentional conduct, and coverage is excluded.[17] Also, one of the necessary elements to prove fraud is intent or misleading another into relying upon a misrepresentation.[18]

Traditional CGL policies provide an insurer will pay sums an insured becomes legally obligated to pay as damages because of bodily injury but only if, *inter alia*, the bodily injury is caused by an "occurrence" that occurs during the policy period. Under such policies, an "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

In the case of *Rice*, Rice alleged her Reverend sexually molested her in the 1970s and 1980s. Since CGL policies typically require the "occurrence" to occur during the policy period, insurers must turn to policies dating back roughly 35 years. What happens if the insured is not able to locate those policies? What if an insurer does not keep records dating back that far? If an insurer is unable to produce an insured's request for policies – assuming they, in fact, exist – then how will an insurer properly assert its own coverage defenses?

The *Rice* case also raises questions with respect to number of occurrences. For instance, if a complaint alleges civil conspiracy and fraud against the Diocese, but the crux of the civil conspiracy and fraud allegations stem from alleged sexual abuse, is this one occurrence? Multiple occurrences? In addition, if the abuse occurred over long periods of time, what is the triggering event – the alleged abuse? Each act in furtherance of the conspiracy? There are no clear answers to some of these questions.

It appears only the slow moving wheels of civil justice will help to answer these questions. Therefore, as litigation unfolds, it will be interesting to see how insurers balance their duties to defend and indemnify with insureds' reasonable expectations of coverage.

ENDNOTES

[1]Bob is a partner at Wade Clark Mulcahy, LLP and Lauren is an associate in WCM's Philadelphia office.

[2]Judicial Code (42 PA.C.S.) - OMNIBUS AMENDMENTS - Act of Nov. 26, 2019, P.L. 641, No. 87; Cl. 42; Session of 2019, No. 2019-87.

[3]For purposes of Section 5533(b)(2) of Title 42:

> (ii) . . .the term "sexual abuse" shall include, but not be limited to, . . . sexual activities between . . . an individual who is 23 years of age or younger and an adult, provided that the individual bringing the civil action engaged in such activities as a result of forcible compulsion or by threat of forcible compulsion which would prevent resistance by a person of reasonable resolution . . .

[4]Judicial Code (42 PA.C.S.) – CONTRACTS OR AGREEMENTS FOR NONDISCLOSURE OF CERTAIN CONDUCT - Act of Nov. 26, 2019, P.L. 649, No. 89; Cl. 42; Session of 2019, No. 2019-89.

[5]*Nicolaou v. Martin*, 195 A.3d 880 (Pa. 2018).

[6]In permitting Rice to continue with her claims, the Court held:

> Ms. Rice's alleged circumstances allow her to argue to the finder of fact that the Diocesan Defendants owed her a fiduciary duty to disclose their ongoing cover-up and Fr. Bodziak's history of child molestation. By failing to disclose, the Diocesan Defendants' silence may have induced Ms. Rice to relax her vigilance or to deviate from her right of inquiry. The trial court, therefore, erred by not permitting her case to proceed according to her fraudulent-concealment theory.
>
> Finally, even if a jury rejects those two tolling theories, Ms. Rice's civil conspiracy count remains viable. She alleges a continuing conspiracy and that the last act in furtherance of the conspiracy occurred in 2016. Based upon these allegations, Ms. Rice has filed this lawsuit well within the statute of limitations for civil conspiracy.

See Rice, 212 A.3d at 1059-1060.

[7]On or about September 12, 2019, the Diocese of Altoona-Johnstown, Charles Bodziak, and Joseph

Adamec filed a petition for allowance of appeal to the Supreme Court of Pennsylvania.

[8]*See Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 651 (Pa.Super. 1994) (quoting *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 188 A.2d 320, 321 (Pa.1963))

[9]*See e.g., Belser v. Rockwood Cas. Ins. Co.*, 791 A.2d 1216, 1219, 1222 (Pa.Super. 2002); *Phico Ins. Co. v. Presbyterian Med. Servs. Corp.*, 663 A.2d 753, 755 (Pa.Super. 1995).

[10]*See Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 562 F.3d 591, 595 (3d Cir. 2009).

[11]*See Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Comm. Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006).

[12]*Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290 (Pa. 2007).

[13]*See e.g. Westfield Ins. Co. v. Holland,* No. 07–5496, 2008 WL 5378267, at *7 (E.D. Pa. 2008) ("Pennsylvania courts have not been opposed to enforcing molestation exclusions within policies."); *Children's Aid Soc. Of Montgomery County v. Great Am. Ins. Co.*, 1995 WL 251374, at *6 (E.D. Pa. Apr. 28, 1995) (holding Abuse and Molestation Exclusion bars coverage); *Fed. Ins. Co. v. Sandusky*, 2012 WL 1988971, at *4 (M.D. Pa. June 4, 2012) (public policy of Pennsylvania as announced by its courts prohibits reimbursement of defendant for any damage award arising from allegations of molested and sexually abused children).

[14]*See Am. Nat. Prop. & Cas. Companies v. Hearn*, 93 A.3d 880, 886 (Pa. Super. 2014).

[15]*See Humphreys v. Niagara Fire Ins. Co.*, 590 A.2d 1267 (Pa. Super. 1991).

[16]*See Federal Ins. Co. v. Potamkin*, 961 F.Supp. 109 (E.D. Pa. 1997) (applying Pennsylvania law).

[17]*See First Liberty Ins. Corp. v. Anderson*, 2016 WL 2958831, at *7 (E.D. Pa. May 23, 2016).

[18]*See Feeney v. Disston Manor Pers. Care Home, Inc.*, 2004 PA Super 114, ¶ 16 (2004).

Combating Implicit Gender Bias in the Workplace

By Catherine S. Loeffler, Esquire, Houston Harbaugh, P.C.

The topic of sex discrimination in the workplace has been heavily researched, discussed, and frequently litigated, particularly in the era of the #metoo movement. Today, employers are more aware of words and actions that should be avoided to diminish or prevent sex discrimination in order to limit liability. Most employers have taken measures to educate their employees on sexual discrimination and have updated their employee handbooks to include anti-harassment and anti-discrimination policies. As a result, the perception is that sexual bias is becoming a vestige of the past. The reality, however, is that while training and education may diminish overt sex discrimination, it can never completely eradicate the decades of implicit bias engrained in a person's subconscious. If employers desire to permanently change the way employees interact with one another in the workplace, they need to recognize and address the root of the problem. There are many different kinds of bias, but this article is focused on gender.

What exactly is implicit bias? It is a prejudice in favor of or against one thing, person or group based on unconscious thoughts, beliefs, feelings or stereotypes. Implicit bias is fueled by cultural stereotypes, which are widely-held, oversimplified images or ideas of a particular type of person or thing. Some of these antiquated tropes include: the idea that women are not good at math or science, men are always the "breadwinners," and women are always good homemakers. These unconscious biases are adopted and engrained at an early age and can be influenced by a person's environment or upbringing. Exposure to certain cultural influences such as television programs, movies, local politics, and the opinions of family, friends, and colleagues can perpetuate these ideas. Individuals can harbor unconscious bias even if they consciously believe that bias or discrimination is wrong.

How does this translate to implicit gender bias in the workplace? Interestingly, it often occurs when male supervisors act based on their benign natural or learned instinct to be the female protector. For example, a male supervisor may not be inclined to send a qualified female employee to an on-location assignment in a remote or dangerous location so as not to jeopardize her safety. Or, a male supervisor may decide not to appoint a qualified female employee to manage a specific project if he knows or believes that the other male employees assigned to the project would not listen to directions given by a woman, thereby creating undue difficulty and stress for her and potentially derailing the project. While the male managers may believe they are acting in the best interests of the female employees (and perhaps they are in certain circumstances), they should carefully weigh this perspective against hindering female career growth and development by not providing them with the same opportunities as male colleagues, which serve the basis for promotions, bonuses, recognition, and other incentives. This perpetuates the cycle of male-dominated management and inhibits gender diversity in administration and female professional development.

It is important for employers to tackle gender bias to maximize the company's full potential. Business reasons to eliminate gender bias include: gender diverse teams are more focused and productive; the quantity and quality of work increases; there is an influx of new ideas and different approaches for problem-solving strategies; gender heterogynous authorship teams are more likely cited in publications than those produced by gender-uniform authorship teams; the morale and work environment improves leading to increased productivity, pride in work product, loyalty to the employer, and retention of valuable employees; and it creates a viable defense if litigation arises and may decrease employee claims.

Elimination of implicit gender bias is certainly no easy task, but employers can implement the following strategies to facilitate this effort:

- Proficient manager and supervisor recognition and identification of biased and stereotypical thoughts and actions. If you are aware, you can work on implementing alternative behaviors.
- Create and implement company policies and procedures that aim to eliminate bias in the workplace, such as appointing diverse compensation and promotion committees, instead of leaving career growth and development solely to manager discretion. Draft and update anti-discrimination policies and emphasize zero tolerance.
- Eliminate female quotas and un-

qualified, meritless promotions to fulfill the perception of diversity. This is more harmful than helpful.

- Conduct anti-discrimination training to make employees and management cognizant of their unconscious thoughts and behaviors. Periodic, long-term training is essential. Life-long bias cannot be eradicated in one annual training session. This is a waste of time, money and effort.
- Provide employee incentives for best workplace practices, such as giving PTO time to employees who actively promote and participate in anti-discrimination training.
- Periodically collect data to assess incremental changes and progress, such as conducting employee perception surveys and analyzing gender gaps in pay and career advancement.
- Provide and advertise the proper channels for employees to submit complaints or concerns of bias or discrimination, promptly investigate any reported claims, and take swift and appropriate action as necessary.

Although it is unrealistic to believe that all forms of gender bias and discrimination can be eradicated from the workplace, if employers can recognize the implicit biases harbored by their employees and take appropriate action to counteract those subconscious motivators, it will go a long way to create a harmonious environment for employees, improve gender diversity in management, positively impact the company's bottom line, and limit the company's exposure to future litigation.

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New Rule for Utilization Review Requests

By Katherine M. Richardson, Esquire, The Dombrowski Group, P.C..

Keystone Rx LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (Compservices Inc./AmeriHealth Casualty Services), No. 1369 C.D. 2018.

The Commonwealth Court established a new rule that for Utilization Review procedures occurring after December 12, 2019, where an Employer, Insurer or an Employee requests Utilization Review, a Provider which is not a "healthcare provider" as defined in the Act, such as a pharmacy, testing facility or provider of medical supplies, must be afforded notice and an opportunity to establish a right to intervene under the usual standards for allowing intervention.

Background: This case comes before the Commonwealth Court on a Petition for Review filed by Keystone Rx LLC (Pharmacy) following an adverse Fee Review matter where the Bureau had dismissed two applications for Fee Review filed by the Pharmacy by relying upon a prior Utilization Review Determination which found that ongoing medications from the physician to the claimant were unreasonable and unnecessary. The Pharmacy's appeal essentially argued that the recent due process holding in Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (Wegman's Food Markets, Inc.), 206 A.3d 660 (Pa. Cmwlth. 2019) (Armour II) applied and the Fee Review Hearing Office's reliance on Utilization Review Determination resulted in an improper deprivation of the Pharmacy's due process rights with respect to the payment of prescriptions. Notably, there are statutory limitations wherein the Pharmacy is not an entity that can challenge reasonableness and necessity of treatment under Section 306(f.1)(6). Under the Act, a pharmacy is only a provider under Section 306(f.1)(5) of the Act with respect to Fee Review and as such, a pharmacy may only challenge the amount and timeliness of payment from the Insurer or the Employer under the parameters of the Fee Review setting. The Court, in accordance with its holding in Armour II, found that the Utilization Review (unlike the Compromise and Release Agreement in Armour I) was binding on the Fee Review Office. The Court ultimately found that, in this instance, the Pharmacy was essentially attempting to attack the Utilization Review process and receive payment for treatment that was found to be neither reasonable nor necessary. As such, the Court upheld the Bureau's decision. However, in doing so, the Court established a new rule moving forward from this 12/12/2019 decision. It acknowledged that there are due process issues for providers such as pharmacies when they are precluded from participating in the Utilization Review process but are bound by the results. As such, the Commonwealth Court established a new rule as follows: For Utilization Review procedures occurring after December 12, 2019, where an Employer, Insurer, or an Employee requests Utilization Review, a Provider which is not a "healthcare provider" as defined in the Act, such as a pharmacy, testing facility or provider of medical supplies, must be afforded notice and an opportunity to establish a right to intervene under the usual standards for allowing intervention.

Takeaway: Moving forward, while the

Commonwealth Court does not indicate what type of notice must be afforded to an entity that is not a "Healthcare Provider" as defined in the Act in the Utilization Review section (such as a pharmacy, testing facility or provider of medical supplies), some type of notice must be provided. We suggest that the entity filling the prescriptions of the physicians who recommended the treatment under review be sent a copy of the initial Utilization Review Request. In the abundance of caution, we suggest that similar notice be provided when filing a Petition for Review of Utilization Review Determination. When requesting retrospective review of a known pharmacy who submitted a bill which triggered the desire to review the treatment, the pharmacy can simply be provided a copy of the Utilization Review Request. When the pharmacy is not known at the time of the request and/or you are requesting prospective review of a physician's recommendation for prescriptions, the file should be monitored such that once the pharmacy (or testing facility or DME provider) becomes known at a later date, notice will be sent to ensure compliance with the Court's new rule.

POST-KOKEN UPDATE

By Daniel E. Cummins, Esquire, Cummins Law*

Bifurcation of Trial

In the Post-Koken case of ***Pena v. Van Blargen and State Farm*, No. 10185-CV-2016 (C.P. Luz. Co. Oct. 1, 2019 Gartley, J.)**, Judge Tina Polachek Gartley of the Luzerne County Court of Common Pleas denied a tortfeasor Defendant's Motion to Bifurcate the Trial of third party negligence claims from the breach of contract and bad faith claims asserted against the UIM carrier. The decision was issued by Order only.

Effect of Third Party Release

In the case of ***Bonk v. American States Ins. Co.*, No. 3:18-CV-2417 (M.D. Pa. Oct. 1, 2019 Caputo, J.)**, the court declined to preclude a Plaintiff from pursuing a UIM claim based upon the language of the Release that the Plaintiff executed in the companion third party case.

The UIM carrier in this case argued that, because the third party Release referred to a release of liability in favor of "any and all persons" that Release amounted to a blanket barring of all claims given that the UIM claim was not exempted out.

More specifically, the Release at issue confirmed that the Plaintiff "release[d] and forever discharge[d] [the tortfeasor] and any other person, firm, or corporation charged or chargeable with responsibility of liability" from any and all claims and causes of actions arising out of the subject incident.

While the court agreed that the UIM carrier was indeed a firm or corporation, the court felt that the UIM carrier had not established how it had been "charged or chargeable with responsibility of liability" with respect to the third party matter. The court emphasized that the UIM carrier did not cover the tortfeasor. The language in the Release was read by the court as applying only to those parties that would be held accountable for causing the accident.

Notably, Judge Caputo declined to follow the Philadelphia County Court of Common Pleas decision in the case of *Crisp v. Ace American Ins. Co*., No. 150902953 (C.P. Phila. Co. 2017).

The court in this *Bonk* case noted that the language in the Release in the *Crisp* case released "any and all persons or entities whatsoever," making that Release distinguishable in the court's eyes from the Release in the *Bonk* case before it.

Effect of Third Party Release

In the case of ***Lane v. USAA General Indem. Co.*, NO. 18-537 (E.D. Pa. Oct. 18, 2019 Surrick, J.)**, the UIM carrier argued that a general release signed in a third party claim can be used by the underinsured motorist carrier to release an underinsured motorist claim, even when the UIM carrier paid no consideration.

The Plaintiff executed a release in the third party action which included language releasing "any other person, firms or corporations liable or who might be claimed to be liable." The Court noted that the Release did not identify the UIM insurer directly.

In rejecting the carrier's position , the District Court relied, in part, upon the Pennsylvania Superior Court's decision in *Sparler v. Fireman's Ins. Co. of Newark, N.J.*, 521 A.2d 433 (Pa. Super. 1987), *allocator denied*, 540 A.2d 535 (Pa. 1988). The District Court noted that, "[u]nder *Sparler*, Plaintiff's general release…..will not preclude Plaintiff from pursuing the present action against Defendant for UIM benefits because the executed release did not contain language unequivocally discharging Defendant from its contractual obligation to provide UIM benefits to Plaintiff."

The District Court finds that the carrier's reliance on *Buttermore v. Aliquippa Hosp.*, 561 A.2d 733 (Pa. 1989) to be distinguishable because *Buttermore* did not involve UIM benefits.

The Court also rejected the UIM carrier's reliance on the Philadelphia Court of Common Pleas case of *Crisp v. ACE Am. Ins. Co.*, 2017 Phila Ct. Com. Pl. LEXIS 125 (Phila. Cnty. C.C.P. 2017) is because that case was not binding precedent.

Household Exclusion

The Pennsylvania Supreme Court's decision in *Gallagher v. Geico*, 201 A.3d 131 (Pa. 2019), which served to invalidate the Household Exclusion in automobile insurance policies, was relied upon in a recent Lebanon County case to deny a Defendant carrier's Preliminary Objections.

In the case of ***Loose v. Pennsylvania National Mutual Insurance*, No. 2019-00664 (C.P. Leb. Co., Oct. 23, 2019 Kline, J.)**, the court denied Penn National's Preliminary Objection in a

case in which a Plaintiff sought a ruling to find the household exclusion invalid under the *Gallagher* decision.

In the *Loose* case, the Plaintiff was injured after being in an accident while on her husband's Geico insured motorcycle. The Plaintiff received the underinsured motorist (UIM) coverage on the motorcycle.

The Plaintiff then made a claim on her personal UIM policy with Penn National that had stacked coverage.

Penn National attempted to limit *Gallagher* to the facts of the case, i.e., efforts to recover UIM coverage under two separate policies that had been issued by the same carrier. The trial court in *Loose* rejected the carrier's efforts to limit the scope of the *Gallagher* case.

Rather , the trial court in *Loose* held "that *Gallagher*'s conclusion invalidating the Household Vehicle Exclusion as violative of the Motor Vehicle Financial Responsibility Law shall be permissibly extended and applied as precedent to the issue at bar."

It therefore appears, at least in Lebanon County where the *Loose* case was handed down, that having different companies providing UIM coverage under a given set of facts does not change the result that the Household Exclusion is invalid as being a violative exclusion is not valid. The trial court is now following the federal courts on this issue.

Household Exclusion

The Superior Court's recent decision in the case of ***Kline v. Travelers*, No. 104 MDA 2019 (Pa. Super. 2019 McLaughlin, J., Ford Elliott, P.J.E., Gantman, P.J.E.)(Op. By Gantman, P.J.E.)**, involved both the *Sackett* stacking issue as well as the issue of the retroactive effect of the Pennsylvania's eradication of the household exclusion in the Gallagher v. GEICO decision.

The trial court had ruled in favor of the insured on the *Sackett* issue but against the insured on the household exclusion issue. Travelers appealed the *Sackett* issue, and the insured appealed the household exclusion issue.

In this *Kline* case, the Superior Court found in favor of the insured on both issues, vacated the lower court's decision and remanded the case for further proceedings.

The case involved issues surrounding whether the Plaintiff-insured was entitled to stack his UIM coverage on two vehicles that had been added to his policy prior to the accident where the carrier did not secure new waiver of stacking forms from him. Another issue was whether the Plaintiff-insured was able to further stack coverage under a policy separately issued to his mother. As such, there were inter-policy and intra-policy stacking questions at issue in this case.

With regards to the Plaintiff-insured's own policy, the Court in *Kline* ruled that prior precedent under the *Bumbarger* supported its decision that the Plaintiff should be permitted to stack the coverages under his own policy.

Relative to the Household Exclusion and the retroactive effect of the *Gallagher* decision, the Court in *Kline* ruled that, as a general rule, appellate courts are required to apply the law as it exists as of the time of appellate review before the court. After applying the law of *Gallagher*, the court in *Kline* ruled that the *Gallagher* case rendered the Household Exclusion invalid such that the Plaintiff-insured could pursue stacked coverage that included the coverage under his mother's policy.

Future Medical Expenses

For the first time in a precedential Opinion, the Pennsylvania Superior Court addressed, in the case of ***Farese v. Robinson*, 2019 Pa. Super. 336 (Pa. Super. Nov. 8, 2019 Lazarus, J., Kunselman, J., and Colins, J.)(Op. by Colins, J.)**, the somewhat recurring issue of whether a claim for future medical expenses in an automobile accident case must be reduced in accordance with the cost containment provisions under Act 6 (75 Pa.C.S.A. Section 1797) of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL).

In this motor vehicle accident case, the jury entered a verdict in excess of $2.5 million dollars, of which $900,000 was an award for future medical expenses.

In the end, the Court in *Farese* held that future medical expenses did not need to be reduced in accordance with Act 6 before being presented to the jury. **See p. 21-26 of Opinion.**

Overall, the Court is *Farese* concluded that the limitations placed upon medical providers in terms of what they could charge for treatment of motor vehicle accident injuries (i.e., Act 6 reduced amounts) simply did not apply to claims for future medical expenses.

It is noted that this decision did not affect the rule of law that past medical expenses have to be reduced in accordance with Act 6 before being presented to a jury.

Daniel E. Cummins is the managing partner of the Clarks Summit, PA law firm of Cummins Law. He is also the writer of the Tort Talk Blog and provides mediation services through Cummins Mediation.

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AUTOMOBILE CASE LAW UPDATE

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

SUPERIOR COURT HOLDS THAT NEW STACKING WAIVER REQUIRED WHEN VEHICLES ARE ADDED TO A POLICY; GALLAGHER APPLIED TO INVALIDATE HOUSEHOLD EXCLUSION

KLINE v.TRAVELERS, ___ A.3d ___ (Pa. Super. 2019).

Bradly Kline owned one motor vehicle in 2002 which he insured with Travelers, and he rejected stacked UIM coverage when he purchased the policy. In 2007 and 2011, Mr. Kline added vehicles to the policy but was never given an opportunity to reject stacking. In 2012, Mr. Kline was involved in an accident and made a claim to Travelers for UIM coverage. Travelers tendered the non-stacked UIM limits of $50,000. Kline argued that he was entitled to stacked limits of coverage for all of his vehicles since he had not been given the opportunity to reject stacking when he added the two other vehicles to his policy. Kline's mother was also insured by Travelers, and he made a demand for the limits of her UIM coverage as well. Travelers denied the claim under the mother's policy based on the household exclusion.

Superior Court held that Travelers was required to provide stacked UIM limits to Kline since he was not given the opportunity to reject stacking when he added other vehicles to his policy in subsequent years. The Superior Court also gave retroactive effect to the Gallagher decision, which invalidated the household exclusion in Pennsylvania, and found that Kline was entitled to UIM benefits under his mother's policy.

PENNSYLVANIA SUPERIOR COURT RULES THAT FUTURE MEDICAL EXPENSES AWARDED AT TRIAL SHOULD NOT BE REDUCED BY ACT 6 FEE-SCHEDULES

FARESE v. ROBINSON/VENTURI TECHNOLOGIES, INC., ___ A.3d ___ (Pa. Super. 2019).

Louis Farese sustained significant injuries in a motor vehicle accident which occurred in August of 2014. The case proceeded to trial, and the jury awarded plaintiffs $2,579,000. Of this amount, $900,000 represented future medical expenses.

The defendant filed post-trial motions alleging several errors by the trial court. One argument raised in the post-trial motions was that the trial court committed error in not reducing the claimed future medical expenses to the present day Act 6 fee scheduled amounts pursuant to §1797(a) of the Pa.MVFRL.

The trial court denied the defendant's post-trial motions and an appeal to the Superior Court followed. One of the issues raised was whether the cost containment provisions of the Pa.MVFRL obligated a court to reduce the amount of future medical bills.

In deciding the issue the Superior Court noted that there is no Pennsylvania appellate case law on point. Further, there is no precedent for allowing a jury's award for future medical expenses to be molded pursuant to the cost containment provision of the Pa.MVFRL. The Superior Court found that whenever courts have considered the question of whether 75 Pa.C.S.A. §1797 applies to future medical expenses, it has been unanimously concluded that it does not.

This is the first time that a Pennsylvania appellate court has addressed this issue. According to this decision, limitations placed upon medical providers in terms of what they could charge for treatment of motor vehicle accident injuries (Act 6 reduced amounts) do not apply to claims for future medical expenses.

SUPERIOR COURT FINDS THAT TRIAL COURT DID NOT COMMIT ERROR BY REFUSING TO CHARGE ON §3321 OF THE PENNSYLVANIA MOTOR VEHICLE CODE GOVERNING VEHICLES ENTERING AN INTERSECTION FROM DIFFERENT DIRECTIONS AT THE SAME TIME

MATTHEWS v. BATRONEY, ___ A.3d ___ (Pa. Super. 2019).

This matter involved an intersectional collision in downtown Philadelphia between a bicycle ridden by Matthews and a car driven by Batroney. Matthews was traveling south on 19th Street, which is a one-way street. Batroney was driving eastbound on Cherry Street, also a one-way street.

Batroney testified that she stopped at the stop sign, or a little after it, and looked both ways, including up 19th Street, but did not see Matthews. Matthews admitted that he did not stop at the stop sign while traveling south on 19th but believed he had made eye contact with Batroney before entering the intersection. An eyewitness at the intersection testified that Batroney's car stopped before moving into the intersection but that Matthews never brought his vehicle to a stop.

At trial the jury rendered a verdict finding Batroney 30% negligent and Matthews 70% negligent. As such, he could not recover. Matthews filed post-trial motions on the basis that the trial court erred in refusing to charge the jury on §3321 of the Pennsylvania Motor Vehicle Code. Section 3321 provides that when two vehicles approach or enter an intersection from different roads at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. As such, it is was Matthews' contention that he had the right-of-way and properly entered the intersection.

The trial court originally indicated that it would charge on §3321 but it later reconsidered after Matthews' counsel had explained §3321 to the jury. The post-trial motions were denied, and Matthews appealed to the Pennsylvania Superior Court.

On appeal the Superior Court found that the trial court did not err by failing to charge the jury on §3321 as Matthews did not dispute that he failed to stop prior to entering the intersection of 19th and Cherry Streets. Therefore, it was proper for the trial court to charge on §3323 of the Motor Vehicle Code. The court also found that Matthews' admitted violation

of §3323(b) forfeited his right-of-way created by §3321.

FEDERAL COURT UPHOLDS JURY VERDICT FOR MEDICAL EXPENSES AND LOST WAGES BUT NOT PAIN AND SUFFERING

ABED-RABUH v. HOOBRAJH, No. 3:17-cv-15 (W.D. Pa. 2019).

Zaidan Abed-Rabuh was driving a tractor-trailer on the Pennsylvania Turnpike in Bedford County when he collided with a tractor-trailer driven by Jagdat Hoobrajh, which was disabled on the side of the road. Abed-Rabuh filed suit against Hoobrajh for personal injuries and the case proceeded to trial. The jury awarded plaintiff $25,000 for medical expenses and lost wages but did not award any sum for pain and suffering.

Plaintiff filed a post-trial motion arguing that the jury's verdict was against the weight of the evidence and that he should be entitled to a new trial. However, the trial court noted that plaintiff's own treating physician testified that plaintiff exhibited signs of "symptom magnification." She also testified that plaintiff's shoulder pain was likely the result of the aging process rather than the accident. Under these facts, the court found that the jury award for only medical expenses and wage loss was not against the weight of the evidence.

Plaintiff also filed a motion for delay damages which the court denied because it was filed more than ten days after the verdict.

FEDERAL DISTRICT COURT UPHOLDS DENIAL OF UIM BENEFITS BASED UPON "REGULAR USE EXCLUSION" IN THE INSURER'S POLICY

BARNHART v. THE TRAVELERS HOME AND MARINE INSURANCE COMPANY, 2:19-cv-00523 (W.D. Pa. 2019).

Mary Barnhart was injured while a passenger on a motorcycle operated by her husband, William Barnhart. Mr. Barnhart owned the motorcycle and insured it through Progressive Insurance Company. Mrs. Barnhart recovered the liability limits available to the tortfeasor and then claimed UIM benefits under her own Travelers automobile policy. Travelers denied Mrs. Barnhart's claim for UIM benefits based upon the "regular use exclusion" contained in the Travelers policy.

The relevant exclusion reads as follows:

> Travelers does not provide uninsured motorist coverage or underinsured motorist coverage for "bodily injury" sustained:
>
> 1. By you while "occupying" or when struck by any motor vehicle you own or that is furnished or available for your regular use which is not insured for this coverage under this policy. . .

Barnhart's declaratory judgment action averred that this "regular use exclusion" is unenforceable pursuant to the recent Pennsylvania Supreme Court decision in Gallagher v. GEICO.

The federal district court refused to extend the holding in Gallagher to the "regular use exclusion." The court further noted that Gallagher was decided under §1738 of the Pa.MVFRL, while the "regular use exclusion" is governed by §1731 of the Pa.MVFRL.

The court found that this factual scenario fell within the precedent set by Williams v. GEICO, a Pennsylvania Supreme Court case upholding the "regular use exclusion." As Williams, and not Gallagher controlled, the regular use exclusion was valid and enforceable in this factual scenario.

LACKAWANNA COUNTY TRIAL COURT PERMITS PLAINTIFF TO AMEND COMPLAINT TO INCLUDE PUNITIVE DAMAGE CLAIM EVEN THOUGH STATUTE OF LIMITATIONS HAS RUN

NOVAJOSKY v. NORTH PENN DISTRIBUTORS, INC., No. 17-CV-94 (C.C.P. Lackawanna Co., 2019).

Plaintiff was driving a Dodge Dakota southbound on Drinker Turnpike in Lackawanna County when he encountered two vehicles blocking his lane. He alleged that he was forced to travel into an unplowed snowy and icy lane of travel, which caused him to lose control and crash. He claimed that the defendants did not place any emergency reflective triangles, flares, or other warning devices on the roadway as required by state and federal law.

After the two-year statute of limitations had run, plaintiff filed a motion for leave to amend his complaint to include a claim for punitive damages. The defendants objected to the proposed amendment, but the trial court allowed it. The court noted that the plaintiff had produced lay witness and expert witness evidence to support his claim that defendants knew that by parking their vehicles in the roadway they created a risk of harm to others but then acted in disregard of that risk.

The court therefore found that it was appropriate for the jury to consider punitive damages. The court further noted that punitive damages are not a cause of action in themselves but are only incidental to a cause of action. Thus, plaintiff was permitted to add a punitive damage claim after the statute of limitations had run.

PREMISES LIABILITY UPDATE

By Daniel E. Cummins, Esquire, Cummins Law*

Dog Bite

In the case of ***Roegner v. Steezar*, No. 2019-CV-929 (C.P. Lacka. Co. Sept. 6, 2019 Nealon, J.)**, the court addressed Preliminary Objections filed by a dog owner in a dog bite case in which the Defendant filed a demurrer seeking to dismiss the action on the grounds that the allegations of the Complaint were legally insufficient to state a claim of negligence against the dog owner.

According to the Opinion, the Plaintiffs were the guests at the property of the Defendants, Joseph Steezar and Maryellen Steezar, when the Plaintiff was suddenly attacked by a pit bull that was owned by Defendant, Ryan Steezar.

The Plaintiffs filed a premises liability claim against the Steezars and further asserted that Ryan Steezar engaged in negligent conduct, careless conduct, gross, wanton, and reckless conduct for failing to adequately control the pit bull when he knew or should have known that the dog had a tendency to attack and had dangerous propensities. The Plaintiff additionally alleged that Ryan Steezar had violated the dog law by failing to properly confine, secure or control his dog and/or by harboring a dangerous animal.

The Defendant dog owner filed a demurrer asserting that Pennsylvania law establishes that no absolute liability may be imposed upon a dog owner for injuries caused by dogs. Rather, proof of the owner's negligence is required, such as showing that the owner had prior knowledge of the dog's vicious propensities.

The Defendant asserted a demurrer indicating that the Plaintiff's Complaint contained no allegations which would allow for the imposition of liability under Pennsylvania law for the Plaintiff's alleged injuries.

The court agreed with the Defendant that the mere ownership of a dog does not subject a dog owner to absolute liability for injuries caused by the dog.

Judge Nealon referred to the settled law that provides that, for a victim of a dog bite to establish negligence on the part of the dog's owner, the victim must prove that (1) the dog had dangerous propensities; (2) the owner knew, or had reason to know, that the dog had those dangerous propensities; and (3) the owner failed to exercise reasonable care to secure or control the dog so as to prevent it from injuring another person.

The court additionally stated that a dog's dangerous propensity is determined by the dog's behavior rather than its breed. It was also noted that a large overly-friendly dog that jumps on to people may be considered to be judged as dangerous as a vicious dog.

Under Pennsylvania law, there is no distinction between an animal that is dangerous and viciousness and one that this merely dangerous from playfulness.

Accepting the Plaintiff's allegations in the Complaint as true as required by the standard of review for a demurrer, the court found that Plaintiff had stated a cognizable cause of action in negligence against the dog owner.

As such, the demurrer was denied and the court suggested that the Defendant could revisit the issue once discovery is completed.

Trivial Defect Doctrine

In the case of ***McKenzie v. Wal-Mart*, No. 1540-CV-2018 (C.P. Monroe Co. Oct. 18, 2019 Williamson, J.)**, Judge David J. Williamson of the Monroe County Court of Common Pleas granted a Defendant store's Motion for Summary Judgment in a trip and fall case.

According to the Opinion, during the afternoon hours of October 3, 2017, the Plaintiff was walking from his vehicle to the store when he tripped and fell in the parking lot due to an alleged defect in the seam between the sidewalk and a raised curb. The alleged defect was a gap that was estimated to be somewhere between one and a quarter inches wide, one and a half inches deep, and running the length of the sidewalk.

The defense filed a Motion for Summary Judgment arguing that the Plaintiff was unable to show that there was any defect to the walking surface or that any alleged defect that was allegedly present was a trivial defect.

In response, the Plaintiff asserted that the triviality of a defect is a question of fact that should be put to the jury.

Judge Williamson pointed to Pennsylvania cases that reviewed the trivial defect doctrine and in which it had been held that an elevation, depression, or irregularity in a sidewalk may be so trivial that the court, as a matter of law, is bound to hold that there is no negligence in permitting it to exist. He also noted that the courts have held that there is no definite or mathematical rule that can be laid down as to the depth or size off a sidewalk depression necessary to give rise to liability on a landowner.

After reviewing prior decisions out of Monroe County involving similar facts, Judge Williamson noted in this *McKenzie* case that, reviewing the evidence in a light most favorable to the Plaintiff, summary judgment was appropriate as the circumstances surrounding the alleged defect did not rise to support any finding of negligence. The court noted that the gap at issue was clearly visible, not overly large, and appeared to be a part of the design of the sidewalk.

Slip and Fall

In the case of ***Elliot v. Cinemark USA, Inc.*, 5550-CV-2017 (C.P. Monroe Co. Oct. 4, 2019 Williamson, J.)**, the court entered summary judgment in favor of a movie theater in a slip and fall matter after finding that the Plaintiff did not establish that the Defendant had actual or constructive notice of the existence of a dangerous condition.

According to the Opinion, the Plaintiff went to the Defendant's theater in the early afternoon hours to see a movie. While walking near a self-serve condiment station in the lobby, the

Plaintiff slipped and fell. The Plaintiff alleged that she slipped and fell on a spill of popcorn butter.

According to the evidence in the case, the Defendant admitted that the self-serve condiment area was known to become messy quickly such that it was the theater's policy to clean the area every thirty (30) minutes. The Plaintiff alleged that this policy was inadequate.

The Plaintiff had testified that the floor was wet and greasy when she fell. Another witness testified to the existence of a couple of drops of some substance, about the size of a quarter, approximately three (3) feet from the counter.

The Defendant's employees testified that they performed the required half-hour checks at the condiment station. The Defendant also provided documentation to show that the various cleaning tasks had been completed that afternoon.

Based upon the record before the court, the judge ruled that the Plaintiff did not establish that the Defendant had any actual or constructive notice of any dangerous condition. As such, summary judgment was entered in favor of the theater.

**Daniel E. Cummins is the managing partner of the Clarks Summit, PA law firm of Cummins Law. He is also the writer of the Tort Talk Blog and provides mediation services through Cummins Mediation.*

PROPERTY AND CASUALTY CASE LAW UPDATE

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

PENNSYLVANIA SUPERIOR COURT REVERSES GRANT OF NEW TRIAL IN TRIP AND FALL CASE

KOZIAR V. RAYNER, 200 A. 3d 513 (Pa. Super. 2018).

Mariana Koziar was employed as a house cleaner and was assigned to clean the home of Neal and Andrea Rayner. When leaving the home through the garage, Koziar tripped on a lip in the driveway sustaining a left ankle fracture which necessitated surgery. Koziar told the emergency room personnel that she tripped by the garage entrance. However, when she saw an orthopedic surgeon the next day, she gave a different version of how the incident occurred. Eventually she filed suit against the Rayners.

At trial Neal Rayner testified that a "lip" was present when the house was purchased but it had never caused anyone to stumble and/or fall. Of note, the Defendants did not call their medical expert at trial as his opinions were similar to those of the treating surgeon.

The jury returned a verdict for the Defendants finding that they were negligent but that their negligence was not a factual cause in bringing about the Plaintiff's harm. Koziar filed a Motion for Post-Trial Relief which was granted as the trial court found that there was uncontested medical evidence; therefore the jury had to find factual cause. The Defendant homeowners appealed the grant of a new trial to the Superior Court.

On appeal the Rayners argued that although an injury was conceded, it did not correlate that any negligence was the factual cause of the injury. The Superior Court agreed finding that the fact that there was uncontroverted medical evidence does not relieve a Plaintiff of the burden of proving that the Defendants' negligence was a factual cause of the injury. The court further found that there were ample grounds for the jury to find that any negligence was not the "factual cause" as there were multiple versions of how the incident occurred. Further, the Plaintiff's own negligence could have caused the injuries. As such, the grant of a new trial was reversed and the original verdict reinstated.

IN MEMORANDUM DECISION PENNSYLVANIA SUPERIOR COURT AFFIRMS GRANT OF SUMMARY JUDGMENT TO SUPERMARKET IN SLIP AND FALL CASE

WASNETSKY V QUINN'S MARKET, ET AL., 1160 MDA 2018 (Pa. Super. 2019).

Joseph Wasnetsky slipped and fell in the defendant's market hitting his head and ultimately passing away from his injuries. His Estate filed a complaint against Quinn's Market alleging a "dangerous condition" as there was water or juice on the floor in the area where the decedent fell. The only witness was a fellow shopper who saw the decedent walking when his legs went up in the air and he fell backwards.

According to the witness the area was free of any slipping hazards and there was no evidence of liquid on the floor. The witness inspected the decedent's shoes and found no slippery foreign substances. In addition, store employees testified that they did not observe any liquids on the floor.

In support if its case, the Estate hired two biomechanical experts, Angela D. DiDomenico, Ph.D. and Brian Benda, Ph.D. Both experts opined that the decedent slipped on a substance on the floor and that the Defendant market was negligent in failing to protect customers from slippery surfaces. The problem was that neither expert could identify any substance which could have caused the fall. Further, the experts' conclusions were based upon assumptions not supported by the record.

In granting summary judgment, the trial court had relied upon the testimony of the eye witnesses and disregarded the expert reports as speculative. On appeal, the Superior Court found that an invitee, such as the decedent, must prove that a possessor of land either contributed to the creation of the condition or had constructive notice of it. The court agreed that the expert reports were "speculative" and that the evidence of record did not establish anything "slippery" on the floor. As such, the Superior Court agreed that the Estate failed to meet its burden of proof as there was no evidence of a dangerous condition on the Defendant's premises which caused the decedent's fall.

FEDERAL DISTRICT COURT HOLDS THAT HOMEOWNER'S INSURER HAS DUTY TO DEFEND INSURED ACCUSED OF CYBERBULLYING DUE TO NEGLIGENCE CLAIM IN COMPLAINT

STATE FARM FIRE & CASUALTY COMPANY V. MOTTA, __ F. Supp. 2d__ (E.D. Pa. 2018).

Julia Morath, a high school student, committed suicide after being cyberbullied by fellow student Zach Trimbur. The record reflected that Trimbur had cyberbullied others at school on prior occasions. Morath's parents sued Trimbur and his parents in State Court. Trimbur's mother asked State Farm, her homeowner's insurer, for a defense. A defense was tendered under a Reservation of Rights.

State Farm then brought a Declaratory Judgment action in Federal Court asking for a declaration that it had no obligation to defend Trimbur and his parents in the State Court action as there was no "accident", thus no "occurrence" as the text messaging was an intentional act. The parties filed cross-motions for judgment on the pleadings with the court granting Trimbur and his parents' motion and denying State Farm's motion.

In reaching its decision, the Federal District Court held that State Farm must defend Trimbur in the State Court case because the negligence claim, as alleged, falls within the scope of "occurrence" in the homeowner's policy. The court also held that it could only find that there was no duty to defend if apparent upon the face of the complaint.

The court differentiated the complaint in this instance from one alleging assault only. The court also found that State Farm must defend Trimbur's parents as only negligence was alleged against them. The court pointed out that it was not holding that State Farm would have to ultimately indemnify Trimbur.

SUMMARY JUDGMENT GRANTED TO RESTAURANT WHERE PLAINTIFF SLIPPED AND FELL IN WATER IN RESTROOM AS NO EVIDENCE THAT THE RESTAURANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CONDITION

WATSON V BOSTON MARKET CORP., No. 17-5648 (E.D. Pa. 2019).

The Plaintiff slipped while exiting a restroom at a Boston Market location in July, 2017. She had used the restroom and washed and dried her hands but she did not notice any food, water or debris on the floor at the time. The Plaintiff then slipped on liquid on the floor. She fell on her back and noticed water dripping onto the floor from a ceiling light.

The restaurant manager testified that she herself had inspected the bathroom no more than 35 minutes before the fall and that there was no liquid on the floor. She also testified that she never recalled water dripping from the ceiling. The Plaintiff testified that there were brown water spots on the ceiling indicating prior incidents of leaking water.

The case was arbitrated in January, 2019 and the panel ruled in favor of the Defendant restaurant. The Plaintiff appealed and the restaurant subsequently filed a motion for summary judgement.

The ruling on the motion for summary judgment by the Federal District Court cited the legal standard that a possessor of land owes a duty to an invitee only when the possessor "knows of or should discover conditions and realize that it involves an unreasonable risk of harm to the invitee." To establish knowledge, an invitee must prove that the possessor had a hand in creating a harmful condition or had "actual or constructive notice of such condition."

The court granted the restaurant's motion for summary judgment holding that the Plaintiff failed to adduce sufficient evidence to render the Defendant liable. There was no evidence that the Defendant had a hand in creating the harmful condition as there was no evidence that the Defendant caused the water to be on the floor.

Further, there was no evidence of actual knowledge as the Defendant was not aware of the harmful condition. This finding was based upon the fact that there was no evidence of leaking on prior occasions. Finally, the court held that there was no evidence of "constructive knowledge" as the length of time between the inspection and the incident was insufficient to demonstrate constructive knowledge.

DAUPHIN COUNTY TRIAL COURT GRANTS SUPERMARKET'S MOTION FOR SUMMARY JUDGEMENT WHERE PLAINTIFF CANNOT PROVE EITHER ACTUAL OR CONSTRUCTIVE NOTICE OF DANGEROUS CONDITION

GUMBY V. KARNS PRIME & FANCY FOOD, LTD., 2017 CV 7013(C.C.P. Dauphin Co., 2019).

The Plaintiff slipped and fell in Defendant supermarket in October, 2015 alleging that she slipped on liquid that had "leaked or spilled onto the floor." As a result of the incident the Plaintiff sustained injuries to her right shoulder, neck and back. Discovery revealed that the Plaintiff believed that she had slipped on liquid from smashed grapes. She did not see anything before she fell. According to the Plaintiff, the assistant manager told her that he observed liquid in the area at the time of the fall.

The Defendant filed a motion for summary judgment which was granted. The court held that the Plaintiff presented no evidence that the Defendant created a condition which caused her to fall. Therefore the Plaintiff must establish that the Defendant had "actual or constructive notice."

The court went on to find that the fact that the store lacked an adequate floor maintenance policy did not constitute "constructive notice." It was further held that the Plaintiff failed to present a prima facie case which may be tried to a jury as the Plaintiff did not know how the grapes allegedly came to be on the floor and how long they were there.

LACKAWANNA COUNTY TRIAL COURT GRANTS MOTION FOR SUMMARY JUDGMENT OF ADJACENT LAND OWNER BY FINDING THAT NO DUTY OWED TO PLAINTIFF

SLAVINSKI V. GALLATZ, GERMAN PRESBYTERIAN CEMETERY AND HICKORY STREET PRESBYTERIAN CHURCH, 13 CV 1772(C.C.P. Lackawanna Co., 2019).

Plaintiff fell on the Gallantz property and injured her arm on a protruding tip of a cemetery grave marker imbedded in the ground. She sued Gallantz, as well as the adjacent cemetery and the church that owned the cemetery. In her complaint Plaintiff alleged that the grave marker had been disposed of from debris of the cemetery. However, Plaintiff failed to produce any evidence as to how the grave marker became imbedded in the neighbor's property or show that the cemetery/church had actual or constructive knowledge of the condition. The Plaintiff had not previously witnessed grave markers in the alleyway in the neighboring property.

The Defendant cemetery and church filed a motion for summary judgment contending that there was no evidence of a duty owed by the cemetery to the Plaintiff, or that these Defendants had actual or constructive knowledge of the condition. These defendants argued that there was no evidence of where the grave marker came from as it could have been thrown there by vandals. The Plaintiff argued that the cemetery had a duty to make sure that individuals did not throw debris onto the adjacent property.

In granting the Defendants' motion for summary judgment, the trial court held that a possessor of land was only liable for a dangerous condition on the property if it knew or should have known of the condition and realized that it presented a risk of harm. It is Plaintiff's burden to show that there was a dangerous condition and actual or constructive knowledge on the part of the adjoining landowners. This burden was not met.

The court further held that there is no duty for a neighboring land owner to correct artificial conditions on a neighbor's property. There was no evidence of any prior instances of harm of this nature and no proof that the cemetery or church was aware of the removal of the grave markers. As such, the only duty imposed by law was upon the land owner where the accident occurred.

MONROE COUNTY TRIAL COURT GRANTS PRELIMINARY OBJECTIONS OF LANDLORD WHERE MINOR BITTEN BY TENANTS' DOG

GALLO V. PRECIOUS MOMENTS ACADEMY, ET AL., No. 904 Civil 2018 (C.C.P. Monroe Co., 2019).

The minor Plaintiff, a four year old girl, was injured when bitten by a dog at the Precious Moments Academy Daycare Center. The daycare center was owned by defendants Heather Nembhard and Stephanie Greenlief. These Defendants had leased the premises for the daycare center from Defendant Broadheadsville Storage (here and after "Storage").

Plaintiff's complaint alleged that starting in 2016 Nembhard and Greenlief began to have dogs present on the daycare premises. On the date in question, each of these individuals had a dog on a leash near the minor. Nembhard's dog allegedly attacked the minor biting her in the face. The complaint also named Defendant Storage under a theory of agency as well as independently alleging that the landlord knew that there were young children on the premises and that the tenants' housed dogs on the premises.

Defendant Storage filed preliminary objections to the complaint. The first was that the factual allegations in the complaint, taken as true, failed to establish a violation of the Pennsylvania Dog Law as there were no allegations that Defendant "owned" the dogs. The court agreed finding that only an "owner" or "keeper" can violate the Dog Law and that a landlord out of possession was not an owner or keeper without more.

The second preliminary objection was to the agency claim. The court agreed with Defendant Storage that there were no facts alleged in the complaint to support a claim that a landlord out of possession is vicariously liable for the activities of its tenants.

The third preliminary objection concerned insufficient allegations of negligence. Defendant Storage contended that there were no specific allegations of independent negligent conduct on its behalf. The court agreed.

The final preliminary objection was in the nature of a motion to strike Plaintiff's claim for punitive damages against Defendant Storage. In striking the punitive damage claim the court held that there were no allegations of "bad motive" or "reckless indifference" on the part of the landlord. As there were no allegations that the landlord had the authority to regulate the tenants' pets, there were insufficient allegations of conduct to support a punitive damage claim. The court also struck the "wanton, willful and reckless" allegations against the landlord.

Snapshots of Pennsylvania Workers 'Compensation Cases Decided in 2019

*By Thomas R. Bond, Esquire**

Pennsylvania Supreme Court Premises Case Having Broad Implications

Claimant, an airline attendant coming off her shift, was injured in a shuttle bus while being transported to a parking lot within the confines of the Philadelphia International Airport. Neither the shuttle bus nor the parking lot were owned by Employer. Nevertheless, the Pennsylvania Supreme Court affirmed based on the fact that employers' premises can encompass areas significantly connected to an employer's affairs, including a reasonable avenue of ingress and egress from the workplace.

US Airways, et al, Aplts. v. WCAB (Bockelman) - No. 35 WAP 2018; Decided November 20, 2019

Commonwealth Court Decides Fireman's Cancer Claim on Substance Rather Than Form

Claimant, a volunteer firefighter, was awarded benefits under Section 108 (r) of the Act despite the fact that the documentation he submitted did not specify the carcinogen(s) to which he was exposed. The Court found that he had met the burden of showing that it was possible that his particular type of cancer resulted from his exposure to deleterious chemicals and particulates at the scene of the various fires where his presence was documented.

Bristol Borough V. Workers' Compensation Appeal Board (Burnett), No. 464 C.D. 2018; March 22, 2019

90-Day Period to File Notices to Stop Compensation Payments and Denials Runs from the Date Claimant First Receives Workers' Compensation.

If Claimant receives wages on the first day of his disability instead of workers compensation benefits, the 90-day period within which Employer must file a Notice Stopping Temporary Compensation Payable and a Notice of Workers Compensation Denial commences on the date when Claimant first receives workers' compensation benefits. If Employer makes these filings beyond the 90-day mandatory period, the TNCP converts into a NCP.

Thomas Kurpiewski, v. Workers' Compensation Appeal Board (Caretti, Inc.), No. 194 C.D. 2018; Decided January 18, 2019

A Very Dangerous Dermatitis Case Holding

Claimant held to be entitled to continuing the temporary total disability benefits even though his work-related contact dermatitis had become asymptomatic, with no evidence of a remaining rash. His physician testified that a return to his work as a bricklayer, where he would once again be exposed to chromium, could be life-threatening. The Court rejected the argument that liability under the Act should end when the Claimant's condition had returned to baseline.

Kreschollek v. WCAB (Commodore Maintenance Corp.), 297 C.D. 2018; Decided January 7, 2019

A Really Interesting and Well-Reasoned Extraterritorial Jurisdiction Decision

Claimant was injured in a facility owned by Employer in Delaware. Previously, he had done work as a union carpenter for Employer in Pennsylvania.

Each time he finished the job for Employer in Pennsylvania his employment was separated by periods of time during which he had been laid off, with no guarantee of future work with Employer.

The Court held that Claimant had not established extraterritorial jurisdiction in Pennsylvania with the Court noting that the work Claimant was doing for Employer in Delaware was different than the work he did for Employer in Pennsylvania; that he had to fill out new employee forms for the Delaware position, and there was no evidence of an ongoing employment relationship.

James McDermott, v. Workers' Compensation Appeal Board (Brand Industrial Services Inc.), No. 518 C.D. 2018; Decided January 18, 2019

Here Is a New Twist: Anticipated Overtime for a Claimant Working Less Than 13 Weeks to Be Included in Calculating AWW

Even when a claimant has worked for less than 13 weeks and does not have a fixed wage, it is mandatory that overtime worked and *anticipated* be factored into calculation of his pre-injury average weekly wage.

Carl Sadler v. Workers' Compensation Appeal Board (Philadelphia Coca-Cola), No. 328 C.D. 2018; Decided May 22, 2019

A Criminal Conviction Not Incarceration Alone Is Necessary Before Compensation May Be Suspended

During the time a claimant is incarcerated for failure to make bail, but before conviction, the employer is not entitled to suspend his medical and indemnity compensation in that it cannot be maintained that his incarceration is due to fault on his part, or voluntary withdrawal from the workplace.

Carl Sadler v. Workers' Compensation Appeal Board (Philadelphia Coca-Cola), No. 328 C.D. 2018: Decided May 22, 2019

Solid Case Investigation Yields a Rare Denial of Benefits to a Traveling Employee Injured on His Way Home

When a traveling employee significantly deviates from his usual way home after the workday and has an injurious automobile accident, he is not entitled to the protection usually afforded to traveling employees and the road risk they face on their route home.

Jonathan Peters, v. Workers' Compensation Appeal Board (Cintas Corporation), No. 1835 C.D. 2017; Decided July 18, 2019

Even Though a Workers' Compensation Trust Operated Like an Insurance Company Paid Heart

and Lung Benefits to the Claimant, Subrogation Denied Because the Court Focused on the Nature of the Benefit Payments, Not the Source of Payments

In holding that the Employer was not entitled to subrogation in connection with a third-party recovery, the Court stressed that it is the nature of the benefits for which subrogation is being sought, i.e., are they Heart and Lung benefits or workers' compensation benefits, that is critical in determining whether a right of subrogation exists. Benefit payments, ultimately determined by the Court to be Heart and Lung benefits, were being paid out of a workers' compensation trust being operated like an insurance company for the employer members.

Erie Insurance Co. and Powell Mechanical, Inc. v. WCAB (Comwlth of PA, Dept. of L&I, Bureau of WC) - 20 C.D. 2018; Decided February 21, 2019

In the Battle of Vocational/Earning Power Experts the WCJ Must Determine Which of Them Is Providing Credible and Accurate Job Descriptions

The Court held that the WCJ had erred in finding Claimant continued to be totally disabled based on the testimony of Claimant himself that he could not perform the duties of the positions allegedly found for him by a vocational expert testifying on behalf Employer. This expert testified to various requirements of the jobs found.

The vocational expert presented by Claimant testified to different qualifying and physical requirements with respect to the same positions.

The holding of the Court turned on the fact that the WCJ had failed to resolve the conflicts in vocational evidence as to the qualifying physical requirements of the jobs; whether prior experience was required; and whether on-the-job training was provided.

Fedchem, LLC, & The SWIF v. WCAB (Wescoe) - 1641 C.D. 2018; Decided November 18, 2019

**Thomas R. Bond, Esquire, Of Counsel, in the Philadelphia Office of O'Hagan Meyer.*

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