COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE
An Association of Defense Lawyers and Insurance Executives, Managers and Supervisors OCTOBER 2019

# Amazon as "Seller" under Restatement (2nd) of Torts 402A: Paradigm or Paradox? *OBERDORF v. AMAZON.COM, INC.*

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**"THE FURRY GANG"**

On December 2, 2014, Heather Oberdorf purchased a dog collar on Amazon.com sold by a third-party vendor, "the Furry Gang." Over a year later, on January 12, 2015, the dog collar broke, injuring one of her eyes. She did not sue until June, 2016, a month after "The Furry Gang" ceased activity on Amazon. Unable to locate "The Furry Gang," Oberdorf sued Amazon.com Inc. (hereafter "Amazon") in federal court in Pennsylvania alleging strict product liability, negligence. breach of warranty, misrepresentation, and loss of consortium.

Amazon moved for summary judgment on the product liability claims, arguing that it was not a "seller" under § 402A of the Restatement (Second) of Torts because it never took title to or possession of the products sold by third-party vendors, and that characterizing Amazon as a "seller" would be inconsistent with the policy considerations inherent in Pennsylvania product liability law.

**THE AMAZON BUSINESS MODEL**

Amazon is a multinational technology company best known for hosting online sales. Products are offered for sale at Amazon in three ways. First, Amazon sources, sells, and ships some products as the seller of its own brand products. Second, third-party manufacturers sell products through Amazon Marketplace "Fulfilled by Amazon," retaining Amazon to store and ship their products. Third – ***and the means of sale at issue in this case*** – third-party sellers may use the Amazon Marketplace like a shopping mall, selling their products on the site without adopting the additional Amazon "fulfillment" services. These sellers, like "The Furry Gang," supply and ship products directly to consumers without their ever being in Amazon's possession.

Amazon Marketplace has seen enormous growth in recent years. More than one million businesses of all sizes sell products on Amazon Marketplace.

**WHAT WOULD THE PENNSYLVANIA SUPREME COURT DO?**

The Pennsylvania Supreme Court has not ruled on whether an online sales listing service like Amazon Marketplace qualifies as a "seller" under § 402A of the Restatement (Second) of Torts. Nor have any other Pennsylvania appellate courts. Therefore, given the absence of a controlling decision by the Pennsylvania Supreme Court, "a federal court applying that state's substantive law must predict how Pennsylvania's highest court would decide th[e] case." *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 45-46 (2009).

**THE DISTRICT COURT *OBERDORF* OPINION**

In *Oberdorf v. Amazon.com, Inc,* 295 F. Supp.3d 496 (M.D. Pa. 2017), the district court granted Amazon's motion for summary judgment and found that Amazon is not a "seller" under Pennsylvania law,[1] and thus is not subject to strict products liability claims.[2] Judge Matthew Brann emphasized that while the Pennsylvania Supreme Court has liberally defined "seller" under §402A of the Restatement (Second) of Torts, it has not left that category "boundless." He relied primarily on *Musser v. Vilsmeier Auction Co. Inc.*, 562 A.2d 279 (1989), which held that an auctioneer is not a "seller" for purposes of *§ 402A*.

In *Musser,* the Pennsylvania Supreme Court held that it is improper to impose strict liability on a defendant unless doing so furthers the underlying policy of *§*402A, namely the "special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."

Judge Brann held that, despite Amazon's influence over the sales process,[3] its role is akin to the *Musser* auctioneer deemed not a §402A "seller." Like an auctioneer, or a brick-and-mortar shopping center, Amazon is merely a third-party vendor's "means of marketing," since third-party vendors - not Amazon – "choose the

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products and expose them for sale by means of" the Amazon Marketplace. 295 F. Supp. at 501. Because of the enormous number of third-party vendors (and, presumably, the correspondingly enormous number of goods sold by those vendors), Amazon is "not equipped to pass upon the quality of the myriad of products" available on its Marketplace. Further, because Amazon has "no role in the selection of the goods to be sold," it also cannot have any "direct impact upon the manufacture of the products" sold by the third-party vendors. *Id*.

In sum,

> Amazon Marketplace serves as a sort of newspaper classified ad section, connecting potential consumers with eager sellers in an efficient, modern, streamlined manner. Because subjecting it to strict liability would not further the purposes of *§ 402A*, as revealed by *Musser* and other Pennsylvania cases, it cannot be liable to the Oberdorfs under a strict products liability theory.

*Id.*

**JULY 3, 2019 PANEL DECISION OF THE THIRD CIRCUIT COURT OF APPEALS: JUDGE ROTH'S MAJORITY OPINION**

In July 2019, a split three-judge panel of the United States Court of Appeals reversed Judge Brann's grant of summary judgment in Amazon's favor.[4] 930 F.3d 136 (3d Cir. 2019), *vacated*, 936 F.3d 182 (3d Cir. 2019).

Like the district court, the Third Circuit panel based its decision primarily on the Pennsylvania *Musser* decision. Unlike the District Court, the panel majority found that in Amazon's case, the policy at *Musser*'s core compelled the opposite conclusion.

Writing for the two-judge majority, Judge Roth relied on a four-factor test originating in *Francioni v. Gibsonia Truck Corp.*, 372 A.2d 736, 739 (Pa. 1977), which *Musser* had also applied. Those factors are:

1. Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress;"
2. Whether imposition of strict liability upon the [actor] serves as an incentive to safety;
3. Whether the actor is "in a better position than the consumer to prevent the circulation of defective products;" and
4. Whether "the [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in business, i.e., by adjustment of [contractual] terms.

The Third Circuit panel two-judge majority held that all four *Francioni* factors weigh in favor of imposing strict liability on Amazon. 930 F.3d at 145-48.

As to factor one, "Amazon may be the only member of the marketing chain available to the injured plaintiff for redress," as the Furry Gang could not be located. Unlike the plaintiff in *Musser*, Oberdorf (having waited well over a year to bring suit) was unable to sue other parties in the distribution chain. The Court construed Amazon's Agreement with third-party vendors as allowing vendors to "conceal themselves." Amazon does not require third-party vendors to stay in good standing under the laws of the country in which their business is registered. *Id.* at145.

Second, the "imposition of strict liability upon [Amazon] would serve as an incentive to safety." The Court reasoned that although Amazon does not have a direct influence over the design and manufacture of third-party products, it exerts significant control over the vendors and is capable of removing unsafe products from its website. *Id.* at 145-46. To do so would require Amazon independently to assess the safety of all of the millions of products sold through its site.

Third, Amazon is "in a better position than the consumer to prevent the circulation of defective products" because Amazon has established relationships with third-party vendors. Amazon also communicates directly with customers for feedback, providing a basis for it to exert its influence over the products being sold. *Id.* at 146-47.

Fourth, Amazon can "distribute the cost of compensating for injuries resulting from defects." *Id* at 147-48.

The two-judge majority opted for an expansive view of the meaning of "seller," noting that "*Comment f to § 402A* makes clear that the term 'seller' is not limited by its dictionary definition, as it 'applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor . . ." The Court referenced the policy articulated in *Francioni, supra,* in 1978, that strict product liability should be applied broadly to those who market products, "whether by sale, lease or bailment, for use and consumption by the public." *Id.* at 738.

The majority judged that its conclusion is consistent with other Pennsylvania appellate decisions, but cited nothing more recent than 1982. For example, in *Hoffman v. Loos & Dilworth, Inc.*, 452 A.2d 1349 (Pa. Super. 1982), the Pennsylvania Superior Court decided

that a sales agent was a "seller" under § 402A, and thus subject to strict product liability under Pennsylvania law. The Superior Court relied upon the exclusive relationship between sales agent and manufacturer to find the sales agent to be a "seller" under Pennsylvania law even though that agent never had title to or possession of the products being sold. 452 A.2d at 1354-55.

None of the decisions relied upon by the 2-judge majority involved an online retailer such as Amazon. Indeed, the Internet did not exist when those cases were decided.

Notably, the majority decision was, as of July 2019, the lone departure from other federal Courts grappling directly with the "Amazon as 402A seller" issue, regardless of the nuances of the involved states' substantive law. See, e.g., *Fox v. Amazon.com, Inc*., 930 F.3d 415, 425 (6th Cir. 2019) (applying Tennessee law); *Erie Ins. Co. v. Amazon.com, Inc.,* 925 F.3d 135, 141-42 (4th Cir. 2019) (applying Maryland law); *Stiner v. Amazon.com, Inc*., 120 N.E.3d 885, 893-94 (Ohio App. 2019); *Garber v. Amazon.com*, Inc., 380 F. Supp.3d 766, 776-78 (N.D. Ill. 2019); *Carpenter v. Amazon.com, Inc.*, 2019 WL 1259158, at *5 (N.D. Cal. March 19, 2019); *Eberhart v. Amazon.com, Inc.,* 325 F. Supp.3d 393, 398-400 (S.D.N.Y. 2018); *Allstate N.J. Insurance Co. v. Amazon.com, Inc.*, 2018 WL 3546197, at *7-12 (D.N.J. July 24, 2018). Each of these decisions involved the interpretation of a particular state's product liability law as to whether Amazon was a "seller" under § 402A.

However, the majority disregarded other states' law.

> [I]n deciding whether Amazon is a "seller" within the meaning of § 402A, we must predict what the Pennsylvania Supreme Court would decide under Pennsylvania law interpreting the Second Restatement of Torts. It is of little consequence whether Amazon is a "seller" for purposes of other states' statutes, as each of those statutory schemes is based on distinct language and policy considerations.

Id. at 150 (footnotes omitted).

**JULY 3, 2019 PANEL DECISION OF THE THIRD CIRCUIT COURT OF APPEALS: JUDGE SCIRICA'S DISSENT**

At the outset of his dissent, Judge Scirica framed the issue as follows: "this case implicates an important yet relatively uncharted area of law. No Pennsylvania court has yet examined the product liability of an online marketplace like Amazon's for sales made by third parties through its platform." 930 F.3d at 154.

> Our task, as a federal court applying state law, is to predict how the Pennsylvania Supreme Court would decide the case. We must take special care to apply state law and not to participate in an effort to change it.

*Id.* (citation and quotation marks omitted). Judge Scirica cautioned that the majority opinion "substantially widens" what has previously been a narrow, case-specific exception to the typical rule for identifying products liability defendants sufficiently within the chain of distribution. "A 'seller' in Pennsylvania is almost always an actor who transfers ownership from itself to the customer, something Amazon does not do for Marketplace sellers like The Furry Gang." *Id*.at 154. *See, e.g., Chelton v. Keystone Oilfield Supply Co.,* 777 F. Supp. 125 (W.D. Pa. 1991) (wholesaler); *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615 (Pa. Super. 1983) (retailer); *Francioni, supra,* at 739-40 (lessor); *Villari v. Terminix Int'l, Inc.,* 663 F. Supp. 727 (E.D. Pa. 1988) (pest control company supplying insecticide as part of service). Each of these cases holds liable a "seller" who transferred the right to possess the product from itself to the customer.[5]

Judge Scirica expressed concern that the two-judge majority decision sets it apart from sets the Third Circuit apart from all other United States Courts of Appeals which have dealt with the issue whether Amazon is a "seller" within the meaning of § 402A for transactions using the online Amazon Marketplace.[6] He considers these federal decisions significant, because despite the "nuances" of the particular state's substantive product liability law, each like Pennsylvania has adopted § 402A of the Restatement (Second) of Torts and the federal courts were all dealing with the same question - whether and under what circumstances Amazon could justifiably and fairly be considered a "seller" subjecting it to strict liability for Amazon Marketplace transactions.

Judge Scirica cautioned that "policy factors alone cannot create seller status." Unlike the two-judge majority, Scirica would resolve each of the four *Francioni* factors in Amazon's favor in this case.

More important to Judge Scirica was the threshold question: whether Amazon's Marketplace played the role of a true product supplier for The Furry Gang in this case? As the Pennsylvania Supreme Court explained, the *Francioni* test applied in *Musser* guides "whether a particular supplier of products, whose status as a supplier is already determined, is to be held liable for damages caused by defects in the products supplied." *Cafazzo v. Cent. Med. Health Servs.,* 668 A.2d 521, 525 (Pa. 1995).

According to Judge Scirica, "as *Cafazzo* makes evident, once a court has determined a defendant is 'too tangential' to be considered a supplier of the product at issue, applying the *Francioni* policy factors is unnecessary. *Id.* at 523-24." Reiterating that Amazon neither stored nor shipped the product, *id.* at 159, the dissent concluded that the Amazon Marketplace is "too tangential" to the sales of third-party products to be considered a supplier or seller of those products under Pennsylvania law. "The *Francioni* policy factors therefore cannot establish seller liability." *Id.*

Interestingly, *Cafazzo* was decided after *Musser,* yet played no role in the *Oberdorf* panel's majority decision. The *Cafazzo* court stated, "It is . . . not clear enough that strict liability has afforded the hoped for panacea in the conventional products area that it should be extended so cavalierly in cases such as the present one." 668 A.2d at 527.

Finally, Judge Scirica suggested that The Third Restatement of Torts offers guidance to the meaning of "seller" consistent with his analysis. *Id*. at 162.[7]

**GRANT OF REHEARING *EN BANC***

Following the Third Circuit panel's July 3, 2019 split decision in favor of plaintiff Oberdorf, Amazon immediately filed a petition for rehearing *en banc*. On August 23, 2019, that petition was granted and the July 3, 2019 opinion and judgment were vacated. *Oberdorf v. Amazon.com Inc.*, 936 F.3d 182 (3d Cir. 2019) (*per curiam*). As of this publication, the rehearing has not yet been briefed or scheduled.

**SO, WHAT NOW?**

In obtaining reargument, Amazon *forcefully* argued that the Third Circuit, exercising diversity jurisdiction, should not have interpreted Pennsylvania law in a novel fashion to expand tort liability in the absence of any state court precedent for doing so. "A federal court in diversity is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975); *see Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (federal courts are "not free to apply a different rule however desirable it may believe it to be").

In this respect, the panel's majority decision was contrary to these decisions of the Supreme Court, and other Third Circuit precedent holding that federal courts sitting in diversity cannot "act as … judicial pioneer[s]" by deciding "whether and to what extent they will expand state common law." *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993). The majority's adoption of unprecedented "seller" liability under Pennsylvania law − with far-reaching consequences for all other online businesses and service providers departed from a long line of Third Circuit precedent.[8]

**PA. R. A. P. 3341. PETITIONS FOR CERTIFICATION OF QUESTIONS OF PENNSYLVANIA LAW**

Will the Third Circuit Court of Appeals certify the question for decision by the Pennsylvania Supreme Court whether - and under what circumstances - Amazon is or may be a "seller" under § 402A of the Restatement (Second) of Torts?[9] This tool is available to the Third Circuit and that Court has used this process before in the product liability context. *See, e.g.*, *Berrier v. Simplicity Mfg., Inc*., 563 F.3d 38, 45-46 (2009) (requesting certification of the question of bystander liability under the then *Azzarello*-based body of Pennsylvania law, since abrogated by *Tincher* and progeny).[10] There is no indication at this time that the Third Circuit Court of Appeals is considering taking such a step, nor is there any way to predict how The Pennsylvania Supreme Court would respond in the post-*Tincher* area, since the *Tincher* court expressly espoused the incremental development of the common law in the absence of legislation. 104 A.3d at 397.

**IN SUM, FINDING AMAZON TO BE A § 402A "SELLER" WOULD HAVE SIGNIFICANT NEGATIVE IMPLICATIONS FOR ONLINE RETAILERS GENERALLY AND AMAZON IN PARTICULAR**

1. Amazon would be saddled with unprecedented and unjustified product liability exposure, based not on a duty undertaken but rather on Amazon's size and stature. However, that same size and stature means that any novel "duty" to ensure the safety of products marketed by others on its online marketplace would require it somehow to ascertain the safety of millions of products.
2. It is fundamentally unfair to impose on Amazon liability for defects in products it does not manufacture, where its connection to the myriad of vendors' products sold through its online platform is extremely remote. Typically, Amazon does not even supply the products (other than its own brands, or "fulfillment" setups). Here, "The Furry Gang" continued to operate on Amazon for over a year after Oberdorf's injury, so if the plaintiff had acted more quickly, the actual seller remained available.
3. The new realities of online marketing require judicial restraint, not judicial pioneering, especially in diversity cases in which the federal courts have to predict how the Pennsylvania Supreme Court and others like it would deal with the realities of e-commerce and online retail.
4. Such decision will affect many other online retailers, much smaller and more limited than Amazon. The effect will be a chilling one, resulting in third-party vendors losing valuable markets and consumers having fewer choices. This new duty could embrace other similarly situated entities, such as newspapers with product-related want ads and shopping center owners operating brick-and-mortar marketplaces.
5. Any such novel expansion is best left to a state's highest Court or legislature, where the decision will ultimately have to be made.

## ENDNOTES

[1]Pennsylvania has adopted § 402A of the Restatement (Second) of Torts, which states that: "(1) [o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." Restatement (Second) of Torts § 402A (1965); *Tincher v. Omega Flex, Inc*., 104 A.3d 328 (Pa. 2014); Webb v. Zern, 220 A.2d 853 (Pa. 1966). *Tincher v. Omega Flex, Inc.,* 180 A.3d 386 (Pa. Super. 2018)(*Tincher II*).

[2]The Court also found Oberdorf's claims of Amazon's liability as the online publisher of a third party's content are barred by the Communications Decency Act ("CDA"). This article is limited to a discussion of the meaning of "seller" for purposes of Pennsylvania product liability law.

[3]By the terms of the Amazon's Services Business Solutions Agreement with third-party vendors, Amazon serves as the conduit through which payment flows, collecting money from purchasers and directing it to third-party vendors after deducting a fee. Amazon requires third-party vendors, as a condition of utilizing the Amazon Marketplace, to agree to conduct all communication with consumers through Amazon's messaging platform. Amazon retains the right to edit the content and determine the appearance of product listings. Finally, Amazon imposes rules on how third-party vendors should handle shipping and returns.

[4]Judge Roth wrote the majority opinion, and Judge Shwartz joined in that opinion. Judge Scirica authored an opinion dissenting from the majority holding that Amazon was a "seller" for purposes of

Restatement (Second) of Torts § 402A. The portion of the decision concerning CDA preemption (see n.2) was unanimous and is not subject to en banc reconsideration.

[5]In Pennsylvania, "sellers" have included traditional wholesalers and retailers, as well as those who supply a product through a transaction other than a sale.

[6] Even in cases involving "fulfillment" services, the Federal Appeals Courts' decisions have reached the same conclusion. *See, e.g., Erie Ins. Co. v. Amazon.com, Inc., supra.*

[7]In *Tincher v. Omega Flex, Inc., supra*, the Pennsylvania Supreme Court expressed its willingness to adopt sections of the Third Restatement of Torts "if the cause of action and its contours are consistent with the nature of the tort and Pennsylvania's traditional common law formulation." 104 A.3d at 354.

[8]*Sheridan v. NGK Metals Corp.*, 609 F.3d 239 (3d Cir. 2010); *Travelers Indemnity Co. v. Dammann & Co.*, 594 F.3d 238 (3d Cir. 2010); *Lexington Nat'l Ins. Corp. v. Ranger Ins. Co.*, 326 F.3d 416 (3d Cir. 2003); *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002), Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78 (3d Cir. 2000); *Leo v. Kerr-McGee Chemical Corp.*, 37 F.3d 96 (3d Cir. 1994); *Adams v. Madison Realty & Development,* 853 F.2d 163 (3d Cir. 1988), *Falcone v. Columbia Pictures Industries*, 805 F.2d 115 (3d Cir. 1986); *Bruffett v. Warner Communications*, 692 F.2d 910 (3d Cir. 1982); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980).

[9]**Pa. R. A. P. 3341. Petitions for Certification of Questions of Pennsylvania Law** (a) **General Rule**.—"On the motion of a party or sua sponte, any of the following courts may file a petition for certification with the Prothonotary of the [Pennsylvania] Supreme Court:

………..

(2) Any United States Court of Appeals.

(c) **Standards.**-- The [Pennsylvania] Supreme Court shall not accept certification unless all facts material to the question of law to be determined are undisputed, and the question of law is one that the petitioning court has not previously decided. The [Pennsylvania] Supreme Court may accept certification of a question of Pennsylvania law only where there are special and important reasons therefor, including, but not limited to, any of the following:

(1) The question of law is one of first impression and is of such substantial public importance as to require prompt and definitive resolution by the Supreme Court;

(2) The question of law is one with respect to which there are conflicting decisions in other courts; or

(3) The question of law concerns an unsettled issue of the constitutionality, construction, or application of a statute of this Commonwealth."

[10]The Supreme Court denied that petition because at that time (pre-*Tincher*) Pennsylvania products law was in a great state of flux.

# PA Supreme Court Limits Application of Household Vehicle Exclusions

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

*Gallagher v. GEICO Indem. Co.*, No. 35 WAP 2017 (Pa. Jan. 23, 2019)

In a recent decision, the Pennsylvania Supreme Court declared that the household vehicle exclusion contained in a GEICO policy acted as a de facto stacking waiver and that it violated the mandate of Section 1738 of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL). The breadth and scope of the Supreme Court's surprising decision is not yet clear.

The Court dedicated a large portion of its Majority Opinion to outlining the underlying facts of the case, which seem to have been critical to the Court's ultimate holding. To briefly summarize, Gallagher owned two automobiles and a motorcycle and insured all three vehicles through GEICO. GEICO issued two policies: one to cover the automobiles and one to cover the motorcycle. The two policies provided for stacked underinsured motorists (UIM) benefits. The policy covering Gallagher's automobiles contained a "household vehicle exclusion," which stated: "This coverage does not apply to bodily injury while occupying or from being struck by a vehicle owned or leased by you or a relative that is not insured for Underinsured Motorists Coverage under this policy."

After sustaining injuries in an accident with an underinsured motorist while operating his motorcycle, Gallagher submitted first- and second-tier UIM claims under his GEICO policies. GEICO paid the UIM limits under his motorcycle policy but denied his claim for stacked UIM benefits under the automobile policy, relying upon the household vehicle exclusion. GEICO took the position that, since he was occupying his motorcycle at the time of the accident, and since his motorcycle was not insured under the automobile policy, the household vehicle exclusion applied to preclude Gallagher's UIM claim under the automobile policy.

Gallagher sued GEICO. The trial court granted summary judgment in favor of GEICO, and the Superior Court affirmed. On appeal to the Pennsylvania Supreme Court, Gallagher argued that the household vehicle exclusion "impermissibly narrows and conflicts with the mandates of the MVFRL." Section 1738 of the MVFRL provides for stacked UM/UIM coverage as the default coverage unless the insured signs a waiver of stacked coverage. Gallagher argued that he was entitled to stacked UIM coverage since he did not execute a stacking waiver and that the household vehicle exclusion operated as a "disguised waiver of stacking."

GEICO argued that, by virtue of the household vehicle exclusion, the automobile policy did not provide UIM coverage to Gallagher while operating his motorcycle. Since there was no UIM coverage in the first place, application of Section 1738 and/or the question of whether stacking applied was moot.

Ultimately, the Supreme Court determined that the household vehicle exclusion was "inconsistent with the unambiguous requirements" of Section 1738 as "it acts as a de facto waiver of stacked UIM coverage provided for in the MVFRL." The Supreme Court reasoned that Section 1738 provides for stacked UM/UIM coverage as default coverage unless the insured executes a waiver. Because Gallagher did not sign a stacked coverage waiver, GEICO could not rely upon an exclusion which "strips an insured of default UM/UIM coverage" absent that waiver. The Supreme Court did not address GEICO's argument that the household vehicle exclusion operated to preclude UIM coverage under the automobile policy entirely and does not implicate Section 1738. The court

did, however, note that GEICO had issued both policies and, therefore, could not argue that it was not already aware of all of the household vehicles prior to the loss at issue.

In footnotes, the Supreme Court acknowledged its prior decisions upholding the identical household vehicle exclusion, but it sidestepped issues of stare decisis by determining that the cases relied upon by GEICO and the Superior Court were not binding precedent upon the Supreme Court. Perhaps in an effort to mitigate the impact of its ruling, the Supreme Court commented that insurers can "require disclosure of all household vehicles and policies as part of its application process." In a strongly-worded dissenting opinion, Justice Wecht pointed out the practical issues associated with the Majority's decision and its potential impact on the insurance industry.

The Majority's ultimate holding seems to turn on the fact that there were two insurance policies issued by the same insurer; the claimant was the named insured on both policies; the insurer required issuance of both policies; and the claimant-named insured selected and paid for stacking under both policies. The Court's focus on these specific facts, and the fact that the issues certified on appeal were also framed in terms of these facts, should render the sweeping statement at the close of the Majority's Opinion – that "the household vehicle exclusion violates the MVFRL" – mere *dicta*. Regardless, the scope and breadth of the Majority's decision is likely to be litigated in the years to come.

# CONFLICTING I'S, IME VERSUS IRE IN PENNSYLVANIA

*By Kevin L. Connors, Esquire ConnorsO'Dell, LLP**

This is a letter to a client explaining the difference between an IME and an IRE and the effect of choosing one over the other in the current atmosphere of Workers' Compensation claims.

Dear Client:

So, which "I" do you pick, do you check the IME box, or do you check the IRE box?

Starting over, if you are dealing with an open workers' compensation claim, in which liability has been accepted by the Employer/Insurer/Administrator, with either the issuance of a Notice of Compensation Payable ("NCP"), or a Notice of Temporary Compensation Payable ("NTCP"), that has "converted" to a liability-accepting NCP, under which an obligation now exists for continuous payment of workers' compensation benefits in the form of temporary total disability benefits, required to be paid to compensate for wage loss-producing disability, and medical compensation benefits, subject to reasonableness, necessity, and causal relationship to the accepted work injury benefits will have to be paid, absent one of the following claim-resolving events occurring:

(1) The Claimant dies, compensation benefits terminate by operation of both death and loss;

(2) The Claimant voluntarily returns to work in their pre-injury capacities, and there is no continuing wage loss post-return to work, such that the Claimant's compensation benefits are suspended;

(3) The Claimant returns to work in a modified-duty capacity, with some reduction in return-to-work wages, such that the Claimant's compensation benefits are modified, and temporary partial disability benefits are paid, subject to the 500-week limitation;

4) The Claimant executes a Supplemental Agreement, perfecting either a termination, suspension, or modification of the Claimant's workers' compensation benefits;

(5) The Claimant signs a Final Receipt (almost never used), under which the Claimant agrees that all compensation benefits have been paid;

(6) The Claimant is deported by virtue of not being able to prove legal immigration status;

7) The claim is settled under a Compromise and Release Agreement, perfecting some type of compromise of the indemnity and medical compensation benefits liability associated with the claim; and,

8) The Claimant's compensation benefits are terminated, modified, or suspended by order of a workers' compensation judge, with the employer/insurer carrying the burden of proving the entitlement to a change in the Claimant's benefit entitlement status.

Present tense, workers' compensation benefits are now being paid on the claim, and if you are interested, as an Employer, or Administrator, or as a claims representative, to resolve the claim in avoidance of lifetime liabilities that might otherwise be imposed by the Pennsylvania Workers' Compensation Act, 77 P.S. 1, et seq., what defensive resources are at your disposal?

Given the blatant humanitarian nature of workers' compensation statutes, effectuating the "grand bargain", where the employee has statutorily sacrificed the right to sue for personal injury damages, requiring proof of negligence and/or fault, in exchange for the guarantee of compensation schedules, as to wage loss benefits, and medical compensation benefits, etc., the Pennsylvania Workers' Compensation Act, as in almost all other states in the United States, provides Employers and their Insurers and Administrators with limited resources to challenge ongoing liability for workers' compensation benefits, typically limiting the resources

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to the following challenges:

- A claim denial, requiring the injured employee to prove compensability and disability;
- The utilization review process, to challenge the reasonableness and necessity of ongoing medical treatment for the alleged work injury;
- The independent medical examination, allowing the Employer/Insurer to request an IME of the Claimant, allowable every six months under Section 314 of the Act, typically focused on determining an injured employee's recovery from the work injury, be it a full recovery, permitting a challenge to the ongoing entitlement to any workers' compensation benefits being paid on the claimant, or to a recovery sufficient enough to allow an injured employee to return to work in some restricted-duty capacity, obviously subject to restricted-duty work either being available from the time of injury Employer, or alternative restricted-duty work being available, either through a Labor Market Survey ("LMS") and/or Earning Power Assessment ("EPA");
- A job offer in some capacity, offered by the time of injury Employer, after medical evidence establishes that the injured employee is capable of performing some level of work, be it pre-injury work, and/or restricted-duty work, typically regarded as modified duty work, or light-duty work;
- The unilateral right to suspend or modify compensation benefits, if the injured employee returns to work, with the time of injury Employer, or alternatively, the injured employee finds work on their own, such that the injured employee is again earning income/wages, whether at pre-injury wage rates, resulting in a suspension of compensation benefits, although medical remains open, or at wages less than pre-injury, resulting in a modification of the wage loss benefits, dependent upon wages actually earned, with compensation benefits converting to temporary partial disability benefits, subject to a 500 week cap, in the event of conversion of temporary total disability benefits to temporary partial disability benefits;
- The Impairment Rating Evaluation, utilizing AMA Guides to determine the whole person impairment rating, limited to the accepted work injury, of an injured employee who has received 104 weeks of temporary total disability benefits, often resulting in litigation over the "conversion" from temporary total to temporary partial disability benefits.

Historically, Pennsylvania has always been a form-intensive, wage-loss disability state, with the IRE concept first being introduced into the statute as a result of statutory reforms in 1996, initially establishing an impairment rating threshold, for conversion purposes, of any impairment less than 50% of the whole person, with that threshold reduced, in 2018, to a statutory threshold of 35%.

We know, what the heck?

So, when do you employ the IME versus the IRE?

Obviously, the IME is your initial resource in defending the claim, as it can be requested, either in defense of a claim or claimant-filed petition, and/or it can be requested in an accepted claim, where benefits are being paid, with IMEs being allowed every 6 months, for purposes of determining an injured employee's ability to return to work, and recovery from the accepted work injury.

In the above context, the IME almost always occurs before the IRE, and the claim may likely be the beneficiary of multiple IMEs, before the IRE question even arises.

If there has been no change in benefit status, meaning that there is no IME evidence of a full recovery, to include no IME medical evidence of a claimant being able to return to available work, whether actual or fictional, excusing the linguistic license, as fictional is either the, LMS, or EPA, still requiring acceptance and adoption by mostly claimant-oriented Workers' Compensation Judges, for purposes of suspending or modifying compensation benefits, then the IRE is a useful resource for determining if the Employer/Insurer/Administrator has a basis for seeking conversion of the injured employee's compensation benefits from total to partial disability, potentially resulting in the partial disability benefits being capped at the 500 week statutory limit.

However, there are some claims where you, as claim-bending claims representative, have an IME of full recovery, or it establishes the basis for either actual or fictional work, and the issue of challenging the claimant's compensation benefit status involves some form of defense petition, either a termination, predicated on a full recovery medical opinion, or a suspension or modification, based upon medical evidence of the ability to perform less than pre-injury work, and you have paid 104 weeks of temporary total disability benefits, potentially entitling you to request an IRE with the focused purpose of converting total disability to partial disability, then you have to ask yourself, "do I feel lucky, well do you?"

Before you throw all your claims muscle against the IRE box the question arises as to how Workers' Compensation Judges balance an IME medical opinion of a full recovery against an IRE medical opinion establishing some percentage of impairment for an accepted work-related injury?

Since there are very few IREs that come back with a 0% impairment rating determination, essentially because it is extremely difficult to secure a 0% impairment rating in reliance upon the AMA Guides to impairment rating, absent an injured employee being in better physical shape and health than they were pre-injury, and that in 30 years of defending workers' compensation claims, we have never witnessed such an occurrence, then the potential exists that the IRE establishing any impairment percentage, can potentially undermine a Workers' Compensation Judge's assessment as to the merits of medical evidence, through the IME medical

report and IME's doctor's deposition that the injured employee has, in fact, fully recovered from the accepted work injury, the obvious footnote being that Termination Petitions, are rarely granted by Workers' Compensation Judges, as the Termination Petition burden of proof is regarded as perhaps the highest burden of proof required for any petition under the Pennsylvania Workers' Compensation Act, begging the question as to the next of requesting the IRE?

Prove us wrong?

So, back to that "do you feel lucky?" question the truth is, that it is probably a 100% guarantee that an IRE establishing any percentage of impairment while a defense petition is being litigated on an IME medical basis, will result in a denial and dismissal of the Employer-filed petition, as Workers' Compensation Judges view the examination conflict, between an IME and an IRE, as a claim-defeating imbalance.

Keep in mind, given the humanitarian nature of workers' compensation statutes, as well as general claimant-inflected orientation unanimously maintained by Workers' Compensation Judges they, however noble or not, are looking for ways to find weaknesses in Employer-filed petitions, begging the question of why make it easy for them?

Perhaps the better recommendation, is to continue aggressively pursuing the termination, or other Employer-filed petition, while filing your Request for Designation of an IRE Physician, for purposes of being bound by the IRE physician designation requesting, for potential future conversion of the claimant's compensation benefits from total to partial disability.

And the only reason why we did not say that at the outset of this missive, is that we really love commas, as well as conclusions.

**ConnorsO'Dell defends Employers, Self-Insureds, Insurance Carriers and Third Party Administrators in Workers' Compensation matters throughout Pennsylvania. The firm's attorneys have vast experience in Workers' Compensation cases. Members of the Workers' Compensation Practice Group are all AV rated.*

# POST-KOKEN UPDATE

*By Daniel E. Cummins, Esq.*, Foley, Comerford & Cummins*

**Split of Authority on Consolidation v. Severance Continues**

In the case of *Ali v. Erie Insurance Company*, No. 2017-CV-03544 (C.P. Dauph. Co. March 1, 2019 Cherry, J.), the court denied a Plaintiff's Motion to Consolidate a third party negligence claim with a companion UIM claim in a post-Koken motor vehicle accident matter.

In his detailed Order, Judge John F. Cherry of the Dauphin County Court of Common Pleas held that the "consolidation of these matter[s] would not serve the interests of judicial efficiency, but rather, create confusion to the jury."

The court additionally noted that the cases involved "separate and distinct causes of action" against the two (2) types of Defendants, that is, a negligence claim for bodily injury against the Defendant driver and owner and a separate contract claim against the UIM carrier.

**Split of Authority on Severance and Stay of Bad Faith Claims Continues**

In a detailed Order recently entered in the Post-Koken case of *Hansen v. Fucetola and NJM Ins. Co.*, 1079-2014-Civil (C.P. Pike Co. Feb. 26, 2019 Chelak, J.), Judge Gregory H. Chelak of the Pike County Court of Common Pleas granted a UIM carrier's Motion to Sever and Stay the Plaintiff's Bad Faith Claim From the Plaintiff's Breach of Contract Claim.

The court relied upon Pa.R.C.P. 213(b), which grants the trial court power to bifurcate or sever matters, and ruled that severance was the most prudent action under the circumstances presented in this case.

In this regard, the court noted that the failure to sever the bad faith claim could prejudice the UIM carrier in front of a jury in the carrier's defense of the breach of contract UIM claim. The court also found that there would be no prejudice to the Plaintiff in granting the severance of the bad faith claim.

Judge Chelak additionally noted that the granting of the severance motion would advance the interests of judicial economy and foster a more efficient and speedy resolution of the underlying claims presented. In the court's opinion, the UIM claim would be able to be resolve or concluded more promptly if the bad faith claim was severed.

Notably, Judge Chelak's Order not only results in the severance of the claims for purposes of discovery but also specifically holds that the bad faith claim was bifurcated for purposes of any eventual trial. An additional rationale for his ruling was that the bifurcation of the bad faith claim from the trial on the third party and UIM claims would avoid confusion on the part of the jury.

Judge Chelak concluded his Order by mandating that all discovery on the bad faith claim was stayed pending the resolution of the third party negligence and UIM claims.

**Superior Court Reaffirms that UIM Carrier's Credit is Amount of Tortfeasor's Limits (Non-precedential)**

The Pennsylvania Superior Court issued a notable but "Non-precedential" decision on May 28, 2019 in the case of *IDS Prop. Cas. Ins. Co. v. Piotrowski*, No. 2546 EDA 2018 (Pa. Super. Ct. May 28, 2019 Lazarus, J., Colins, J., Kunselman, J.) (Non-Precedential Mem. Op. by Kunselman, J.), involving the amount of the credit due to a UIM carrier.

In this underinsured motorist claim

there was a dispute over how much of a credit the underinsured motorist carrier was entitled to on a policy which had $100,000 of liability coverage but where there was a jury verdict of over $1 million against the third party tortfeasor.

Before trial the third party insurance carrier offered $36,001.00 which was rejected. The third party insurance carrier agreed to pay any amount of a verdict even if it exceeded the liability limits.

The jury returned a verdict of over $1 million and then the case was settled for $485,000 before the trial court's decision on the defendant's post-trial motions.

A UIM claim was pursued and the insured argued the UIM carrier was entitled to a credit on the third party policy limit of $100,000.

The UIM carrier argued that it was entitled to a $485,000 credit. The trial court allowed a credit of $100,00 and the carrier appealed.

On appeal, the Superior Court held that the carrier was entitled to a credit of only the $100,000 limits set forth in the tortfeasor's liability policy. The Superior Court adopted the trial court's rationale that the additional $385,000 "was not made because of Piotrowski's bodily injury, but rather to avoid a potential bad faith claim, including punitive damages.'"

As such, the trial court's decision that the UIM carrier was entitled to a credit in the amount of the tortfeasor's policy limits was affirmed.

**Doctrine of Collateral Estoppel Applied to Defeat UIM Claim After Binding Third Party High/Low Arbitration Completed**

In the federal Post-Koken case of *Shiffer v. Liberty Mutual Fire Ins. Co.*, No. 3:17-CV-978 (M.D. Pa. July 22, 2019 Mariani, J.), Judge Robert D. Mariani of the Federal Middle District Court of Pennsylvania applied the collateral estoppel doctrine to support the entry of summary judgment in favor of an automobile insurance carrier on a UIM claim where the Plaintiff had previously concluded the third party claim by way of a binding high/low arbitration at which an award was entered below the amount of the tortfeasor's liability limits.

According to the Opinion, during the course of the prior third party litigation, the parties in that matter agreed to proceed to a binding high/low arbitration at which the high parameter was set at the tortfeasor's liability limits.

In the Binding Arbitration Agreement to relative to the third party claim, the Plaintiff expressly reserved the right to pursue a UIM claim. The UIM carrier was not a party to that Arbitration Agreement.

As noted, the arbitrator in the third party claim entered an award in favor of the Plaintiff that was less than the tortfeasor's liability limits.

After the Arbitration, the Plaintiff signed a Release requested by the tortfeasor's carrier which confirmed a settlement of the third party liability case in the same amount as the Arbitration Award.

Thereafter, the Plaintiff commenced this UIM Post-Koken lawsuit. After discovery, the UIM carrier filed a Motion for Summary Judgment asserting the collateral estoppel doctrine and asserted that the Plaintiff was collaterally estopped from pursuing the UIM claim as the matter had been previously fully litigated and the tortfeasor had essentially been determined not to have been underinsured.

The Plaintiff responded with the argument that the criteria for the application of the collateral estoppel doctrine had not been met by the defense. The Plaintiff additionally asserted that the Court should honor the language in the Arbitration Agreement under which the Plaintiff preserved the right to pursue a UIM claim following the Arbitration.

After providing a thorough and detailed analysis of the collateral estoppel doctrine in general as well as in this particular context of the impact of a third party award less than the tortfeasor's limits on a UIM claim, the Court granted summary judgment in favor of the carrier on the UIM claim.

The Court found that the Plaintiff had been provided with a full and fair opportunity to litigate the claim at the Arbitration and that a final determination had been made at the Arbitration relative to the amount of damages that the Plaintiff was entitled to as a result of the accident. Given that the Arbitration Award was less than the tortfeasor's liability limits, the Plaintiff was found to be collaterally estopped from pursuing an underinsured motorist claim against the Plaintiff's own automobile insurance policy.

The Court additionally held that the language in the Binding Arbitration Agreement under which the Plaintiff had attempted to preserve the right to pursue a UIM claim did not serve to alter the result.

*Anyone desiring a copy of any of the above Opinions may contact the author at dancummins@comcast.net.*

***In addition to defending auto law, premises liability, and products liability matters, Attorney Cummins also writes the TortTalk.com Blog and serves as a mediator through Cummins Mediation.***

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# PREMISES LIABILITY UPDATE

*By Daniel E. Cummins, Esq.*, Foley, Comerford & Cummins*

**No Liability For Landowner if Fall Happens While it is Still Snowing**

In the case of *Rosatti v. McKinney Properties, Inc.*, No. 2017-0022 (C.P. Centre Co. Jan. 22, 2019 Grine, J.), the court entered summary judgment in favor of a Defendant and owner under the Hills and Ridges Doctrine.

According to the Opinion, when the Plaintiff arrived at the property at around 4:00 p.m., freezing rain was falling outside. A few hours later, when the Plaintiff decided to leave the premises at around 7:00 p.m., it was snowing with freezing rain. The Plaintiff slipped and fell while leaving the property.

The Defendant filed a Motion for Summary Judgment under the Hills and Ridges Doctrine. After reviewing the factors at issue under that doctrine, which required the Plaintiff to show that the snow and ice had accumulated on the walkway in ridges or elevations in such size and character as to unreasonably obstruct travel and constitute a danger to pedestrian traveling thereon, the court entered summary judgment.

Judge Grine also emphasized that under the prevailing case law "[A] landowner has no obligation to correct the conditions until a reasonable time **after** the winter storm has ended." *Collins v. Phila. Sub. Dev. Corp.*, 179 A.3d 69, 75 (Pa. Super. 2018) (emphasis added in *Rosatti*).

The court additionally noted that "[a] property owner does not have a duty to clear ice or snow from walkways as soon as it forms or falls. Citing with *"see" signal*, *Tucker v. Bensalem Twp. School District*, 987 A.2d 198, 203 (Pa. Cmwlth. 2009).

**Dog Bite Claims Against Landlord Dismissed**

In the case of *Gallo v. Precise Moments Academy*, No. 904-Civil-2018 (C.P. Monroe Co. Jan. 4, 2019 Harlacher Sibum, J.), Judge Jennifer Harlacher Sibum of the Monroe County Court of Common Pleas ruled that a landlord was not liable under state dog law or agency principles where a tenant's dog bit a child at a leased daycare facility.

The court found that the Plaintiff failed to allege specific facts to support any claims of negligence or punitive damages against the landlord.

According to the Opinion, the Plaintiffs were parents of a minor child who attended a daycare facility. A dog owned by one of the tenants who ran the facility bit the minor child while she was at the daycare resulting injuries to the child's face.

In addition to suing the tenants, the Plaintiffs sued the landlord who owned the property on which the daycare facility was located. The Plaintiffs alleged that the landlord negligently and recklessly maintained dangerous dogs on the daycare premises despite the substantial risk of injury to children. The case came before the court by way of the landlord's Preliminary Objections.

Initially, the landlord asserted that the dog law in Pennsylvania did not apply given that the landlord was not an "owner" of the dog as required for the application of that statute which required dog owners to confine, secure or otherwise control their dogs.

The court agreed with the landowner Defendant in this regard and noted that prior case law had held that a landlord out-of-possession, without more, was not considered the owner of a tenant's dog under that dog law. The court stated that the Plaintiffs presented no other facts in support of its legal conclusion assertions in the Complaint that the landlord housed and kept the dog.

The court also agreed with the landlord Defendant's argument that the Plaintiffs' allegations of agency should be stricken because there were no facts to support allegations of vicarious liability. The court noted that the Complaint did not identify any agency relationship between the landlord and its tenants.

Judge Harlacher Sibum additionally found that the catch-all phrasing of negligence in the Plaintiff's Complaint against the landlords was insufficient under Pennsylvania law.

The court also agreed with the landlord Defendants' contention that the Plaintiffs' claims for punitive damages should be stricken for insufficient specificity where the Plaintiff failed to allege that the landlord acted with any bad motive. The court reiterated that the landlord did not have any control over the daycare premises or any authority to regulate the tenant's pets.

As such, Judge Harlacher Sibum concluded that the landlord's conduct was not reckless or wanton as a matter of law. Accordingly, the Preliminary Objections filed by the out-of-possession landlord Defendant were sustained and the claims against it dismissed.

**Adverse Inference Instruction Warranted Where Landowner Destroy Video in Slip and Fall Case**

In the case of *Marshall v. Brown's IA, LLC*, No. 2588 EDA 2017 (Pa. Super. March 27, 2019 Bowes, J., Stabile, J., and McLaughlin, J.) (Op. by Bowes, J.), the Pennsylvania Superior Court reversed a trial court ruling after finding that the trial court erred in refusing to give an adverse inference instruction based upon the Defendant's alleged spoliation of videotape evidence in a grocery store slip and fall case.

According to the Opinion, the Plaintiff allegedly slipped and fell on water in the produce aisle of a ShopRite located in Philadelphia. The ShopRite employees came to the Plaintiff's aid immediately after the incident and summoned medical assistance. The manager also completed an incident report at that time.

Approximately two (2) weeks after the incident, the store received a letter of representation from the Plaintiff's attorney requesting that the store retain any surveillance video of the accident and/or the area in question for six (6) hours prior to the incident and three (3) hours after the incident. The court noted that the letter from the Plaintiff's attorney also cautioned that any failure by the store to maintain that video surveillance evidence until the disposition of the claim, it would be assumed by Plaintiff

that the store intentionally destroyed and/or disposed of the evidence. The attorney also advised the store that it (the store) was not permitted to decide what evidence the Plaintiff would like to review for the case. As such, the attorney specifically indicated in the letter to the store that "discarding any of the above evidence will lead to an adverse inference against you in this matter."

The court confirmed in its Opinion that the Plaintiff's slip and fall was indeed captured on the store's video surveillance system.

However, according to the record before the court, the store decided to preserve only 37 minutes of the video prior to the Plaintiff's fall and approximately 20 minutes after. The store otherwise permitted the remainder of the film to be automatically overwritten after thirty (30) days.

The court additionally noted that, during the course of the trial, defense counsel for the store told the jury in an opening statement that, "it is impossible to tell from the video if there was water on the floor, how it got there or when it got there."

At trial, the store's manager testified that it was the store's "rule of thumb" to preserve video surveillance from twenty (20) minutes before and twenty (20) minutes after a fall. The store's Risk Manager also testified that, in his opinion, the video produced was sufficient to see the defective condition, if it could be seen at all. He additionally asserted that, since the substance on the floor could not be seen on the retained portion of the video, it "would be a fool's errand" to go back several hours as requested. He also asserted that it was impractical and costly to retain the requested six (6) hours of pre-incident video tape.

At trial, the Plaintiff asserted that the store's conscious decision not to retain the video evidence constituted spoliation for which the Plaintiff should be given an adverse inference charge to the jury.

In opposition, the store argued that there was no relevant evidence as the video did not show drops of water on the floor. The store also asserted that it did not act in bad faith in deleting the additional video requested.

The trial court initially found that the fact that the video was requested did not, in and of itself, make the video relevant. The trial court also concluded that there was no bad faith on the part of the store. As such, the trial court refused to give the requested adverse inference charge. However, the trial court did allow the Plaintiff's counsel to argue to the jury that it should infer from the store's decision not to retain more of the video prior to the fall supported a conclusion that the video was damaging to the store. At trial, Plaintiff's attorney made such an argument to the jury.

The Superior Court noted that the defense counsel countered by asserting that, under the quality of the video, there was a question as to whether there was any expectation that, if more video had been saved, something else would have been seen particularly when the video showed an obviously small spot of water that could not be readily seen and given that one could not know when it came to be on the floor.

The jury entered a defense verdict in favor of the store, finding no negligence.

On appeal, one (1) issue was raised for the Superior Court's review, that being whether the trial court abused its discretion by failing to give a spoliation evidence instruction to the jury at trial.

After reviewing the current status of Pennsylvania spoliation law and the penalty of an adverse inference, the Superior Court ruled that the trial court should have given such an instruction as the store's conduct constituted spoliation.

The court noted that other evidence confirmed that another fifty (50) minutes of time had passed between the last time that a store employee had inspected the area and the time noted on the video. The court also noted that there was no testimony from anyone at the store that anyone had watched the video for the six (6) hour period prior to the fall to determine that it did not contain any relevant evidence. Rather, the Superior Court noted that the record confirmed that the store unilaterally determined that there was no relevant evidence on the deleted tape.

The Superior Court also noted that the trial court's finding that there was no spoliation because the store did not act in bad faith was based upon an incorrect application of the doctrine of spoliation. The appellate court noted that spoliation may be negligent, reckless, or intentional.

The Superior Court additionally emphasized that the party's good faith or bad faith in the destruction of potentially relevant evidence instead goes to the type of sanction that should be imposed, not whether a sanction is warranted in the first place.

As such, the court vacated the judgment entered below in favor of the defense and remanded the case for a new trial.

**Pennsylvania Supreme Court to Review Duties Owed by Ski Resorts**

The Supreme Court of Pennsylvania has granted allocatur in the case of *Bourgeois v. Snow Time, Inc.*, No. 768 MAL 2018 (Pa. June 25, 2019) involving a snow tubing accident at the Roundtop Resort in York, PA.

The court accepted all four issues presented for review, which included issues addressing (1) a trial court's obligation to consider expert reports when ruling on an MSJ, (2) the sufficiency of expert reports, (3) the duties owed by a snow tubing facility (previously established in *Tayar v. Camelback*), (4) and whether evidence of industry standards is required to sustain a cause of action in recklessness/ gross negligence.

**Summary Judgment Granted in Supermarket Slip and Fall Case**

In the case of *Gumby v. Karns Prime and Fancy Food, Ltd.*, No. 2017-CV-7013 (C.P. Dauph. Co. June 4, 2019 Cherry, J.), the trial court in Dauphin County entered summary judgment in a slip and fall case involving alleged liquid and/or grapes on the floor of a supermarket.

According to the Opinion, the Plaintiff testified that she was walking at a normal pace, looking straight ahead, when she suddenly and unexpectedly fell to the

floor. The Plaintiff did not see anything on the floor prior to her fall. She also did not know, when she landed on the floor, what, if anything caused her to fall. After the incident, the Plaintiff believed that she slipped on liquid from smashed grapes based upon a statement from one of the store employees, who assisted the Plaintiff after her fall.

In granting summary judgment, the court noted that, given the Plaintiff's admission that she had no evidence that the Defendant created the allegedly dangerous condition, the Plaintiff had to show that the Defendant had actual or constructive notice of the condition that allegedly caused her to fall.

Without any evidence to support such a claim, the Plaintiff asserted that the Defendant had notice because the Defendant store knew or should have known that grapes may fall on the floor because of the packaging. The court in Dauphin County noted that this theory had been rejected previously by the Pennsylvania Superior Court in the case of *Meyers v. Penn Traffic,* 606 A.2d 926, 930 (Pa. Super. 1992) (suggestion by the Plaintiff that either an employee or a customer dropped a grape amounted to mere speculation and did not create any triable issues).

In this *Gumby* case, the court also stated that the Plaintiff's testimony of shopping cart tracks in the area of the crushed grape or liquid equated to evidence supporting an allegation as to how long the grape or liquid was allegedly on the floor. The court rejected this theory as speculation as the alleged track could have occurred in the moments before the Plaintiff's fall, which would have provided insufficient notice to the Defendant of any such condition.

The court additionally noted that the Plaintiff could not satisfy the requirement of constructive notice by asserting that the Defendant lacked an adequate floor maintenance policy. The *Gumby* court stated that evidence of a clean-up policy did not amount to facts as to how long the allegedly dangerous condition existed.

The court noted in *Gumby* also rejected the Plaintiff's assertion that liability could be established under an argument that the Defendant's policy that all employees have a general responsibility to inspect the floors amounted to no policy at all. In this regard, the trial court pointed to Pennsylvania Supreme Court precedent indicating that a store owner was not an insurer of the safety of business invitees and only owed a duty of reasonable care under the circumstances, that is, to correct unsafe conditions discoverable through the exercise of reasonable care.

Last but not least, the court noted that the *Nanty-Glo* rule did not preclude the entry of summary judgment as that rule was inapplicable where, as here, the Plaintiff is found to have failed to establish a *prima facie* case of liability given that the Plaintiff admitted that she did not know how the grape or liquid came to be on the floor or how long it was there.

**Case Against Landowner For Injuries Sustained on Adjacent Land Dismissed**

In the case of *Slavinski v. Estate of Gallatz*, No. 13-CV-1772 (C.P. Lacka. Co. July 5, 2019 Nealon, J.), Judge Terrence R. Nealon of the Lackawanna County Court of Common Pleas addressed issues of alleged adjacent landowner liability for injuries that occurred on a neighbor's property.

According to the Opinion, the Plaintiff allegedly snagged her pants on a neighbor's chain link fence and fell forward onto the surface of the premises owned by that neighbor but injured her arm on the protruding tip of a cemetery grave marker that was embedded in the ground on the neighbor's property.

The Plaintiff sued the neighbor who owned the chain link fence, the nearby cemetery, and the church that owned and operated the cemetery.

Following discovery, the church and the cemetery filed a motion for summary judgment asserting that the Plaintiff had failed to uncover any evidence to show how or when the grave marker became embedded in the neighbor's property or any evidence of actual or constructive notice on the part of the cemetery or church in this regard.

Judge Nealon noted that, while Pennsylvania tort law generally recognizes that landowners may be liable to others for injuries caused by dangerous conditions on the landowner's property, the law does not generally impose a duty or responsibility upon an adjacent landowner to correct or warn others of any defective conditions on a neighbor's property which the adjacent landowner did not create.

Finding no triable issues against the cemetery or the church, the court granted summary judgment in their favor.

**Application of Hills and Ridges Doctrine Results in Summary Judgment; Court Also Rules No Duty to Pre-Treat Surface**

In the case of *Dougherty v. Jay*, No. 2017-00480-40 (C.P. Bucks Co. April 24, 2019 Trauger, J.), the court entered summary judgment in favor of the Defendant under the hills and ridges doctrine.

According to the Opinion, the Plaintiff drove to the Defendants' residence to pick up one of the Defendants to drive her to work. At the time, temperatures in the area were below freezing and there was intermittent freezing rain and freezing drizzle that had fallen. While in the Defendant's driveway, the Plaintiff got out of the car to retrieve a newspaper from the ground and slipped and fell.

In its Opinion, the court in this *Dougherty* case outlined the current status of the hills and ridges doctrine. The court noted that recovery for a fall on a surface covered by a natural accumulation of ice or snow requires an additional showing of, among other factors, an unreasonable accumulation or "hills and ridges" of ice and/or snow. The court noted that this doctrine serves to limit the liability of landowners because to require one's walk to always be free of ice and snow would be to impose an impossible burden in view of the climate in Pennsylvania.

The Plaintiff attempted to get around the hills and ridges doctrine by arguing that the freezing rain that caused the ice did not qualify as "generally slippery conditions." The Plaintiff asserted that localized ice can result in liability when

slippery conditions do not exist generally in the community.

However, the court noted that, in this case, Plaintiff had conceded that his presence on the Defendants' property was due to freezing rain that was generally falling in the area. The court also noted that the Plaintiff did not argue that there was any unnatural source of accumulation on the Defendants' driveway.

The court additionally rejected the Plaintiffs assertion that pre-treatment of the driveway area could have prevented any dangerous conditions. Rather, the only duty of a landowner to guard against the transient danger of ice on a pavement is to act within a reasonable time after notice of the condition and to then remove it.

Given that the court found no evidence of liability presented by the Plaintiff, it requested the Superior Court to affirm the trial court's entry of summary judgment in this Rule 1925 Opinion.

*Anyone desiring a copy of any of the above Opinions may contact the author at dancummins@comcast.net.*

***Daniel E. Cummins is a partner in the Scranton, PA insurance defense firm of Foley, Comerford & Cummins. In addition to defending auto law, premises liability, and products liability matters, Attorney Cummins also writes the TortTalk.com Blog and serves as a mediator through Cummins Mediation. Attorney Cummins also serves as an expert in legal malpractice matters.***

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## Application for Membership

**Eligibility for Membership:**
Those persons shall be qualified for membership and may continue to hold membership herein who are:

Members of the Pennsylvania Bar actively engaged in the practice of civil law, who individually devote a substantial portion of their time on litigated matters, to the defense of damage suits on behalf of individuals, insurance companies or corporations.

Full-time executives, managerial or supervisory employees, of insurance companies, self-insurers, or corporations who individually devote a substantial portion of their time to claim administration or to matters with a direct impact upon claims administration including legislation activities.

Please complete the information requested on this form and mail or fax this application with your check (payable to the Pennsylvania Defense Institute) to: **Pennsylvania Defense Institute, P.O. Box 6099, Harrisburg, PA 17112, FAX: 800-734-0732**

To ensure proper credit, please supply all names of applicants or have each new member complete a copy of this application.

**Annual Membership Fees**

- ☐ 1-9 members per organization: $265 per member
- ☐ 10 or more members per organization: $240 per member
- ☐ Retired members: $25 per member

Name ____________________

Firm or Company ____________________

Address ____________________

____________________

E-mail Address ____________________

Telephone Number ____________________

If you are an attorney, please provide the following information:

(1) Name, address, telephone number and company affiliation for two current clients you represent in defense litigation matters:

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(2) Name, address, telephone number of two members of the Pennsylvania Bar who can confirm that you devote a substantial portion of your practice on litigation matters in defense of damage suits on behalf of individuals, insurance companies or corporations.

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____________________
Signature

____________________
Date

**Description of Present Responsibitilies** ____________________

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## PENNSYLVANIA DEFENSE INSTITUTE

### Committee Preference

*Please select up to three committees in which you would like to serve, numbering them in order of preference.*

Amicus Curiae & Appellate Practice . . . . . . . . . . . ____

Bad Faith. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ____

Civil Practice and Procedure. . . . . . . . . . . . . . . . . . ____

Employment and Civil Rights. . . . . . . . . . . . . . . . . ____

General Liability . . . . . . . . . . . . . . . . . . . . . . . . . ____

House Counsel . . . . . . . . . . . . . . . . . . . . . . . . . . ____

Insurance Coverage and Subrogation . . . . . . . . . . . ____

Motor Vehicle Law . . . . . . . . . . . . . . . . . . . . . . . . ____

Products Liability . . . . . . . . . . . . . . . . . . . . . . . . . ____

Professional Liability . . . . . . . . . . . . . . . . . . . . . . ____

Publications. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ____

Transportation and Trucking. . . . . . . . . . . . . . . . . . ____

Workers' Compensation . . . . . . . . . . . . . . . . . . . . . ____

Young Lawyers . . . . . . . . . . . . . . . . . . . . . . . . . . . ____

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***We appreciate your cooperation.***