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COVID-19 BUSINESS INTERRUPTION COVERAGE LITIGATION UPDATE

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Everyday life changed in March 2020, after the novel coronavirus disease (COVID-19) spread throughout the world, causing states across the country to take action to limit the spread of COVID-19, including implementation of restrictions on various business operations. During that time, the World Health Organization ("WHO") declared COVID-19 a global pandemic and former President Donald Trump declared it a national emergency.[3]

Pennsylvania was one of the many states that responded to the pandemic by enacting policies to stop the spread of COVID-19. On March 19, 2020, Pennsylvania Governor Tom Wolf ordered a statewide closure of all physical locations of non-essential businesses.[4] In total, forty-six other states and Washington D.C. also enacted similar policies.[5] The Pennsylvania Department of Health also issued an Order in April of 2020 directing essential businesses to take certain safety measures to prevent the spread of COVID-19.[6] These safety measures included cleaning and disinfecting the workplace, providing masks and requiring employees and customers to wear them indoors, and promoting social distancing.[7] By April 1, 2020, the entire Commonwealth of Pennsylvania was under Governor Tom Wolf's stay-at-home order.[8] Several months later, states, including Pennsylvania, began gradually reopening. It wasn't until July 3, 2020, that all sixty-seven Pennsylvania counties were fully reopened, albeit with certain limitations.[9] Although both essential and non-essential businesses were permitted to reopen, certain non-essential businesses, such as hair salons, gyms, and malls, were subject to strict occupancy limits.[10] Nearly a year later, on May 31, 2021, Pennsylvania lifted the occupancy restrictions for these non-essential businesses.[11]

As a result of the statewide shutdown orders, as well as the overall decline in economic activity caused by the pandemic, many businesses sought relief from their commercial property insurance providers by making claims under their policies' business income coverage. Generally, business income coverage is "commercial property insurance covering loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of operations."[12] Under Pennsylvania law, the purpose of business income coverage is to "ensure that insured claimants receive the benefits their business would have imparted absent the interruption..."[13] It is not intended to "put them in a better position than they would have been absent the interruption."[14] Business income coverage is typically provided under the "Additional Coverage" section of a property insurance policy and is intended to address losses stemming from physical loss or damage to property.[15]

Following an overwhelming influx of these claims and subsequent coverage denials, policyholders began commencing litigation against their insurance companies across the United States. As of the date of this writing, there have been more than 2,130 lawsuits filed relating to property insurance coverage for losses sustained due to the COVID-19 pandemic.[16] A large majority of these cases have been decided in favor of the insurance carriers. Of the more than 2,130 lawsuits filed for coverage for business income losses sustained during the pandemic, decisions have been issued in more than 90 cases, with nearly 90% of those decisions favoring the insurance companies. However, policyholders have found limited success as well, more typically in state court than federal court.

Ultimately, the dispute in these cases is the scope of coverage provided by business income coverage provisions of commercial property insurance policies, where limitations are placed on the use of commercial properties

On The Inside

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because of the pandemic and related government mandated closures. These cases also focus on the applicability and enforceability of the so-called Virus Exclusion. This article is intended to provide a summary of the current state of business income coverage litigation related to COVID-19 and the arguments raised by both policyholders and insurance carriers in these disputes.

Insurance Company Arguments Against Coverage

There are two primary arguments raised by insurance companies in disputing coverage for COVID-19-related losses: the loss does not fall within the policy's business income insuring agreement, and, even if it did, the policy's virus exclusion bars coverage.

First, insurance companies maintain that COVID-19 exposure does not implicate business income coverage because there is no "direct physical loss or damage" to the premises. To trigger business income coverage, there must typically be some sort of "direct physical loss or damage" to the covered premises. Insurance companies contend that in order to have "direct physical loss or damage" there must be some tangible, physical damage or structural change or alteration to the insured premises, "or actual contamination that eliminates or destroys the property's utility."[17] By this standard, it is insufficient to claim business income coverage when there is only a temporary loss of use of the property.[18] A majority of courts have agreed, and held that the loss of use or function, without more, does not constitute "direct physical loss or damage" and, therefore, does not trigger business income coverage. In *Oral Surgeons, P.C. v. Cincinnati Insurance Co.*, the Eighth Circuit reasoned that allowing loss of use to constitute "direct physical loss or damage" "would allow coverage to be 'established *whenever* property cannot be used for its intended purpose.'"[19] For example, such an interpretation would provide business income coverage if a building was re-zoned to have a lower occupancy limit.

Also, insurance companies argue that the virus exclusion, contained in many policies, bars coverage for these claims. Some virus exclusion provisions contain anti-concurrent causation language while others do not. For example, some provisions exclude coverage "for loss or damage caused directly or indirectly by… [p]resence, growth, proliferation, spread or any activity of … virus." regardless of any other cause or event that contributes concurrently or in any sequence to the loss.[20] Other provisions exclude coverage for loss or damage caused by or resulting from "[a]ny virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease."[21] It is worth noting that the presence or absence of anti-concurrent causation language has not typically been dispositive in the application of these exclusions.

Although they are not included in all insurance policies, virus exclusions have become a major obstacle for policyholders seeking insurance coverage in COVID-19 business interruption cases. In *Handel v. Allstate Insurance Co.*, the court found that, even if "direct physical loss or damage" could be read to include intangible loss or damage stemming from COVID-19, the virus exclusion, and several other exclusions still bar coverage.[22]

There are several additional policy exclusions that insurance companies argue preclude coverage including (1) loss of use exclusions, (2) ordinance or law exclusions, and (3) acts or decisions exclusions. A loss of use exclusion typically bars coverage for losses or damages resulting from any loss of use or loss of market. According to the insurance companies, these loss of use exclusions underscore the argument that business income coverage requires some sort of tangible, physical damage, and not merely loss of use. [23]

Ordinance or law exclusions are also frequently cited by insurance carriers to deny business income coverage. These exclusions typically provide that the insurance carrier "will not pay for loss or damage caused directly or indirectly by [t]he enforcement of or compliance with any ordinance or law… [r]egulating the…use…of any property."[24] Insurance companies often contend that ordinance or law exclusions apply to COVID-19 business income claims because statewide government shutdown orders sought to regulate the use of covered premises.[25] Overall, court treatment of these exclusions is split with some courts relying on them and others refusing to apply them. Some courts have found that ordinance or law exclusions only apply to "ordinances related to the structural integrity, maintenance, construction, or accessibility due to the property's physical structural state, which existed *before*."[26] Therefore, they do not apply to the COVID-19 government shutdown orders. Other courts, however, have relied on the exclusion to preclude coverage entirely.[27]

A small number of courts have relied on "Acts or Decisions" exclusions to deny business interruption coverage related to COVID-19. An "Acts or Decisions" exclusion typically bars coverage for losses caused by "conduct,

acts or decisions … of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault."[28] Some courts have denied the applicability of these exclusions by holding that they are ambiguous.[29] However, other courts have relied on these exclusions and have held that the acts or decisions of the policyholder or government caused the loss.[30] For example, some courts have reasoned that the policyholder's losses resulted from the government-ordered shutdowns, which were decisions by state and local governments.[31]

Policyholder Arguments in Favor of Coverage

One argument frequently used by policyholders in support of coverage for business income losses related to COVID-19 is that the plain and ordinary meaning of "direct physical loss or damage" includes the loss of use. They typically argue that "direct physical loss" includes the deprivation of the ability to use their property caused by the government shutdown orders. Courts have largely rejected this argument and refused to treat loss of use as "direct physical loss or damage."[32] For example, the Fifth Circuit found that a restaurant's loss of use caused by the suspension of dine-in services did not constitute "direct physical loss" and interpreted "loss" as "being lost or destroyed, ruin[ed], or destruct[ed]".[33] However, there have been several courts which have accepted this argument.[34]

Another argument offered by policyholders is that the actual presence of COVID-19 on the property results in direct physical loss.[35] They argue that the coronavirus physically alters the property by attaching itself to surfaces and contaminating the indoor air.[36] According to policyholders, the COVID-19 virus attaches itself to solid surfaces through electrical attraction between molecules of the virus and molecules of the surface that the virus lands on.[37] Additionally, since COVID-19 is an airborne virus, policyholders argue that people with this virus could contaminate the indoor air at the property and risk exposing others.[38] Some courts have held that the continuous presence of COVID-19 on a property constitutes "direct physical loss or damage" that could trigger business income loss coverage.[39] Policyholders have found more success with this argument compared to the "loss of use" argument for "direct physical loss or damage".[40] However, in rejecting policyholders' arguments for direct physical loss based on the physical presence of the virus, courts have done so based on the transient nature of the virus which can easily be cleaned.[41]

Lastly, policyholders have argued under the theory of regulatory estoppel that virus exclusions are unenforceable in business income coverage disputes. Although the doctrine of regulatory estoppel has not been recognized in most states, courts have applied it to pollution exclusions in both Pennsylvania and New Jersey.[42] In order to plead a claim of regulatory estoppel, "a [policyholder] must allege an inconsistency between the … interpretation of an exclusionary provision used to deny coverage and the interpretation … previously advanced to state regulators when seeking approval for that provision."[43] To date, no court has accepted this regulatory estoppel theory.

Procedural Issues for COVID-19 Business Interruption Litigation in Pennsylvania

On April 29th, 2020, a policyholder, located in Pittsburgh, filed an Emergency Application for Extraordinary Relief asking the Pennsylvania Supreme Court to use its King's Bench and statutory powers to coordinate a system to resolve all COVID-19 business income insurance cases in Pennsylvania.[44] The King's Bench power "allows the state supreme court to assume plenary jurisdiction over an issue *even when no matter is pending in a Pennsylvania court*."[45] This application was denied by the Pennsylvania Supreme Court in May 2020. In response to this denial, the same policyholder filed a Motion for Coordination under Pennsylvania Rule of Civil Procedure 213.1. Unlike many other states, Pennsylvania's Rules of Civil Procedure allow for coordination of related actions across different counties. Rule 213.1(a) provides that:

"In actions *pending* in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions. Any party may file an answer to the motion and the court may hold a hearing. [emphasis added]"[46]

The policyholders filed the motion under Rule 213.1 to move all pending and future COVID-19 business interruption litigation against Erie Insurance Exchange to Allegheny County.[47] The Court of Common Pleas of Allegheny County granted this Motion for Coordination.[48]

However, on August 10th, 2021, the Superior Court of Pennsylvania reversed the trial court and held that the court violated Rule 213.1 when it required consolidation of all *future* cases filed against Erie Insurance Exchange for COVID-19 business interruption cases.[49] The court concluded that Rule 213.1 only applies to pending cases.[50] Therefore, it cannot be used to bring in related future cases.[51] In striking down this coordinated consolidation program, the Superior Court reasoned that roping in future cases into the program "deprives future litigants of their right to be heard *before* the coordination order is entered."[52] Also, they noted that the trial court's consolidated coordination order turned the proceeding into an improper quasi-class action or federal multidistrict litigation program.[53] Thus, Rule 213.1 "cannot function as a substitute for class certification procedures because it does not provide…the necessary protections found in our class action rules to bind all future and unnamed litigants to a pending coordination action."[54] This case is now pending before the Pennsylvania Supreme Court as both parties have filed Petitions for Allowance of Appeal.

Looking Forward

In 2022 the COVID-19 business income coverage landscape will likely see more development at the appellate level. So far, federal appellate courts for the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have unanimously found in favor of insurance

carriers in these COVID-19 business income coverage disputes.[55] We continue to await decision on the appeals pending before the First, Third, and Fourth Circuit Courts.

In Pennsylvania, two cases are listed for argument before an *en banc* panel of the Pennsylvania Superior Court.[56] First, in *Ungarean v. CNA,* Judge Christine Ward of the Allegheny County Court of Common Pleas granted summary judgment in favor of a policyholder who closed most of their dental practice during the government lockdown.[57] The lower court found in favor the policyholder's interpretation of "direct physical loss or damage" to include loss of use or possession.[58] Additionally, the court concluded that the insurer failed to demonstrate that the policy's ordinance or law and acts or decisions exclusions clearly and unambiguously prevented coverage.[59] Next, in *MacMiles v. Erie Insurance Exchange*, Judge Christine Ward once again ruled in favor of the policyholder on these issues and granted their motions for partial summary judgment.[60] Similar to the court in *Ungarean*, the court disagreed with the insurer's interpretation that business income coverage requires tangible harm to the premises.[61] Several other appeals on issues related to COVID-19 business income coverage are pending in Pennsylvania state courts as well.[62]

In November of 2021, the U.S. Court of Appeals for the Third Circuit consolidated fourteen appeals concerning COVID-19 business income insurance coverage under Pennsylvania and New Jersey law.[63] All other appeals to the Third Circuit on COVID-19 business income coverage are stayed pending the resolution of these consolidated cases. Also, the consolidated policyholders have indicated an intent to request that the issue be certified to the Pennsylvania Supreme Court for a decision.

These anticipated Pennsylvania appellate decisions will elucidate the state's interpretation of "direct physical loss or damage" and the potentially applicable exclusions.

Conclusion

Since the onset of the COVID-19 pandemic, the landscape of commercial property insurance law has significantly changed. Lawsuits for business income coverage increased steadily through June 2021. However, since June 2021, new business income coverage filings have plateaued. As the two-year statute of limitations grows closer, there will likely be an influx of new cases. Although, most of the decisions in these cases have sided with the insurance carriers, several courts have found the policyholders' arguments to be more persuasive. Overall, whether policyholders are entitled to business interruption coverage in COVID-19 related disputes is still not entirely settled as state and federal appellate courts continue to grapple with this question.

Endnotes

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[3] *See* Kathy Katella, *Our Pandemic Year – A COVID-19 Timeline*, Yale Med. (Mar. 9, 2021), https://www.yalemedicine.org/news/covid-timeline.

[4] *See A Year of COVID-19 in Pennsylvania,* ABC 27, https://www.abc27.com/timeline-of-a-year-of-covid-19-in-pennsylvania/ (last visited Dec. 16, 2021).

[5] *See* Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC News (Apr. 3, 2020), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806.

[6] *See PA Department of Health Mandates Safety Measures for Essential Businesses*, Fox Rothschild (Apr. 16, 2020), https://www.foxrothschild.com/publications/pa-department-of-health-mandates-safety-measures-for-essential-businesses.

[7] *See id*.; *see also* Paul Gough, *Essential business? Here are new rules you'll have to follow*, Pitts. Bus. Times (Apr. 15, 2020), https://www.bizjournals.com/pittsburgh/news/2020/04/15/essential-business-here-are-new-rules-to-follow.html

[8] *See A Year of COVID-19 in Pennsylvania, supra* note 4.

[9] *See id.*

[10] *See id*.

[11] *See Pennsylvania lifts all COVID-19 mitigation orders except masking*, Pittsburgh's Action News (May 31, 2021), https://www.wtae.com/article/pennsylvania-to-lift-all-covid-19-mitigation-orders-except-masking-memorial-day/36579302.

[12] *Business Income Coverage*, Int'l Risk MGMT. Inst., https://www.irmi.com/term/insurance-definitions/business-income-coverage (last visited Dec. 21, 2021).

[13] *See Eidelman v. State Farm Fire & Cas. Co*., 2011 U.S. Dist. LEXIS 5395, *17-18 (E.D. Pa. Jan. 19, 2011).

[14] *See id*.; *see also Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 154 (3rd Cir. 1992).

[15] *See* Julia Kagan, *Business Income Coverage Form*, Investopedia (Oct. 3, 2021), https://www.investopedia.com/terms/b/business-income-coverage-form.asp.

[16] *See Covid Coverage Litigation Tracker*, Ins. Law CTR., https://cclt.law.upenn.edu/ (last visited Dec. 28, 2021).

[17] *See Glat v. Nationwide Mut. Ins. Co.,* 531 F.Supp.3d 908, 914 (E.D. Pa. 2021).

[18] *See Oral Surgeons, P.C. v. Cincinnati Ins. Co*., 2 F.4th 1141, 1144 (8th Cir. 2021).

[19] *Id*.

[20] *See Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co*., 513 F.Supp.3d 549, 563 (E.D. Pa. 2021).

[21] *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.,* 499 F.Supp.3d 95, 98 (E.D. Pa. 2020).

[22] *See Handel*, 499 F.Supp.3d at 100.

[23] *WM Bang LLC v. Travelers Cas. Ins. Co*., 2021 U.S. Dist. LEXIS 173408 (S.D.N.Y. Sept. 13, 2021).

[24] *Ordinance or Law Coverage: Code for Recovery!*, Adjusting Today, file:///Users/Lexie/Downloads/3009_OrdinanceorLawCoverage_2008-LOCKED.pdf (last visited Dec. 17, 2021).

[25] *See* Wynstan M. Ackerman, *COVID-19 Business Interruption Insurance Claims – Don't Overlook the Ordinance or Law Exclusion*, Nat. L. Rev. (2020), *available at* https://www.natlawreview.com/article/covid-19-business-interruption-insurance-claims-don-t-overlook-ordinance-or-law.

[26] *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co*., 506 F.Supp.3d 360, 380 (E.D. Va. 2020).

[27] *See Walnut Ace, LLC v. Seneca Ins. Co.*, 2021 U.S. Dist. LEXIS 189157 (E.D. Pa. Sept. 29, 2021).

[28] *Elegant Massage,* 506 F.Supp.3d at 371.

[29] *See id*. at 380.

[30] *See id.; see also Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co*., 531 F.Supp.3d 908, 916 (E.D. Pa. 2021); *see also Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, 503 F.Supp.3d 884, 907 (S.D. Iowa 2020).

[31] *See Paul Glat MD, P.C.,* 531 F.Supp.3d at 916; *see also Whiskey River on Vintage, Inc.,* 503 F.Supp.3d at 907.

[32] *See Federal Appellate Courts Rule for Insurers on COVID-19 Business Interruption Claims*, Clausen Miller (Oct. 14, 2021), https://www.clausen.com/federal-appellate-courts-rule-for-insurers-on-covid-19-business-interruption-claims/; *see also* Robert M. Travisano, *In COVID Coverage Dispute, Pennsylvania Court Hands Insured a Rare Win*, Nat. Law Rev. (June 7, 2021), https://www.natlawreview.com/article/covid-coverage-dispute-pennsylvania-court-hands-insured-rare-win.

[33] *Terry Black's Barbecue LLC v. State Auto. Mut. Ins. Co.*, 2022 U.S. App. LEXIS 287, *9 (5th Cir. 2022).

[34] *See North State Deli, LLC. V. Cincinnati Ins. Co.*, 2020 N.C. Super. LEXIS 38 (N.C. Super. Oct. 7, 2020); *see also Ungarean v. CNA,* 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Pa. Com. Pl. Mar. 22, 2021).; *MacMiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753 (Pa. Ct. Com. Pl. 2021).

[35] *See 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 513 F.Supp.3d 623, 631-32 (W.D. Pa. 2021).

[36] *See Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 500 F.Supp.3d 565, 567 (E.D. Tex. 2021).

[37] *See Inns-by-the-Sea v. Cal. Mut. Ins. Co*., 71 Cal. App. 5th 688, 713 (2021).

[38] *See id*. at 713-14.

[39] *See Cinemark*, 500 F.Supp.3d at 567.

[40] *See e.g.*, *SWB Yankees v. CNA Fin. Corp*., 2021 WL 3468995 (Pa. Com. Pl. 2020).

[41] *See e.g. SJP Inv. Partners LLC v. Cincinnati Ins. Co*., 2021 U.S. Dist. LEXIS 162612 at *9 (N.D. Ala. Aug. 27, 2021); *Troy Stacy Enters. Inc. v. Cincinnati Ins. Co*., 2021 U.S. Dist. LEXIS 183442 at *23 (S.D. Ohio Sept. 24, 2021); *Mario Badescu Skin Care Inc. v. Sentinel Ins. Co*., 2022 U.S. Dist. LEXIS 15270 at *11 (S.D.N.Y. Jan. 27, 2022).

[42] *See Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 499-500 (2001); *see also Morton Intern., Inc. v. General Acc. Ins. Co. of America*, 134 N.J. 1, 30-31 (1993).

[43] *Cedar Run Orthodontics, P.A. v. Sentinel Ins. Co.*, 2021 U.S. Dist. LEXIS 210818 (D.N.J. Nov. 1, 2021).

[44] *See* Sean P. Mahoney & Ciaran B. Way, *King's Bench Petition Seeks to Consolidate All Pennsylvania COVID-19 Business Interruption Insurance Cases*, White and Williams LLP (May 4, 2020).

[45] *Id*.

[46] Pa.R.C.P. No. 213.1(a)

[47] *See HTR Restaurants, Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 987 (Pa. Super. 2021).

[48] *See id*. at 980.

[49] *See id.* at 987.

[50] *See* Pa.R.C.P. No. 213.1; *see also HTR Restaurants*, 260 A.3d at 987.

[51] *See HTR Restaurants*, 260 A.3d at 987.

[52] *Id*.

[53] *See id*. at 988.

[54] *Id*. at 989.

[55] See *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2022 U.S. App. LEXIS 2655, *7 (2d Cir. 2022); *see also Oral Surgeon, P.C. v. Cincinnati Ins. Co*., 2 F.4th 1141, 1145 (8th Cir. 2021); *see also Terry Black's Barbecue LLC v. State Auto. Mut. Ins. Co.*, 2022 U.S. App. LEXIS 287, *2 (5th Cir. 2022); *see also Dakota Girls, LLC v. Phila. Indem. Ins. Co*., 2021 U.S. App. LEXIS 33002, *16-17 (6th Cir. 2021); *see also Sandy Point Dental, P.C. v. Cincinnati Ins. Co*., 2021 U.S. App. LEXIS 36399, *23-24 (7th Cir. 2021); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am*., 12 F.4th 885, 893-894 (9th Cir. 2021); *see also Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co*., 2021 U.S. LEXIS 37802, *17 (10th Cir. 2021); *see also Gilreath Fam. & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co*., 2021 U.S. App. LEXIS 26196, *7 (11th Cir. 2021).

[56] *See Ungarean v. CNA*, 490 WDA 2021; *MacMiles, LLC v. Erie Ins. Exch.*, 1100 WDA 2021.

[57] *See Ungarean v. CNA,* 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Pa. Com. Pl. Mar. 22, 2021).

[58] *See id*.

[59] *See id*.

[60] *See MacMiles, LLC v. Erie Ins. Exch.*, No: GD-20-7753 (Pa. Ct. Com. Pl. 2021).

[61] *See id.*

[62] *See Scranton Club v. Tuscarora Wayne Mut. Grp., Inc.*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 243 (Lackawanna Cty. Ct. Com. Pl. 2021); *see also Isaac's at Spring Ridge, LLP v. MMG Ins. Co*., No. Cl-20-03613 (C.P. Lanc. Co. 2021*); Lehigh Valley Baseball, LP v. Philadelphia Indem. Ins. Co.*, 2021 Phila. Ct. Com. Pl. LEXIS 18 (Phila. Ct. Com. Pl. 2021); *Spector Gadon Rosen Vinci P.C. v. Valley Forge Ins. Co.*, 2021 Phila. Ct. Com. Pl. LEXIS 16 (Phila. Ct. Com. Pl. 2021*); Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 200501093 (Phila. Ct. Com Pl. 2021).

[63] *See* Matthew Santoni, *Pa. Businesses Ask 3rd Circ. To Overturn Virus Policy Rulings*, Law360 (Nov. 9, 2021), https://www.law360.com/insurance-authority/articles/1439129/pa-businesses-ask-3rd-circ-to-overturn-virus-policy-rulings

EVIDENCE OF "CONCURRENT CAUSE" IN POST-*TINCHER* PENNSYLVANIA: "A FACTOR IS BUT A FACTOR"

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In the wake of *Tincher v. Omega Flex, Inc.*,104 A.3d 328 (Pa. 2014), a product manufacturer should be able to argue at trial that the plaintiff's actions or inactions when combined with the actions or inactions of others, whether parties or nonparties, fully explain the accident and are factors which rebut plaintiff's threshold burden to prove causation. A confluence of concurrent causes having nothing to do with an alleged product defect is logically and legally relevant to rebutting the plaintiff's theory of causation in a product liability trial.[1]

In theory, there should be no impediment to admission of this evidence, both to rebut plaintiff's theory of causation and - separately and additionally – to support affirmative defenses, including intervening and superseding cause, product misuse and assumption of the risk.

Instead, as if by reflex, the "*Reott*[2] 'highly reckless' rhetoric" is typically presumed the benchmark for allowing evidence of the plaintiff's conduct, and the Workers' Compensation Act is often invoked to preclude evidence of the employer's causative conduct. These two rote responses are both logically and legally baseless.

Reott was decided in 2012, while *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), was still the law in Pennsylvania. *Reott* limited evidence of plaintiff's conduct at trial to proof of the "sole cause" affirmative defense, in turn limited to proof of "highly reckless conduct." The Court's analysis was expressly grounded in *Azzarello*, which forbade the jury from considering a plaintiff's negligence or a manufacturer's conduct for any purpose in a strict product liability trial.

In 2014, *Tincher* expressly overruled *Azzarello*, rejecting as "undesirable" *Azzarello*'s "strict" separation of negligence and strict liability concepts. Instead of separating strict liability and negligence, *Tincher* emphasized their overlap. *Tincher, 104 A.3d* at 371. While *Tincher* did not hold that a plaintiff's negligence should be directly compared to reduce a verdict against a strict liability defendant, it requires practical reexamination of the reflexive conduct prohibition that has its roots in the *Azzarello*-era *Reott* decision. In strict liability cases, like other tort cases, evidence relating to the occurrence of an accident—while inevitably implicating the conduct of the plaintiff or other actors—is relevant to issues of defect and causation without invoking

"negligence" principles or a "negligence" defense. Indeed, independent of the issue of causation, *Tincher* expressly contemplated jury consideration of not only a product's condition, but also a user's knowledge, as part of a risk-utility analysis to determine the presence of a product defect.[3] The incremental development of the common law, urged by the *Tincher* Court, compels counsel and the courts to revisit the relevance of "conduct" evidence as it relates to a plaintiff's burden to prove causation, and separately as it supports affirmative causation defenses.

The case of *Timmonds v. AGCO Corp.,* 2021 Pa. Super. Unpub. LEXIS 961 (Pa. Super. Ct. 04/12/2021) (2:0 non-precedential decision, *see* Superior Court IOP 65.37), sheds important light on the path to a proper, post-*Tincher* analysis of causation in product liability cases. The *Timmonds* case was tried to a defense verdict in the Philadelphia Court of Common Pleas before the Honorable Linda Carpenter. Defendants were AGCO Corp and M.M. Weaver & Sons, Inc. Plaintiff Michael Timmonds suffered a crush injury to his foot when the rear wheel of a tractor ran over his left leg while he was performing work at Flying Hills Golf Club in Reading, PA. Mr. Timmonds was injured while in the course of his employment with George Ley Co., a landscaping company hired by Flying Hills Golf Club to install an irrigation system.

The tractor, originally manufactured by AGCO was purchased used by George Ley Co. The tractor was manufactured in 2005, and sold used to George Ley Co. in 2008. The accident happened in March, 2015.

Just before the incident, Mr. Timmonds sat in the operator's seat and turned the ignition key to the "ON" position, but the tractor engine failed to start. He stepped out of the operator's compartment, left the key in the ignition in the "ON" position, and "hot wired" the engine with the transmission in gear. The engine started and the tractor suddenly lurched forward, crushing his left foot.

The original "new" AGCO tractor design included a bolted barrier guard to prevent such "hot wiring." Affixed to that guard was a label explicitly warning against guard removal and cautioning the operator not to "hot wire" start the engine. In addition to that barrier guard and warning label, the original design included a "neutral start system" which would prevent the tractor from starting with the ignition key in the "ON" position and the transmission in gear, but would be bypassed by a "hot wire" start. There was no dispute that for this accident to have occurred, the original installed barrier guard had to be removed allowing hot wire access, the key had to be left in the ignition in the "ON" position, the transmission gear selector had to be in the forward (not neutral position), and Mr. Timmonds had to be physically positioned directly in the tractor's path of travel.

At trial, plaintiff claimed M.M. Weaver & Sons, Inc. was negligent because it sold the tractor to George Ley Co. with the barrier guard missing. Plaintiff proceeded against AGCO Corp. on theories of both strict product liability and common law negligence. Plaintiff's design theory was that the tractor was defective as designed because it did not incorporate an operator presence sensing switch ("OPC") in the operator's seat, of the sort typically used on riding lawn mowers and industrial lift trucks. It was undisputed that such an OPC would have prevented tractor engine ignition without the plaintiff or a co-worker sitting in the tractor seat.

AGCO Corp. defended the case at trial by contending that the original tractor design was reasonably safe for its intended use, complied with all applicable industry standards, had been substantially altered (to wit: the removal of the barrier guard as well as on-guard warning label), and that no competitor tractor manufacturer equipped equivalent models with an OPC.

> Both defendants presented abundant evidence of the plaintiff's causative conduct and "negligence," for stepping out of the tractor operator compartment, leaving the transmission in gear with the key in the ignition switch in the "ON" position, intentionally hot wiring the engine, and standing in a clearly exposed position.[4]

In her well-reasoned post-trial opinion, Judge Carpenter extensively discussed her rationale for the admission of certain evidence including compliance with industry standards, the employer's negligence, and her comprehensive charge on the factors to be weighed by the jury in evaluating product safety.

> The jury was carefully instructed how to evaluate the conduct of the plaintiff, both defendants and plaintiff's employer, for the separate contexts of plaintiff's burdens of proving design defect and causation on the one hand, and defendant's affirmative defenses on the other.

Judge Carpenter rejected plaintiff's contention that evidence of the employer's causative negligent conduct should be deemed inadmissible for any purpose, on account of both the Workers' Compensation Act and the Fair Share Act. While acknowledging that this legislation precludes a third party from bringing an action in tort or seeking apportionment against an employer whether through an independent cause of action or through a joinder into an existing action:

> neither Act by its terms precluded AGCO, M.M. Weaver, or the Turf defendants from contesting the actual cause of Plaintiff's accident or contesting that Plaintiff could meet his burden of proof regarding the cause of the incident at issue. Here, neither [none of the defendants] ever sought to place Ley on the verdict sheet. As such, no violation of the specific terms of either Act occurred.

Timmonds v. AGCO Corp., 2019 Phila. Ct. Com. Pl. LEXIS 157, 69 (8/27/19).

On appeal, the Superior Court affirmed, stating:

> We concur with the trial court's analysis that the evidence [of the employer's conduct] was relevant to the issue of causation and that its probative value was not outweighed by a danger of unfair prejudice to Timmonds.

> Moreover, Timmonds is unable to demonstrate that the evidence is barred by Section 303 of the [Workers' Compensation] Act. First, Section 303(b) does not preclude the introduction, in a case seeking damages from the third party of evidence regarding an employer's negligence, where such evidence is relevant to defenses raised by the third party. Rather, the statute simply precludes a third party from either bringing an action or seeking apportionment against an employer. Second, none of the cases relied upon by Timmonds addressing the admissibility of evidence of an employer's negligence where it is relevant to another party's defense.

Timmonds, 2021 Pa. Super. Unpub. LEXIS 961 at 28-29.

Therefore, the Superior Court recognized and agreed with Judge Carpenter that evidence of Plaintiff's employer's or co-workers' conduct was relevant to "the causation defenses" and was not solely dependent on the presence of negligence claims against other defendants. Judge Carpenter's approach, affirmed and incorporated by the Superior Court, is a major step toward allowing the jury in a product liability case to consider all factors relevant not only to various defenses that may be raised but – importantly - to the plaintiff's burden to prove causation. These are not the same analyses, nor should they be.[5]

We plan to return our attention to the post-*Tincher* viability of the *Reott* approach in a future article. Today, we emphasize that, in the wake of *Tincher*, (1) the actions of the plaintiff, the employer, co-defendants and other "non-parties" are factors relevant to the jury's determination whether plaintiff has met his or her burden of establishing causation; (2) there is no logical or legal reason to exclude the conduct of the employer *per se* based on the Workers' Compensation Act, or to limit evidence of a plaintiff's actions to "highly reckless" conduct; and (3) plaintiff's burden to prove causation is separate from any affirmative defenses pled by various parties defendant, for which they have a corresponding burden of proof.

ENDNOTES

[1] Pennsylvania courts have not yet been asked to address this scenario, post-Tincher.

[2] Reott v. Asia Trend, Inc., 55 A.3d 1088 (Pa. 2012).

[3] While the fifth and sixth factors cited by *Tincher*—the user's ability to avoid danger by the exercise of care in the use of the product; and the user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions—focus on an ordinary user as opposed to the plaintiff specifically, both factors indicate an intent to shift away from an analysis aimed purely at the condition of the manufacturer's product. *Tincher*, 104 A.3d at 390.

[4] At the conclusion of the plaintiff's case, Judge Carpenter directed a verdict in AGCO Corp.'s favor on the negligence claims.

[5] Importantly, neither Judge Carpenter nor the Superior Court limited these analyses to cases where plaintiff proceeded on theories of strict product liability and common law negligence at trial. Indeed, the Superior Court expressly rules that post-*Tincher*, a plaintiff may pursue both actions separately or simultaneously.

DEFENDING PENNSYLVANIA'S FAIR SHARE ACT IN PRODUCT LIABILITY LITIGATION

By Jonathan T. Woy, Esquire, Littleton Park Joyce Ughetta & Kelly LLP

Pennsylvania's Fair Share Act ("FSA") went into effect in 2011. *See* 42 Pa. C.S. § 7102. It was adopted by the legislature to accomplish two primary objectives: (1) ensure that defendants are only required to pay their fair share of damages in multi-defendant litigation, and (2) curtail joint and several liability. Recently, however, Pennsylvania's appellate courts have done their best to undermine both of these goals, particularly in strict liability cases.

The Pennsylvania Supreme Court launched the judiciary's assault on the FSA in *Roverano v. John Crane, Inc.* 226 A.3d 526 (Pa. 2020), holding that liability must be apportioned among strict liability defendants on a *per capita* basis. The Pennsylvania Superior Court continued the offensive, threatening to gut the FSA's protections by suggesting in *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. Ct. 2021) and *Snyder v. Hunt*, 2021 WL 5232425 (Pa. Super. Ct. 2021) that the FSA only applies when a plaintiff has been apportioned at least a degree of comparative fault.

Taken at face value, these decisions appear to set the stage for a re-imposition of *per capita* apportionment and pure joint and several liability in strict liability cases. They are also fundamentally flawed in ways that leave them vulnerable to challenge.

Roverano is built on a "theoretical dam" dismantled by *Tincher*

For nearly a decade after the FSA was enacted, there was broad agreement that it eliminated *per capita* apportionment among strict liability defendants. Instead, liability was apportioned based on the degree to which each defendant caused the injury. In *Roverano*, however, the Pennsylvania Supreme Court upended that consensus by concluding that the FSA did not disturb the pre-FSA method of apportionment of liability among strict liability defendants. *See Roverano, supra.*. Looking to pre-FSA common law, *Roverano* re-imposed *per capita* apportionment because it was the prevailing standard at the time the FSA was enacted in 2011. In doing so, however, the court ignored the intervening paradigm shift in Pennsylvania product liability law brought about by *Tincher*.

Roverano's determination that Pennsylvania common law required

per capita apportionment was based on the *Azzarello*-era decision *Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992). In *Walton*, the Pennsylvania Supreme Court addressed for the first time whether apportionment among strictly liable defendants should be on a *per capita* basis or on a comparative fault basis as the Superior Court had held. The court chose *per capita* apportionment, basing its decision squarely on the *Azzarello*-era edict that all notions of negligence must be kept out of strict liability claims. Citing *Azzarello* for its observation that "[t]his Court has continually fortified the theoretical dam between the notions of negligence and strict 'no fault' liability," the court reasoned that "[i]t would serve only to muddy the waters to introduce comparative fault into an action based solely on strict liability." *Id.* at 462. Accordingly, the court concluded that—in the *Azzarello* era—it was "improper to introduce concepts of fault in the damage-apportionment process", making *per capita* the preferred method of apportionment. *Id.*

In 2014, however, the Pennsylvania Supreme Court in *Tincher* rejected the *Azzarello*-era exclusion of negligence principles from strict liability claims, thereby dismantling the "theoretical dam" described in *Walton*. In so holding, the court observed that "strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 401 (Pa. 2014). The court went on to criticize *Azzarello*-era decisions that "elevated the notion that negligence concepts create confusion in strict liability cases to a doctrinal imperative, whose merits were not examined to determine whether such a bright-line rule was consistent with reason." *Id.* at 381. *Tincher* underscored Pennsylvania's new approach by adopting the risk-utility and consumer expectations tests, both of which incorporate concepts of negligence that previously would have been off-limits.

Given the sea change brought about by *Tincher*, Pennsylvania courts have instructed that "the bench and bar must assess the *Tincher* opinion's implications for a large body of post-*Azzarello* and pre-*Tincher* case law." *Renninger v. A&R Mach. Shop*, 163 A.3d 988, 1001 (Pa. Super. Ct. 2017). Indeed, the court in *Tincher* recognized that its decision would impact many subsidiary issues of product liability law and instructed that "[t]he common law regarding these related considerations should develop within the proper factual contexts against the backdrop of targeted advocacy." *Tincher*, 104 A.3d at 410.

Although *Roverano's* interpretation of the FSA itself is binding, the *per capita* apportionment of liability among strict liability defendants is ripe for challenge because it is grounded squarely in *Azzarello*-era precedent. Under *Tincher*, *Walton's* primary justification for *per capita* apportionment in strict liability cases—the exclusion of negligence concepts from strict liability matters—no longer exists. *Roverano* simply ignored this critical change in the law, resulting in a holding based on an understanding of Pennsylvania law that *Tincher* explicitly rejected.

Given the intervening shift in Pennsylvania law, the *Azzarello*-era *per capita* standard must be reconsidered and replaced with a method that takes into account the degree to which each defendant caused the injury. Doing so will modernize Pennsylvania's method of apportioning liability and bring this crucial aspect of the common law into compliance with *Tincher*. It will also fulfill the legislature's explicit goals in enacting the FSA. As it stands now, however, *Roverano* represents a significant departure from the manner in which liability was apportioned among strict liability defendants over the past decade.

The FSA's text and underlying legislative intent do not support *Spencer* and *Snyder*

Shortly after *Roverano*, Pennsylvania's appellate courts raised the spectre of further erosion of the FSA in *Spencer*. There, the plaintiff was a pedestrian who was struck by a company-owned vehicle that was being operated by the spouse of the employer/vehicle owner's employee. The jury apportioned liability as follows: 36% to the driver, 19% to the employee, and 45% to the employer/vehicle owner. *Spencer* held that the liability apportioned to the employee (19%) could be combined with the liability apportioned to the employer/vehicle owner (45%) because the employer/vehicle owner was vicariously liable for the actions of its employee relative to the vehicle. This resulted in the employer/vehicle owner being held jointly and severally liable under the FSA because its liability exceeded the requisite 60%.

There were no strict liability claims at issue in *Spencer*. However, the Superior Court offered unwarranted and extraneous commentary that, if it gains traction with Pennsylvania's courts, could undercut strict liability defendants' ability to claim the FSA's benefits. That is, the court examined the text of the FSA and hypothesized in dicta that the FSA only applies where a plaintiff was assigned some degree of comparative fault. Because the plaintiff in *Spencer* had not been assigned any comparative fault, the Superior Court suggested that the FSA would have been inapplicable even if the employer/vehicle owner had not been found vicariously liable.

The court's reasoning was heavily influenced by the structure of the FSA. Section (a)—which was carried over from the Comparative Negligence Act—sets forth the general rule that a plaintiff's comparative negligence is not a bar to recovery, but will instead result in a proportionate reduction of any damages awarded:

> **(a) General Rule.—**In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

42 Pa. C.S. § 7102(a). The next section—Section (a.1)—was a new addition when the FSA was enacted to replace the Comparative Negligence Act in 2011. Section (a.1) eliminated joint and several

liability in all but a few narrowly defined scenarios:

> **(a.1) Recovery against joint defendant; contribution.—**
>
> (1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).
>
> (2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
>
> (3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:
>
> (i) Intentional misrepresentation.
>
> (ii) An intentional tort.
>
> (iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.
>
> (iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act.
>
> (v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No. 21), known as the Liquor Code.

42 Pa. C.S. § 7102(a).

Spencer treated Section (a) as the gateway to the rest of the FSA, concluding that the FSA was inapplicable unless the facts of the case fit within one of Section (a)'s two scenarios. It explained these two scenarios as: (1) if the plaintiff's negligence exceeds the defendants' combined negligence, the plaintiff will be barred from recovery, and (2) if the plaintiff's negligence is less than the defendants' combined negligence, the plaintiff's recovery will be reduced in proportion to the plaintiff's negligence. Because both scenarios contemplate some degree of negligence assigned to the plaintiff, the court concluded that, "for the Fair Share Act to apply, the plaintiff's negligence must be an issue in the case." *Spencer*, 249 A.3d at 559.

The Superior Court's analysis of the FSA in *Spencer* is fundamentally flawed. Nothing about the text or legislative history of the FSA suggests that the legislature intended it to only apply to cases where the plaintiff was assigned a degree of comparative fault. To the contrary, the text of Section (a.1) makes clear that it applies broadly and without limitation whenever "recovery is allowed against more than one person". 42 Pa. C.S. § 7102(a). Nor does anything in Section (a) suggest that the rest of the FSA only applies if the facts of the case fall within one of Section (a)'s two scenarios dealing with a plaintiff's right to recover despite his or her comparative fault.

The Superior Court's analysis would also render several sections of the FSA superfluous. For example, Section (a.1)(3)(i) preserves joint and several liability for intentional misrepresentations and Section (a.1)(3)(ii) does the same for intentional torts. Under *Spencer's* reasoning, the FSA would not apply to either type of case because they do not involve any negligence by the plaintiff. Therefore, the express carve-out from the FSA's elimination of joint and several liability would be superfluous because—under *Spencer's* analysis—the FSA would not apply in the first place. Similar logic applies to Section (a.1)(3)(iv), which preserves joint and several liability for the "release or threatened release of a hazardous substance under . . . the Hazardous Sites Cleanup Act."

Spencer's myopic focus on the negligence-based claim before the court resulted in a broad pronouncement that, if taken at face value, is incompatible with the mechanics of Pennsylvania law. Nevertheless, a different panel of Superior Court judges cited *Spencer's* dicta with approval in *Snyder v. Hunt*, 2021 WL 5232425 (Pa. Super. Ct. Nov. 10, 2021). *Snyder* involved a plaintiff who tripped and fell in a common alleyway shared by the fourteen named defendants. After trial, the plaintiff appealed the trial court's order vacating verdicts that it had directed against five defendants who failed to appear at trial. The Superior Court remanded and instructed that "the trial court shall direct verdicts against [each of the five defendants who failed to appear] on the issue of liability and direct the jury to determine and award damages against them jointly and severally." *Id.* at *6. Citing *Spencer*, the court also instructed that, "[b]ecause [each of the five defendants who failed to appear] did not appear to allege, much less to prove, that Ms. Snyder was contributorily negligent, the Fair Share Act, 42 Pa. C.S.A. § 7102, does not shield them from the common law of joint and several liability under *Spencer*." *Id.*

Although the reasoning in *Spencer's* dicta is flawed, plaintiffs will undoubtedly rely on it during settlement negotiations and as an argument for entering judgments that hold defendants jointly and severally liable. Although parallel negligence-based claims are often pleaded at the outset of product liability matters, product liability plaintiffs typically abandon negligence theories at trial in an attempt to avoid comparative fault and limit the scope of admissible evidence. Unless the trial court allows the jury to assess the plaintiff's conduct (which *Tincher* arguably permits), no jury could ever assign comparative fault to a strict liability plaintiff. If *Spencer's* alternative analysis were applied in such a case, the FSA may be inapplicable, leaving the strictly liable defendants subject to joint and several liability.

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AUTOMOBILE CASE LAW UPDATE

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

PENNSYLVANIA SUPREME COURT HOLDS THAT INSURED'S § 1738 WAIVER OF STACKED UIM COVERAGE DID NOT CONSTITUTE WAIVER OF INTER-POLICY STACKING

DONOVAN V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 256 A.3d 1145 (Pa. 2021).

Corey Donovan was injured while occupying his motorcycle. He received $25,000 from the tortfeasor as well as $50,000 in UIM coverage from the policy covering the motorcycle. Donovan then sought UIM coverage under a policy issued to Linda Donovan, his mother, through State Farm. Linda Donovan's policy insured three vehicles, but not the motorcycle. Ms. Donovan had executed a waiver of UIM stacking limiting the UIM coverage to $100,000. Under Linda Donovan's policy there was no UIM coverage for an insured who sustains bodily injury while occupying a motor vehicle owned by that insured or any resident relative. The Donovan's policy also contained coordination of benefits language which limited household UIM exposure to $100,000, the highest limit in the household. As such, if coverage was applicable, State Farm's obligation under Linda Donovan's policy would be limited to $50,000.

The Donovans filed a declaratory judgment action in Philadelphia County claiming that Linda's waiver of stacking was invalid as to the inter-policy stacking sought by Corey Donovan. State Farm removed the matter to the federal district court and answered that Linda Donovan's waiver of stacking was valid as to both inter and intra-policy stacking and that the household exclusion barred coverage.

The parties filed cross motions for summary judgment. The Donovans contended that the stacking waiver was only applicable to intra-policy stacking and did not operate to waive inter-policy stacking for vehicles under separate policies. Further, the Donovans contended that the household exclusion and coordination of benefits language in Linda Donovan's policy was invalid. It was State Farm's position that the stacking waiver did provide for the waiver of inter-policy stacking and that the household exclusion language barred coverage.

The District Court granted the Donovans' motion for summary judgment finding that Corey Donovan was entitled to $100,000 in UIM coverage under his mother's policy. The court found that there was only a knowing waiver of intra-policy UIM stacking – as the General Assembly had not clarified the applicability at §1738. The court noted that State Farm could have remedied the situation by seeking recourse from the legislature or the Insurance Commissioner, or by altering its policy language.

The case was appealed to the Third Circuit Court of Appeals which certified for the following three questions to the Pennsylvania Supreme Court.

1. Is a named insured's signing of a waiver under §1738 (d) sufficient to waive inter-policy stacking of UIM benefits under the Pa. MVFRL, where the policy insures more than one vehicle at the time the form is signed?
2. If the answer to question 1 Is no, would the household exclusion bar a claim made by a resident relative who is injured while occupying a vehicle owned by him and not insured under the policy under which the claim is made?
3. If the answers to questions 1 and 2 are no, is the coordination of benefits provision in the subject policy nonetheless applicable to limit the amount of UIM coverage to the highest limit in the household?

With respect to the first issue, the Supreme Court found that under Craley v. State Farm, the Court had previously concluded that §1738 allowed insureds to waive inter-policy stacking as well as intra-policy stacking, as long as the insured is provided with the necessary information to allow a knowing rejection of stacked coverage. The Court found that this case was distinguishable from Craley as Linda Donovan had three vehicles insured under her policy. As such, the § 1738 waiver which she executed, in and of itself, did not provide the necessary knowing waiver of inter-policy stacking.

With respect to the second issue concerning the household exclusion, State Farm contended that this factual scenario was different from that in Gallagher as in that case the Geico policy allowed for stacking. Here there was a waiver of stacking under the household policy. The Court ignored this factual distinction and held that Gallagher was applicable and that the household exclusion in the State Farm policy could not be enforced to waive inter-policy stacking as it did not comply with § 1738 (d).

With respect to the coordination of benefits issue, the Court found that this essentially constituted a defacto waiver of inter-policy stacking and was thus unenforceable. Such a provision could not serve as a de facto waiver of inter-policy stacking.

PENNSYLVANIA SUPERIOR COURT INVALIDATES REGULAR USE EXCLUSION

RUSH v. ERIE INSURANCE EXCHANGE, ___ A.3d ___ (Pa. Super., 2021).

Matthew Rush was a police detective for the City of Easton when he was injured in a motor vehicle accident on November 28, 2015. He collected the liability limits from the tortfeasor and the UIM coverage on his police vehicle. He then filed a claim for UIM benefits under his personal policy with Erie. Erie denied coverage based on the regular use exclusion.

Rush filed a declaratory judgment action seeking a declaration that the "regular use" exclusion was void and

unenforceable in this instance. The trial court in Northampton County granted Rush's motion for summary judgment finding that the regular use exclusion was unenforceable.

On appeal the Superior Court affirmed the trial court's decision. Erie requested reargument en banc which the Superior Court denied. Erie has now filed a Petition for Allocatur to the Supreme Court. In its decision, the Superior Court agreed with the trial court that the "regular use" exclusion was unenforceable because it conflicted with the clear and unambiguous requirements of the Pa.MVFRL holding that an individual who selects UIM coverage is entitled to access that coverage. There is no mention in the Pa.MVFRL of any exclusions.

EN BANC SUPERIOR COURT HOLDS THAT INSURED NOT OBLIGATED TO OBTAIN UIM STACKING WAIVER WHEN VEHICLE REMOVED FROM MULTI-CAR POLICY

FRANKS V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ___ A.3d ___ (Pa. Super. 2021)

On January 18, 2013 Franks applied to State Farm for insurance for two vehicles, a Nissan Xterra and a Ford Taurus. At that time the Franks executed a valid waiver of stacked UIM coverage. The policy thus provided UIM coverage of $100,000 per person and $300,000 per accident. In January of 2014 the Franks added a third vehicle, a Nissan Altima, to the policy. A new UIM stacking waiver was executed at that time. In July of 2014 the Ford Taurus was deleted from the policy. No coverage changes were made. The Franks continued to pay reduced premiums for waiving stacked UIM coverage.

In March of 2015 the Nissan Xterra was replaced with a Nissan Frontier. From July of 2014 through the time the accident in August of 2016, the policy insured only two vehicles. After the number of vehicles under the policy was reduced from 3 to 2, no additional stacking waivers were executed. The Franks continued to pay for non stacked UIM coverage during this time period.

In August of 2016 Robert Franks was injured in a motor vehicle accident. He obtained the liability limits from the tortfeasor and then made a UIM claim to State Farm, which tendered the $100,000 in UIM coverage under the policy. It was Mr. Franks' position that he was entitled to $200,000 in UIM coverage.

The Franks filed a complaint in declaratory judgment seeking a declaration that State Farm was entitled to provide $200,000 in UIM coverage as no stacking waiver was obtained when the policy was changed from three to two vehicles. State Farm's counterclaim asked for a declaration that it was only obligated to provide $100,000 in UIM coverage. A nonjury trial was held and a declaratory judgment entered in favor of State Farm finding that there was only $100,000 in UIM coverage. The case was appealed to the Pennsylvania Superior Court and a divided panel reversed the trial court's finding. State Farm's petition for reargument en banc was granted.

The en banc Superior Court framed the issue for decision as whether the removal of a vehicle from an auto insurance policy providing non stacked UIM coverage for three vehicles constitutes the "purchase" of coverage as contemplated by § 1738 (c) of the Pa. MVFRL such that the insured must be provided the opportunity to waive stacked limits of coverage at the time of vehicle removal. The court answered this question in the negative holding that, under the plain language of § 1738, the removal of a vehicle from a policy does not constitute the "purchase" of coverage requiring an opportunity to waive stacked UIM limits.

In reaching its decision the Court found that two things are required for a "purchase;" first, the acquisition of something and second, payment. The court found no case law addressing the deletion of a vehicle from a multicar policy. The prior decisions, including Sackett, addressed either the addition or replacement of a vehicle to a policy, and never the deletion of a vehicle. As there was no "purchase" of coverage, there was no requirement under § 1738 for State Farm to obtain a new stacking waiver when the number of vehicles under the policy was reduced from three to two.

EASTERN DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN CANCELLATION CASE

GONZALEZ v. STATE FARM, No. 20-4193 (E.D. Pa., 2021).

Angel Gonzalez was insured by State Farm and was enrolled in an automatic debit plan for payment of the policy premiums. In July of 2019, Gonzalez's checking account was overdrawn and his bank was therefore unable to process the monthly premium payment. State Farm then issued a cancellation notice indicating that the policy would be cancelled on August 12, 2019. Gonzalez was involved in a motor vehicle accident on August 23, 2019 in which he sustained serious injuries. He submitted a claim to State Farm for benefits which State Farm denied on the basis that the policy had been cancelled.

Gonzalez filed suit against State Farm for breach of contract and bad faith. State Farm moved for summary judgment which the court granted. Gonzalez argued that there was a genuine issue of material fact as to whether State Farm's request for the July premium was submitted as an automatic request or as an "everyday debit transaction" which would have triggered his overdraft protection. The court reviewed State Farm's records and noted that all of the State Farm monthly requests to the bank were marked as "recurring" which triggered an automatic deduction. The court also noted that State Farm properly mailed a notice of cancellation to Gonzalez which advised him that the policy would cancel on August 12, 2019 if it did not receive payment. Gonzalez testified he did not receive the notice, but the court found that under the mailbox rule, the presumption of receipt of a piece of mail cannot be discounted by the recipient stating that he did not receive it.

FEDERAL DISTRICT COURT DISMISSES PLAINTIFF'S BAD FAITH CLAIM BUT GRANTS LEAVE TO AMEND

KELLY v. PROGRESSIVE ADVANCED INS. CO., No. 20-5661 (E.D. Pa., 2021).

Raymond Kelly was rear-ended by

another vehicle while he was stopped at a traffic light. Kelly settled his claim against the tortfeasor's insurer for $275,000 out of an available $300,000 policy limit. Prior to settlement, Kelly obtained consent from Progressive, his UIM carrier. Plaintiff made a claim to Progressive for UIM benefits, but Progressive did not make an offer.

Kelly filed a complaint against Progressive and included a count for bad faith pursuant to 42 Pa.C.S.A. §8371. Progressive filed a motion to dismiss on the basis that the complaint was insufficiently specific. The court agreed with Progressive and noted that Plaintiff's complaint was devoid of facts necessary to support a bad faith claim. The court noted that a plaintiff cannot simply plead that an insurer acted unfairly but must describe with specificity the nature of the alleged improper conduct.

LACKAWANNA COUNTY TRIAL COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON CLAIMS OF RECKLESSNESS AND PUNITIVE DAMAGES

CERESKO v. KEYSTONE CONTAINER SERVICE, INC., No. 18CV3361 (C.C.P. Lackawanna Co., 2021).

Nancy Ceresko was involved in a motor vehicle accident on June 6, 2018 when the defendant, who was driving a truck, made a left-hand turn in front of her resulting in serious personal injuries. She alleged in her complaint that the defendant was speeding and was on his cell phone and that he turned into her lane without using a turn signal and without applying the brakes. She sought compensatory and punitive damages from defendant. She also claimed that his employer knew that he was an incompetent and reckless driver and demanded punitive damages from the employer, as well.

At the conclusion of discovery, defendants moved for summary judgment on the punitive damage claim on the basis that plaintiff had failed to identify any fact of record which indicated that the defendant driver was speeding or using his cell phone.

The court engaged in an exhaustive review of the record and found that plaintiff had produced no direct or circumstantial evidence to support their claim that the defendant driver was speeding or distracted by his cell phone at the time of the accident. The court also noted that none of plaintiff's experts were prepared to testify that the driver was speeding or using his cell phone or otherwise acting recklessly. Instead, the evidence merely showed that defendant made a left turn into plaintiff's lane without using his turn signal.

The court found that this was ordinary negligence and would not support a claim for punitive damages. The court also found there was no evidence which suggested that the employer had any reason to believe that defendant driver was an incompetent and reckless driver when they hired him. All claims for punitive damages were therefore dismissed.

LEHIGH COUNTY COURT DENIES PLAINTIFF'S MOTION FOR POST TRIAL RELIEF IN "ZERO VERDICT" CASE

KIM V. WEISHAUPT, No. 2018-C-6098 (C.C.P. Lehigh Co. 2021)

Plaintiff alleged that she was injured in a motor vehicle accident in September of 2016. At trial Defendant stipulated to negligence but denied causing the injuries and damages alleged by the Plaintiff. Plaintiff contended that both parties' medical experts agreed that there was some injury thus the issue of factual cause should not be submitted to the jury. The trial court disagreed and allowed the jury to determine whether or not the Defendant's negligence was a factual cause in bringing about the claimed injuries. The jury then found in favor of the Defendant and against the Plaintiff. Plaintiff filed a motion for post-trial relief as well as a request for judgment notwithstanding the verdict.

Plaintiff contended that as Defendant's expert had conceded some injury, the issue of factual cause should not have been submitted to the jury. The court disagreed finding that the jury, as the finder of fact, is entitled to believe all, some or none of the evidence presented. The court also noted that the experts had based their opinions, in part, on subjective information provided by the Plaintiff. If a jury does not find a Plaintiff credible, it is free to disregard the expert testimony. The jury was not obligated to find factual cause simply because the Defendant stipulated to negligence.

In denying Plaintiff's motion for post-trial relief the court found that the verdict bore a reasonable relation to the evidence presented at trial and did not shock ones sense of justice. The court also denied the request for judgment notwithstanding the verdict holding that there was contradictory evidence and that the jury was entitled to weigh this evidence and determine credibility. As such, the verdict was not against the weight of the evidence.

DAUPHIN COUNTY COURT AWARDS MEDICAL BILLS AND ATTORNEY FEES IN PRO CASE

TURNPAUGH CHIROPRACTIC HEALTH AND WELLNESS CENTER, P.C. V. ERIE INSURANCE EXCHANGE, No. 2019-CV-6937 (C.C.P. Dauphin Co. 2021)

Cynthia Zimmerman, who suffered from cerebral palsy, was involved in a motor vehicle accident and sought treatment with the Plaintiff. Of note, Ms. Zimmerman had been regularly treating with Turnpaugh Chiropractic at the time of the accident. Erie initially paid for the chiropractic treatment but reduced some of the bills per the procedure codes of § 1797 (a) of the Pa. MVFRL. The matter was also sent for a PRO pursuant to § 1797 (b). Richard Adams, Jr., D.C. was selected by the Peer Review Organization to conduct a review. He found that treatment after August 31, 2017 was neither reasonable nor necessary. As such, payment for the ongoing treatment bills was denied.

The Plaintiff filed suit against Erie alleging an improper referral of the chiropractic bills for peer review. The complaint also alleged that Erie used invalid procedures to deny the payment of the bills at issue. Plaintiff further sought attorney's fees under § 1716, 1797 (b) (6) and 1798 (b) of the Pa. MVFRL.

The matter proceeded to a nonjury trial

wherein the court held that Erie was responsible for paying for chiropractic treatment from August 31, 2017 through September 26, 2018, when the Plaintiff chiropractor had testified that the insured returned to her baseline status. Based on this finding, the court awarded the bills and statutory interest. The court held that no attorney's fees were to be awarded under § 1797 (b) (6) as the matter had been submitted for peer review. Further, no treble damage were awarded under § 1797 (b) (4) as there was no wanton conduct.

However, the court did find that Erie lacked a reasonable basis to send the chiropractic bills for peer review based upon the patient's history. Therefore the Plaintiff was entitled to attorney's fees under both § 1716 and § 1798 (b).

The court also found that the vendor that had fee scheduled the bills had done so improperly and the difference was awarded to the Plaintiff. The court further found that no treble damages were to be awarded for the reduction of the bills paid.

PROPERTY AND CASUALTY CASE LAW UPDATE

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

SUPERIOR COURT FINDS NO "SOCIAL HOST" LIABILITY WHERE EMPLOYEE INJURES THIRD PARTY AFTER BECOMING INTOXICATED AT EMPLOYER-SPONSORED FUNCTION

Klar v. Dairy Farmers of America, et al., _____ A.3d _____ (Pa. Super. 2021)

Dairy Farmers of America (DFA) organized a golf outing for its employees. DFA required employees to make monetary contributions to offset the cost and expenses associated with the outing, including food and alcohol. While at the outing Roger Williams, an employee, became visibly intoxicated. He then operated his vehicle across the center line of a nearby roadway striking the Plaintiff who was operating a motorcycle. The Complaint alleged that DFA was aware that Williams had an alcohol problem but continued to serve him though visibly intoxicated.

The Plaintiff sued Williams and DFA contending that the employer was liable for furnishing alcohol to Williams when he was visibly intoxicated knowing that he was a habitual drunkard. DFA filed a motion for judgment on the pleadings contending that there was no liability as the employer did not qualify as a "licensee" under the Pennsylvania Liquor Code. Further, the employer did not obtain "licensee status" and could not be held responsible for Dram Shop liability. Finally, the employer contended that there is no social host liability where alcohol is served to an adult guest.

The trial court granted the employer's motion for judgment on the pleadings. The Plaintiff then settled with Williams and appealed to Superior Court. The first issue for consideration was whether an unlicensed employer who provides alcohol to visibly intoxicated employees, for renumeration, is liable to a third party. The second issue was whether the employer can be considered a "social host" despite not being in the business of serving alcohol. There was no issue that DFA was not licensed under the Pennsylvania Liquor Code and could not have obtained a license for the golf outing.

On appeal Klar argued that DFA was "negligent per se" as it violated 47 P.S. § 4-493(1) of the Pennsylvania Liquor Code by furnishing alcohol to a visibly intoxicated individual. Klar also contended that, by "selling" alcohol to Williams, DFA assumed the same liability exposure as a licensee. Finally, Klar contended that DFA breached a common law duty when it provided alcohol to someone that was visibly intoxicated.

The Superior Court disagreed holding that § 4-493 of the Pennsylvania Liquor Code was not applicable as DFA was not a licensee. This is a penal statute and DFA did not fall within the catch-all of "any other person." In so holding, the court relied on prior Pennsylvania Supreme Court precedent.

The court also held that it would not expand the prior Supreme Court holdings to find that an employee can obtain the status of a "licensee." The court then held that a social host is not liable for serving alcohol to guests who are of age. It did not matter that the employer received payment from the guests.

SUPERIOR COURT UPHOLDS SUMMARY JUDGMENT IN FAVOR OF HOMEOWNERS SEEKING DEFENSE IN ACTION INVOLVING DRUG OVERDOSE AT INSURED PREMISES

Kramer v. Nationwide Property and Casualty Insurance Company, _____ A.3d _____ (Pa. Super. 2021)

Michael Murray died of a drug overdose while at the home of Stewart Kramer and Valerie Conicello who were insured by Nationwide. Andrew Kramer, their son, was apparently hosting Mr. Murray when he overdosed. It is alleged that the named insureds knew that their son was a drug dealer and drug user.

Suit was filed by the Murray Estate against the parents and their son. It was alleged that the parents were negligent in allowing their son to use the home for selling and using drugs. Nationwide refused to provide a defense to the homeowners citing a coverage exclusion which excluded liability coverage for loss from the use, sale, manufacturer or possession of controlled substances. The homeowners filed a Declaratory Judgment action against Nationwide seeking a defense in the underlying action. Cross motions for summary judgment were filed and the trial court granted the parents' motion compelling Nationwide to provide a defense. An appeal was taken to Superior Court.

The issue for the Superior Court is whether the trial court erred in ordering Nationwide to provide a defense where there was a controlled substance exclusion in the policy.

The Superior Court held that Nationwide had a duty to defend the insured in the Wrongful Death and Survival actions brought by the Estate in connection with the drug overdose. Specifically, the court found that there were potential claims which fell outside the definition of "bodily injury" contained in the policy. Thus, as long as the insurer was potentially obligated to pay damages from at least one claim in the underlying action, the insurer must provide a defense for all claims. Although the policy would exclude damages for "bodily injury," it may not exclude damages for all claims. As such, Nationwide had a duty to provide a defense.

FEDERAL DISTRICT COURT DISMISSES FATERNITY HAZING LAWSUIT AGAINST UNIVERSITY

Jean v. Bucknell University, et al., No. 4:20-CV-01722 (M.D. Pa. 2021)

The Plaintiff pledged the Kappa Delta Rho fraternity at Bucknell University. His lawsuit alleged that he was "hazed" at an initiation ceremony on September 10th and 11th, 2020. At that time he was ordered to drink vodka and was pressured to stay at the initiation event. He was also punched in the face. The Plaintiff vomited and lost consciousness and had to be treated for alcohol poisoning.

Bucknell filed a Motion to Dismiss the original Complaint. This was granted with leave for the Plaintiff to amend the Complaint. In the Amended Complaint it was alleged that Bucknell had previously revoked the KDR charter for four years then reinstated it. It was also alleged that Bucknell created a campus environment that resulted in students drinking on a regular basis and in the open. The Amended Complaint did not allege that Bucknell was aware of the fraternity initiation or approved it.

The Amended Complaint contained specific counts for hazing, negligence and negligence per se contending that Bucknell violated the Pennsylvania "Anti-Hazing" statute. The Amended Complaint also contained allegations of incidents of hazing among University sports teams and other fraternities.

Bucknell filed a Motion to Dismiss the Amended Complaint contending that the University owed no legal duty to the Plaintiff. The motion set forth that the Plaintiff was asking the court to create a new duty not recognized at common law.

The court found that the Pennsylvania Supreme Court allowed for the creation of a new duty in only the rarest of circumstances. In determining whether a new duty should be imposed on a party, the court looked to the relationship between the parties as well as the consequences of imposing a new duty. Here the test was not met as the court would have had to find that the specific hazing event at issue was foreseeable. This was not supported by the allegations in the Amended Complaint.

As such the court held that Bucknell owed no duty to the Plaintiff and dismissed the negligence claim. The court also found that § 2804 of the Anti-Hazing statute requires intent and knowledge on behalf of a party. The statute also requires that the party "facilitate" the hazing conduct at issue. There were no allegations that Bucknell had notice that there would be hazing at the initiation event. The court thus refused to apply an overbroad definition of "facilitate." Therefore the hazing and negligence per se counts were also dismissed as the factual allegations were insufficient to sustain these claims.

FEDERAL DISTRICT COURT APPROVES EXPERT'S METHODOLOGY AND ALLOWS TESTIMONY ON PRODUCT DEFECT THEORY OF LIABILITY; SUMMARY JUDGMENT FOR DEFENDANT DENIED

Allstate Insurance Co. v. LG Electronics USA, Inc, C.A. 19-3529 (E.D. Pa. 2021)

Allstate, the casualty insurer for a home that was destroyed by fire, brought a subrogation action containing a products liability claim against LG Electronics, the manufacturer of the refrigerator in the home. The claim against LG contended that a defective refrigerator was the cause of the fire. Allstate's cause and origin expert determined that the fire started in the top third of the refrigerator. Allstate also retained Christoph Flaherty, an electrical engineer, to opine that the fire damage was caused by a manufacturing defect. Of note, Flaherty did not examine the actual refrigerator. However he used the National Fire Protection Association 921 guidelines in rendering his opinion. These were the same guidelines used by LG's expert.

The Defendant brought a Daubert motion challenging the expert's opinion concerning the defects in the refrigerator and the cause of the fire. The Defendant challenged Flaherty's methodology and the fact that he did not examine the alleged defective product. The Defendant also brought a motion for summary judgment.

In addressing the Daubert motion the court found that F.R.E. 702 requires a court to serve as a "gatekeeper" to ensure that scientific testimony or evidence is relevant and reliable. The court's focus is on assessing the reliability and principles of methodology, not the conclusions generated.

As Flaherty had ruled out other causes for the fire, he demonstrated a reliable methodology and put forth relevant circumstantial evidence of the cause of the fire and the defect. The court found that it did not matter that he did not examine the actual refrigerator. As such, his opinion was accepted and he would be allowed to testify at trial.

As the court found that Flaherty's testimony and report created a triable issue of fact, Defendant's motion for summary judgment was denied.

FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT TO RETAILER IN SLIP AND FALL CASE AS NO JURY COULD REASONABLY FIND ACTUAL OR CONSTRUCTIVE NOTICE OF HARMFUL CONDITION

Pickett v. Target Corp, No. 3:70-237 (M.D. Pa. 2021)

Plaintiff was injured when she tripped over a toy on the floor of a Target Store. The toy was red, blue and green and approximately 24 inches in length. Discovery revealed that the employees were trained to look for items on the floor. One of the employees testified that she regularly circled the store for inspection purposes.

Plaintiff filed suit against Target. At the close of discovery Target moved for summary judgment contending that, as a matter of law, it had neither actual nor

constructive notice of the toy being on the floor when the Plaintiff fell. Further, Target argued that this was an obvious condition which relieved it of liability.

The court agreed with Target and granted summary judgment finding that there was clearly no evidence of actual notice. Further, the court held that reasonable minds could not disagree that there was no evidence of constructive notice. In order to find liability, a jury would have to speculate or guess as to the notice issue. The court found it significant that there was no indication that there had been any substantial length of time between the toy being left on the floor and the fall so as to create constructive notice.

Further, the court found that the toy on the floor would have been obvious to a reasonable person exercising her normal perception. As such there was no liability.

FEDERAL DISTRICT COURT DISMISSES SLIP AND FALL CASE WHERE ALLEGATIONS IN COMPLAINT INSUFFICIENT TO DEMONSTRATE EXISTANCE OF DANGEROUS CONDITION WHICH CAUSED PLAINTIFF'S FALL

Staiger v. Weis Markets, Inc, No. 5:21-CV-03709 (E.D. Pa. 2021)

Gayle Staiger slipped and fell in the aisle of the Defendant's supermarket. She brought a negligence claim against the Defendant alleging that "Plaintiff has no medical condition and she believes and avers that there must have been a substance in the aisle which caused her fall." Ms. Staiger sustained scalp lacerations, a subarachnoid hemorrhage and a left shoulder injury.

The Defendant filed a Rule 12 Motion to Dismiss contending that the Plaintiff did not plausibly allege a dangerous condition that involved "an unreasonable risk of harm to the invitee." As such, the lone allegation of negligence was insufficient for the Plaintiff to move forward on her cause of action.

The court granted the Defendant's Motion to Dismiss holding that Plaintiff's own allegations of a substance on the floor essentially asked the court to draw an impermissible inference that the fall must have been due to this substance. There were no specific allegations that a dangerous condition was the cause of the fall, let alone what this dangerous condition was.

BEAVER COUNTY COURT FINDS THAT EXPERT TESTIMONY NECESSARY TO PROVE BREACH OF STANDARD OF CARE OF HOME HEALTH CARE SERVICE PROVIDER

Rodgers v. Patriot Home Health v. Rodgers, No. 10900 of 2019 (C.C.P. Beaver Co. 2022)

Collen Rodgers, an elderly woman, was being cared for by employees of Patriot Home Health Care. At one point a bed bug issue arose whereby Rhonda Rodgers, Collen Rodgers daughter, was told that Patriot would no longer supply caregivers. On April 6, 2018 no one came to care for the Plaintiff after Mona Washington, a caregiver, finished her shift. Rhonda Rodgers then drove Ms. Washington home knowing that no one from Patriot would be coming to relieve her. Rodgers tried to contact her mother that evening. When her mother did not answer the phone, she went to her house and found Colleen Rodgers deceased. Rhonda Rodgers disputes that there was a "bed bug" issue.

Ms. Rodgers, in her capacity as the administratrix of her mother's estate, filed suit against Patriot Home Health. That entity then joined Ms. Rodgers, as an individual, to the lawsuit. At the close of discovery Patriot filed a motion for summary judgment arguing that the Plaintiff had failed to produce expert testimony as to any breach of the standard of care of Patriot. Further, there was no expert testimony concerning the cause of death and whether it could have been prevented in the absence of negligence. Also, there was no evidence of conscious pain and suffering.

The trial court granted Patriot's motion for summary judgment finding that, without expert testimony, the court could not find that a jury could return a verdict in the Plaintiff's favor. The court also found that Plaintiff needed to produce expert testimony as to the alleged professional negligence, taking into account OSHA regulations. Further, expert testimony was necessary to demonstrate conscious pain and suffering. The court added that the mere failure of Patriot to provide services did not equate to a breach of the standard of care.

MONROE TRIAL COURT DENIES DEFENDANT'S SUMMARY JUDGMENT MOTION IN CASE INVOLVING FALL ON ICE AS MATERIAL ISSUE OF FACT EXISTED CONCERNING THE CAUSE OF ICY PATCH

Yearwood v. Mountain Valley Orthopedics and PBPC Properties, No. 10812-CV-2014 (C.C.P. Monroe Co., 2021)

The Plaintiff was injured when he slipped and fell on an isolated patch of ice while entering a physician's office. He contended that there was "black ice" on the ground which was covered by snow. He further alleged that he fell on the discolored patch of ice. Discovery revealed that Mountain Valley Orthopedics was aware of water "running off" a copper canopy over the entrance to the medical offices and refreezing on the walkway. The Defendants denied that there was any evidence that the water runoff caused ice on the date in question. Further, the snow event was ongoing at the time of the incident.

At the close of discovery the Defendants filed a motion for summary judgment contending that there was no duty to treat the walkway as the snow event was ongoing. Defendants also contended that the icy patch was not caused by water runoff and that there was an alternate entrance to the building.

In denying the Defendants' motion the court found a material issue of fact existed as to whether water runoff caused the icy patch where the Plaintiff fell. The court also held that the "choice of ways" doctrine was not applicable because the Plaintiff chose what he thought was an equally safe path. Finally, the court found that the "hills and ridges" doctrine was not applicable as there was an issue of fact as to whether or not the ice was from an "entirely natural accumulation."

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