

LITIGATION UPDATE

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UM/UIM

***Old Guard Insurance Company v. Houck*, Pa. Super., 801 A.2d 559 (2002)**

The insureds, occupants of a motorcycle, were injured in an accident with a motor vehicle. After collecting the BI limits from the tortfeasor and the UIM limits on the motorcycle they were occupying, the insureds sought to recover stacked UIM coverage from Old Guard which insured several motor vehicles. Old Guard denied coverage on the strength of a household vehicle exclusion. The exclusion avoided coverage where the insureds were occupying an owned vehicle not covered by the Old Guard policy.

The trial court and the Superior Court uphold the denial of coverage. The Superior Court reviews the tortured history of household exclusions under Pennsylvania law. Except for the *Marroquin* case (where the claimant, although in the household, was not the named insured on the involved policy), all of the Supreme Court decisions have upheld the household exclusion. Since Houck conceded that the Old Guard language was unambiguous and applicable and since Houck challenged only the public policy against such an exclusion, Houck's arguments failed.

***Rudloff v. Nationwide*, Pa. Super., 806 A.2d 1270 (2002)**

Rudloff was in an automobile accident caused by a UIM tortfeasor. After exhausting the liability coverage, she sought UIM benefits from Hanover Insurance Company, her carrier which provided coverage on the vehicle she occupied at the time of the accident. Hanover did not pay an award of \$77,500, presumably due to a coverage dispute. Rudloff then sought to collect the award from Nationwide, the UIM carrier for her father with whom she resided. The Nationwide policy had a "household vehicle" exclusion. The Superior Court reverses the arbitrator's award in favor of Rudloff. "Household vehicle" exclusions are enforceable in Pennsylvania. Rudloff had the opportunity to either purchase adequate UIM coverage from Hanover or to insure her vehicle with Nationwide.

Burstein v. Prudential, Pa., 801 A.2d 516 (2002)

Mr. and Mrs. Burstein were injured when the vehicle they occupied was struck by a motorcycle. They received the liability limits of coverage from the motorcycle. The Bursteins then sought UIM coverage from the vehicle they occupied. That vehicle was provided to Mrs. Burstein by her employer as a benefit of employment. She regularly drove the vehicle for both business and personal use. Mr. Burstein, who was driving the vehicle at the time of the accident, did not regularly drive this vehicle. Kemper insured the vehicle but the employer had rejected UM/UIM coverage. The Bursteins accordingly turned for UIM to their own Prudential policy which covered three vehicles they owned. The Prudential policy had an exclusion for UM/UIM when the insured was occupying a regularly used, non-owned vehicle. The Bursteins agreed that the policy language, as applied to this accident would eliminate all UM/UIM coverage. The Bursteins argued, however, that the policy language violated public policy.

Citing the MVFRL goal to contain and control the cost of insurance in Pennsylvania, the Supreme Court finds that the regularly used, non-owned car exclusion is enforceable and does not offend public policy. Mrs. Burstein had several options to avoid the present result. She could have negotiated with her employer to purchase UIM coverage on this vehicle. She could have attempted to purchase it herself. She could have declined to use the vehicle once she learned that it had no UIM coverage.

Lewis v. Erie Insurance Exchange, Pa., 793 A.2d 143 (2002)

Lewis had requested in writing lower UM/UIM limits than the BI limits on the Erie policy but, in so doing, used a form which would not have passed statutory muster had the issue been rejection of the coverage, rather than lowering the amount of the coverage. Following an accident, Lewis took the position that the form, since it did not comply with statutory mandates, was void for all purposes, including selection of lower UM/UIM limits. Erie argued that there are no statutory requirements for selection of lower limits other than a request in writing. In short, any form will suffice.

The Supreme Court agrees with Erie. The precise technical requirements for rejecting UM/UIM coverage or rejecting stacking of those coverage do not apply to written requests for lower limits.

Nationwide v. West, Pa. Super., 807 A.2d 916 (2002)

A Pennsylvania Nationwide insured was a passenger in an Ohio vehicle insured by Allstate. An accident occurred in Pennsylvania. Ohio law is silent on the issue of priority of UM/UIM coverage. The Ohio Allstate policy, however, stated that its UM/UIM coverage was excess. Pennsylvania law makes coverage on the vehicle primary and the Nationwide policy was written in compliance with that law.

The Superior Court ruled that there was no actual conflict between Ohio law and Pennsylvania law. Pennsylvania law states a priority of UM/UIM sources and Ohio does not. That does not create a conflict. The conflict was actually between the terms of the Ohio Allstate insurance contract and the Pennsylvania Nationwide insurance contract. Pennsylvania law could not be used to change the terms of the Allstate Ohio insurance policy and, as a result, the Allstate coverage was deemed excess. Nationwide, although not the carrier on the vehicle occupied by claimant, had to provide primary UM/UIM coverage.

Henning v. State Farm, Pa. Super., 795 A.2d 994 (2002)

Henning, son of the State Farm named insured, sought excess UM benefits from the State Farm policy even though he was by endorsement specifically excluded from all coverage under that policy. The issue on appeal was not resolution of that coverage dispute but rather whether the coverage dispute would be resolved through arbitration or through a declaratory judgment action. The State Farm policy contained the following arbitration clause:

Two questions must be decided by agreement between the insured and us:

1. Is the insured legally entitled to collect compensatory damages from the owner or driver of an uninsured motor vehicle or underinsured motor vehicle; and
2. If so, in what amount?

The Superior Court determined that the arbitration clause did *not* extend to the coverage issue pending between Henning and State Farm. The declaratory judgment action filed by State Farm was the proper forum to resolve that dispute.

Insurance Federation of Pennsylvania v. Koken, Pa. Cmwlth., 801 A.2d 622 (2002)

Insurance Department has implied authority under the Uninsured Motorist Coverage Act and under the MVFRL to require mandatory arbitration of UM and UIM coverage disputes.

Nationwide v. Heintz, Pa. Super., 804 A.2d 1209 (2002)

Heintz had a policy with Nationwide with a \$300,000 liability limit but a \$50,000/\$100,000 stacked UIM limit. The policy insured three vehicles. Nationwide could not establish that Heintz had received the IMPORTANT NOTICE required under §1791 of the MVFRL. Heintz admittedly requested lower limits in writing.

The Superior Court, consistent with the Supreme Court *Salazar* ruling concerning §1791.1 notice, holds that Nationwide's failure to give notice under §1791 provides no remedy to Heintz. The award of arbitrators which had increased, then stacked, the coverage available to Heintz was vacated. Nationwide was responsible only for the lower limits.

Younkin v. Nationwide, Pa. Super., 807 A.2d 275 (2002)

An award of arbitrators was finally entered about nine years after the accident. Claimant sought imposition of prejudgment interest. The Superior Court noted, as it had in the earlier *Ginther* and *McGee* decisions that P.R.C.P. 238 delay damages are not available in contractual UM/UIM arbitrations. The Superior Court also rejected Younkin's claim that common law required prejudgment interest. Such common law prejudgment interest is owed only when there has been a duty to pay a specific amount. The amount Nationwide owed was not established until the arbitration hearing and interest could not be due under common law prior to that time.

City of Meadville v. WCAB, Pa. Cmwlth., 810 A.2d 703 (2002)

A Meadville police officer suffered injuries in a work related motor vehicle accident. The compensation carrier for the City paid disability benefits. The police officer brought a UM claim against the insurance carrier covering the police vehicle. The workers' compensation carrier for Meadville then sought to subrogate against the UM/UIM payment made by the automobile carrier for Meadville.

The Commonwealth Court allows subrogation. If the tortfeasor had adequate liability coverage or assets, the compensation carrier clearly would have been permitted to subrogate. The police officer claimant should not be in a better position (by preventing subrogation) simply by the fortuity that the tortfeasor had no or inadequate liability coverage.

COVERAGE

Connor v. Insurance Department, Pa. Cmwlth., 810 A.2d 182 (2002)

The policyholder challenged the nonrenewal of her personal auto policy with Erie. Connor was involved in a single vehicle accident causing damage to her car and some utility poles. She failed a field sobriety test and was later charged with DUI. She entered an ARD program and thus was never actually convicted of DUI. Erie nonrenewed the policy with the following notice:

On 11/11/00, you struck a pole. We paid \$7,373.47. Prior to the accident you had been drinking alcoholic beverages to the extent that it materially increased the probability of loss. We are not renewing your Erie Insurance Exchange policy because of the substantial change of an increase in hazard presented by your drinking and driving.

The Commonwealth Court upholds the nonrenewal of coverage. Erie did not have the burden of establishing that Connor was guilty of criminal DUI. Erie had only to prove that Connor consumed alcoholic beverages which had an adverse effect on driving. Erie carried that burden through testimony of the investigating police officer about Connor's odor of alcohol, glassy eyes, slurred speech, and staggered gait.

Cardwell v. Chrysler Financial Corporation, 804 A.2d 18 (2002)

The insured's son, driving the insured vehicle with permission, led police on a high speed chase during which the insured vehicle suffered extensive damage. The son pleaded guilty to DUI, fleeing the police, aggravated assault, and recklessly endangering another person. After the incident, the insured stopped making payments to Chrysler, the lienholder on the vehicle. Chrysler sued the insured, the insured's son, and Nationwide as the collision/comprehensive coverage carrier on the vehicle. The Superior Court affirms the trial court ruling in favor of Nationwide.

Unless the policy language specifically states that the lienholder (here, Chrysler) has greater rights than the insured or is not bound by the acts or omissions of the insured, then the policy has a "simple loss payable clause" rather than a "standard loss payable clause." Under the former, the lienholder is subject to all of the coverage defenses that can be raised against the insured. Since the Nationwide policy, typical of all automobile policies, extends no greater rights to the lienholder, the policy was interpreted as providing "simple loss payable clause" coverage. The Court then further determines that the damage to the vehicle was not "accidental" since the damage resulted from willful flight from the police. The Court also finds that the lienholder is bound by any "omission" of the insured, here the son's omission of his duty as a motorist to obey the police.

Wagner v. Erie Insurance Company, Pa. Super., 801 A.2d 1226 (2002)

An underground gasoline line at a self service gasoline station broke, causing extensive damage from the underground leak both to the gas station property and to surrounding properties. Various personal injury and property damage claims were filed against the owner of the station. Erie, the CGL carrier for the self service gasoline station owner, denied coverage based on an absolute pollution exclusion. The trial court granted summary judgment in favor of the insured. The Superior Court reverses and enters summary judgment for Erie.

The Superior Court notes that leaking gasoline clearly qualifies as a "pollutant" under the policy language. It is a liquid, a chemical, and a contaminant. Since the exclusionary language was clearly worded and conspicuously displayed, the insured could not avoid application of the exclusion by claiming that he did not read it or did not understand it. The Court further noted that the owner had been in the gas station business for about 20 years and was "not an inexperienced layperson." The Superior Court ruled that the pollution exclusion avoided coverage not only under the bodily injury and property damage portions of the policy, but also under the personal injury portion which covered "wrongful entry."

Mistick v. Northwestern National Casualty Co., Pa. Super., 806 A.2d 39 (2002)

Tenants brought a lead poisoning claim against the landlord, alleging that children were exposed to and ingested toxic lead based paint. In an earlier appeal, the Supreme Court had already determined that lead based paint qualified as a pollutant under the policy language but that abrasion of lead based paint did not qualify as "discharge, dispersal, release, or escape" of a pollutant under the exclusion. On remand to the Superior Court, the carrier argued that abrasion of lead based paint did fall within the "seepage" and "migration" portions of the pollution exclusion. The Superior Court disagrees and requires the carrier to provide defense and indemnification to the landlord on the lead paint claim by the tenant.

Penn Avenue Place v. Century Steel Erectors, Pa. Super., 798 A.2d 256 (2002)

The Penn Avenue Place property, while under renovation, was damaged by a fire caused by the general contractor and a demolition subcontractor. Penn Avenue Place suffered both insured and uninsured (due to a deductible) losses. The renovation contract contained "waiver of subrogation" clauses under which the parties agreed not to pursue claims against each other where losses were covered by insurance. The trial court permitted the uninsured losses but dismissed the claim for insured losses as barred by the "waiver of subrogation" clauses. The Superior Court affirms.

"Waiver of subrogation" clauses, if clear and unambiguous, are enforceable under Pennsylvania law. The carrier pursuing subrogation, however, argued that such "waiver of subrogation" clauses should be against public policy where the acts or omissions causing the loss violated an ordinance or regulation enacted for the protection of public safety. Here, there had been careless welding in violation of local codes. The Court refuses to find any such public policy as claimed by the insurance carrier. Parties under a "waiver of subrogation" clause do not seek to avoid liability but rather to provide by contract for funding or payment of any losses. The subrogation claim by the fire carrier was denied.

Minnesota Fire and Casualty Co. v. Greenfield, Pa. Super., 805 A.2d 622 (2002)

Greenfield voluntarily provided heroin to Angela Smith who then died of a drug overdose. Greenfield also did not check Angela Smith's condition after she used the heroin. Minnesota Fire provided homeowner's coverage to Greenfield. Smith's parents filed suit against Greenfield raising allegations that sounded in negligence.

The Superior Court finds that Greenfield as a matter of law had an intent to cause injury to Smith and that the Minnesota Fire policy excluded intentionally caused injuries from coverage. Even though Greenfield may not have specifically intended that Smith die, the risk of death was such that intent would be inferred. With regard to Greenfield's failure to check on Smith after she took the heroin, the Court found that "the actions of Greenfield throughout the entire episode are inseparable from the original intentional act." Finally, the Superior Court noted that there were compelling public policy reasons for denial of coverage otherwise the Court would, in effect, approve insurance coverage for heroin dealers.

Erie v. Fidler, Pa. Super., 808 A.2d 587 (2002)

In the tort action, Denslow sued Fidler, alleging that Fidler threw Denslow with such great force that his head struck the wall and a desk, rendering him unconscious. The complaint further alleged that the above conduct was negligent and that Fidler did not desire or know that such consequences would result from his actions. Defense of Fidler was tendered to Erie, the homeowners' carrier. The Erie policy specifically excluded coverage for any bodily injury "expected or intended by anyone we protect." Erie filed a declaratory judgment action to challenge any duty to defend. The trial court and the Superior Court conclude that Erie did not afford coverage to Fidler for the Denslow claim.

Intent as used in the insurance policy does not require specific intent but only knowledge that such consequences were substantially certain to result. In an apparent attempt to assure the existence of coverage for the claim, Denslow in the tort suit does not allege that Fidler "expected or intended" the injuries and, in fact, instead references "negligence." The factual allegations, however, not the legal conclusions, determine the existence of coverage. Fidler's act of throwing Denslow against a wall and into a desk was such that injury as alleged by Denslow was substantially certain to result.

Aegis Security Insurance Company v. Pennsylvania Insurance Department, Pa. Cmwlth., 798 A.2d 330 (2002)

Aegis issued a homeowner's policy to Broschart. Broschart owned a nine year old three legged dog not known to be aggressive. A state trooper who had visited the Broschart property previously through the front entrance instead approached the property from the rear by crossing a creek. He was bitten by the three legged dog. Aegis sought to cancel the homeowner's policy, citing substantial change or increase in hazard as provided by statute.

In Pennsylvania, determining whether a particular dog creates substantial increase in hazard depends on whether the aggressive conduct of the dog was provoked. If the conduct was provoked, there is no substantial increase in hazard. If the conduct is unprovoked, there is a substantial increase in hazard and the policy can be cancelled. The Commonwealth Court affirms the determination of the Insurance Commissioner that the state trooper's unexpected entry to the premises through the rear yard constituted provocation to the dog. Cancellation of the policy was not permitted.

Philadelphia Contributionship Ins. Co. v. Shapiro, Pa. Super., 798 A.2d 781 (2002)

A law firm and its partners were insureds under various commercial policies and homeowners policies. In the underlying litigation, a John Doe plaintiff alleged that the law firm and its partners violated various statutes, intentionally inflicted emotional distress, engaged in prohibited discriminatory conduct, and illegally terminated his employment after learning that he had AIDS. The law firm and partners settled the John Doe lawsuit and then sought recovery from various insurance carriers for indemnity and cost of defense. Summary judgment was eventually entered in favor of all of the carriers. The Superior Court affirms.

The various policies provided coverage for bodily injury or property damage caused by an occurrence. The emotional distress or humiliation alleged by John Doe did not constitute bodily injury. In addition, John Doe's claim for front pay, back pay, and benefits did not constitute property damage. In any event, the intentional act of terminating John Doe's employment could not qualify as an "accident" and thus there was no occurrence under the policies. Finally, the homeowners policies had exclusions for "business pursuits of an insured" and the business decision to fire John Doe fell within the terms of those exclusions.

American Independent Ins. Co. v. E.S., Pa. Super., 809 A.2d 388 (2002)

AIIC brought a declaratory judgment action to establish that it did not owe liability coverage to the operator of a motor vehicle it insured. AIIC insured Crespo. Her son, an unlicensed minor, drove the car and hit a pedestrian, also a minor. The trial judge in the declaratory judgment action ruled:

1. That the coverage action was to be placed in a stay status pending resolution of any tort claim;
2. That AIIC was required at its expense to retain counsel to represent the minor pedestrian in the coverage suit; and
3. That AIIC was required at its expense to retain counsel to represent the minor driver in the coverage suit.

The Superior Court reverses all rulings of the trial court. Since the minor pedestrian was not directly involved in any coverage dispute with AIIC, AIIC had no obligation to provide counsel to her. AIIC similarly had no obligation to provide counsel to the operator of the insured vehicle. If AIIC was correct in its coverage position, it owed no coverage whatsoever to the minor operator. If AIIC was incorrect in its coverage position, it ran the risk of a subsequent bad faith lawsuit. There was no contractual basis, however, to impose on AIIC an obligation to retain counsel for the minor driver in the coverage suit. Finally, there was no factual basis to enter a stay of proceedings of the coverage action. The record did not even reflect that tort suits had been filed.

LIABILITY

Johnson v. City of Philadelphia, Pa. Cmwlth., 808 A.2d 978 (2002)

Officer Bullock, responding to an emergency police call in his squad car, collided with Johnson. At trial, the jury found that Bullock was driving recklessly and that Johnson was driving negligently. The jury assessed 55% of liability to Johnson and 45% to Bullock. The trial court molded the verdict under the Comparative Negligence statute, barring the claim of Johnson. Finding a faulty jury charge, the Superior Court reverses and awards a new trial.

The standard of care for a driver of an emergency vehicle is negligence under emergency circumstances. Under earlier statutes, the driver of such an emergency vehicle could be liable only for reckless conduct. That is no longer the law in Pennsylvania. The trial judge should have instructed the jury that Bullock and Johnson could each be found to be either negligent or reckless. In allocating respective shares, only similar type of conduct (negligent/negligent or reckless/reckless) can be compared.

Nigra v. Walsh, Pa. Super., 797 A.2d 353 (2002)

At a trial of a motor vehicle accident case, the jury returned a verdict that the defendant was negligent but that the negligence was not the proximate cause of plaintiff's injuries. During the course of the trial, defense counsel had given an opening statement and had conducted cross examination concerning plaintiff's application for and receipt of social security disability benefits. The Superior Court grants plaintiff a new trial.

The Superior Court notes that defense counsel could have pursued certain theories of cross examination without actually revealing the social security benefits. The Superior Court stated:

The alleged inconsistencies could have been easily established by asking appellant about his applications to a government agency and whether his statements in those applications are true. Appellant could then be questioned regarding the specific instances of inconsistent statements contained in the applications as well as how the statements contradict or are inconsistent with appellant's position and statements at trial. This could have been done without revealing the governmental agency to which appellant applied and without revealing the result of those applications.

Borger v. Murphy, Pa. Super., 797 A.2d 309 (2002)

Plaintiff appealed an order transferring venue of this medical malpractice action from Philadelphia County to Lehigh County on the eve of trial. Defendant did not claim that venue was improper, but instead that it was inconvenient in Philadelphia County. In affirming the transfer to Lehigh County, the Superior Court notes:

1. The decision of the trial judge on a transfer of venue will not be disturbed absent abuse of discretion.
2. Defendant must establish that the chosen forum is oppressive or vexatious. It is not sufficient to establish that the chosen forum has no significant contact with the claim or that another forum would be more convenient.
3. The defendant physicians in this case established that the extensive commute from Lehigh County to Philadelphia County would disrupt their medical practices and prevent them from seeing patients before and after court time. Defendant physicians also established that employees in their offices would face similar disruptions of their work schedules.

Cummings v. Elinsky, Pa. Cmwlth., 803 A.2d 850 (2002)

Cummings sued Elinsky in the Philadelphia County Court of Common Pleas for an accident that occurred in Newtown Township, Bucks County. Elinsky joined Newtown Township as an additional defendant. Newtown Township filed preliminary objections on venue, asserting that it was amenable to suit only in Bucks County. The trial court denied the preliminary objections. On appeal, the Superior Court reversed and transferred the litigation to Bucks County. A township may be sued only in the county where it is located and the transfer is required regardless of whether the complaint filed against the township is by the plaintiff or by a defendant.

Lange v. Burd, Pa. Super., 800 A.2d 336 (2002)

The automobile accident occurred on 6/20/96. Defendant died on 12/18/96, six months later. Suit was not filed until 6/5/98, about two weeks before expiration of the statute of limitations. Plaintiff, unaware that defendant was dead, named only the defendant (and not an estate) in the suit. At some time after 6/20/98, plaintiff filed a second suit, this time naming the estate.

The trial court and the Superior Court ruled that the first suit was a nullity since defendant was already deceased by the time suit was filed. The second suit was barred by the statute of limitations. The insurance carrier was under no duty to advise plaintiff that defendant was deceased. Although letters sent by the carrier prior to expiration of the statute of limitations made reference to "our insured," such a reference did not rise to the level of active concealment or misrepresentation.

Booher v. Olczak, Pa. Super., 797 A.2d 342 (2002)

The automobile accident occurred on 3/6/98. On Friday, 3/3/00, counsel for plaintiff mailed a praecipe for writ of summons to the Prothonotary of Westmoreland County. The cover letter and check were also dated 3/3/00. A clerk at the Prothonotary's office time stamped the filing on 3/10/00, several days after expiration of the statute of limitations. Defendant obtained judgment on the pleadings based on the statute of limitations defense. The Superior Court affirms. There is a strong policy in Pennsylvania favoring strict application of the statute of limitations. Prejudice is not an element that the moving party is required to prove in order to obtain judgment on the pleadings.

Efford v. Jockey Club, Pa. Super., 796 A.2d 370 (2002)

Owners of a horse farm brought a complaint in equity against an association handling breed registry. The trial court dismissed the litigation for want of personal jurisdiction over the defendant and the Superior Court agreed. Plaintiff sought to establish personal jurisdiction through defendant's web site which permitted on-line registry anywhere in the world. Defendant maintained no offices in Pennsylvania, had no agents or employees in Pennsylvania, did not pay Pennsylvania taxes, and was not registered with Pennsylvania to conduct business. Defendant neither owned nor leased property in Pennsylvania. The Superior Court finds that the maintenance of an internet web site which permits a Pennsylvania user to register a horse on-line is not a sufficient contact to establish jurisdiction under the long-arm statute.

Machado v. Kunkel, Pa. Super., 804 A.2d 1238 (2002)

In a medical malpractice wrongful death action, a separate award was rendered for the 12 year old daughter of the decedent. On appeal, the court distinguished between loss of consortium claims and a child's loss of guidance claims. A loss of consortium claim is brought by a spouse for the loss of company, affection, assistance of, and sexual relations with the injured spouse. Children are permitted to recover for loss of services such as guidance, tutelage, and moral upbringing. The trial judge had incorrectly referred to the child's claim as "loss of parental consortium," a term that is not recognized in Pennsylvania. The error was harmless, however, because the trial judge adequately described the elements of the child's claim.

Nelson v. Heslin, Pa. Super., 806 A.2d 873 (2002)

Plaintiff alleged injury due to a work related incident. His claim for compensation benefits, however, was ultimately denied even though the defense medical witness conceded that he may have suffered some type of injury. The WCAB determined that there was inadequate evidence of disability resulting from any injury. Plaintiff, however, had also retained counsel to pursue a third party products liability action. Counsel failed to file suit within the statute of limitations. Counsel then sought to defend the legal malpractice action by asserting that the compensation decision by collateral estoppel prevented plaintiff from proving any damages in a tort case. The Superior Court disagrees and allows the legal malpractice action to continue. The compensation decision established only that compensable disability had not been proved. In the tort case, plaintiff is not required to establish compensable disability but only an injury with resulting harm. As a result, the first prong of collateral estoppel (i.e. that an issue decided in a prior action is identical to one presented in a later action) had not been met.

Feldman v. Lafayette Green Condominium Assoc., Pa. Cmwlth., 806 A.2d 497 (2002)

Feldman got into an argument with another condo owner at Lafayette Green. The other owner filed a complaint with the condo association. The condo association wrote to Feldman, referencing her "confrontational manner" which it "considers...to be harassment." Feldman brought an action against the condo association for defamation. The Commonwealth Court affirms dismissal of the suit. Since the letter from the condo association clearly disclosed the facts supporting its opinions ("confrontational manner" and "harassment"), no claim is stated under Pennsylvania law. A statement that is merely an expression of opinion is not defamatory.

Poole v. WCAB, Pa., 810 A.2d 1182 (2002)

Poole received workers' compensation benefits after he fell on ice in front of his employer's building. Poole retained counsel to pursue a tort action against the owner of the property. Counsel, however, did not sue the proper parties within the statute of limitations. After Poole settled his legal malpractice claim against his attorney, the compensation carrier sought to subrogate against the settlement funds. The Supreme Court allows subrogation. Since Poole would have been required to prove "a case within a case" (i.e. that, but for counsel's error, he would have recovered from the negligent property owner), the compensation carrier should have the same subrogation rights against the negligent attorney as it would have had against the negligent property owner. The Supreme Court distinguishes this result from its earlier decision in *Dale Manufacturing* which limits such subrogation rights in medical malpractice actions. There is no "case within a case" element in the medical malpractice claim.

Hannington v. Trustees of the University of Pennsylvania, Pa. Super., 809 A.2d 406 (2002)

Plaintiff and the educational institution defendant were involved in litigation over tuition. The case was removed from the trial list when the parties reported a settlement. Various drafts of settlement agreements were exchanged and counsel for plaintiff eventually advised defendant in writing that plaintiff had agreed to the contents of a particular draft release. An order to settle, discontinue and end was filed. Plaintiff, however, refused to sign the release and then sought, through new counsel, to have the case restored to the trial list. The Superior Court affirms the trial court dismissal of the litigation.

The doctrine of apparent authority permits a settlement agreement to be enforced where a third party (here, the educational institution defendant) reasonably believes that the principal's lawyer had the authority to settle the case. This rule is enforced even when the lawyer fraudulently represents that he has such authority. Since the University had a reasonable belief that plaintiff had authorized a settlement, the doctrine of apparent authority was applicable to enforce the settlement agreement.

CPV Manufacturing v. WCAB, Pa. Cmwlth., 805 A.2d 653 (2002)

Claimant suffered a work related injury which required medical treatment. The injury, however, did not result in disability from employment. Instead, claimant lost time to attend doctor visits. The treating doctor did have evening hours which would have allowed claimant to seek treatment without losing time from work.

The Commonwealth Court rules that where medical treatment is available to a claimant during non work hours, claimant's election to instead seek treatment during work hours does not create a compensable disability. Claimant was not entitled to wage loss benefits for the times he left work to seek treatment for the compensable injury.

MVFRL

Bickerton v. Insurance Commissioner, Pa. Cmwlth., 808 A.2d 971 (2002)

Bickerton suffered severe head injuries in an automobile accident and, after exhausting his MVFRL coverage, was eligible for benefits under the now repealed CAT Fund. Because of his injuries, Bickerton lacks a sense of safety and judgment and requires 24 hour unskilled home health care. He needs supervision and care for most routine activities of daily life as well as specialized care, such as catheter care, medication administration, and special treatment of his left ear. The above care was being provided by Bickerton's spouse, son, and their employee. After paying for many years, the CAT Fund eventually challenged the level of detail and then the accuracy on the invoices submitted for payment. The CAT fund eventually denied payment on the theory that the invoices submitted did not document reasonable and necessary expenses for medical treatment and rehabilitative services. The Commonwealth Court affirms the denial of benefits.

The CAT Fund language describing "reasonable and necessary medical treatment and rehabilitative services" is from §1712 of the MVFRL, the same language which applies to MVFRL first party benefits. The invoices had described the care as "monitoring." The Commonwealth Court notes that "monitoring" is not one of the examples given in the §1712 definition. The Court further concludes that "monitoring" does not qualify as "rehabilitative services." "Rehabilitative services" must provide some benefit which would assist or increase a claimant's ability to care for himself. Bickerton failed to establish that "monitoring" met that standard. With regard to "medical treatment," the Court concludes that treatment requires overt action which is warranted by the circumstances and the value of which is verified by credible and reliable evidence. Bickerton once again failed to meet this standard since "monitoring" is not overt action. The Court further affirms denial of the claims for laundry care, house cleaning, and food preparation. While such services may have been covered under the old No Fault Act, the "replacement services" provision from that repealed statute does not appear in the MVFRL. The Court interprets that omission to constitute a statutory intent not to provide payment for such services.

Hoffman v. Troncelliti, Pa. Super., 799 A.2d 68 (2002)

Plaintiff, a passenger in her mother's van, was injured in an automobile accident with another vehicle. The mother's coverage provided full tort rights. Plaintiff, however, had her own limited tort policy. The trial judge ruled that the mother's full tort policy controlled and plaintiff accordingly was not required to prove an exception to limited tort at trial. The Superior Court reverses. The unambiguous language of §1705(b)(2) of the MVFRL controls:

...the tort option elected by a named insured shall apply to all insureds under the private passenger motor vehicle policy who are not named insureds under another private passenger motor vehicle insurance policy...

Since plaintiff was a named insured on a separate policy, her tort option, not her mother's tort option, applied.

BAD FAITH

Ridgeway v. U.S. Life Credit Life Insurance Company, Pa. Super., 793 A.2d 972 (2002)

Ridgeway had a life insurance policy with U.S. Life Credit with a mortgage company as the beneficiary. Following Ridgeway's death, U.S. Life refused to make payment until suit was filed by the Estate. U.S. Life then made payment to the mortgage company and further agreed to pay the Estate for consequential damages caused by the initial refusal to pay. In addition, the Estate pursued a bad faith claim which resulted in a \$95,000 award. A second bad faith lawsuit was then filed by the Estate against U.S. Life when the carrier failed to pay the promised consequential damages reimbursement and failed to pay the \$95,000 judgment. After the second suit was filed, U.S. Life finally made the payments. The Estate then sought further imposition of bad faith punitive damages for the failure to timely pay the earlier settlement on the consequential damages and the earlier judgment on the bad faith award. The trial court denied the U.S. Life preliminary objections but the Superior Court reversed and dismissed the lawsuit.

The Actions on Insurance Policies statute at 42 P.S. §8371 applies only to claims arising under an insurance policy. The Superior Court states that plaintiff's cause of action must originate from a writing setting forth an agreement between the insured and the insurance carrier that the insurance carrier would pay the insured upon the happening of certain circumstances. That was not the type of claim brought in the second bad faith lawsuit. Instead, Ridgeway at that point was simply a judgment creditor, not a claimant under an insurance policy. Once a settlement has been reached or a judgment has been entered against the insurance carrier, the carrier's fiduciary duty as an insurer is extinguished. As a result, the Actions on Insurance Policies statute no longer applies.

Petrecca v. Allstate Ins. Co., Pa. Super., 797 A.2d 322 (2002)

Petrecca brought a homeowners' claim against Allstate for alleged water loss damage. At trial, the judge refused the demand for jury trial and instead heard both the breach of contract claim and the bad faith claim non jury. An award was entered for plaintiff for compensatory damages, attorneys fees, and punitive damages. Since Allstate was entitled to a jury trial on the breach of contract claim, the Superior Court reverses. The Superior Court further vacates the punitive damage award and instructs the trial court to "reevaluate the bad faith damages following the jury's verdict on the breach of contract claim."

EMPLOYMENT

Heath v. WCAB, Pa. Cmwlth., 811 A.2d 90 (2002)

Claimant, a parole agent at Graterford Prison, filed a claim for workers' compensation disability benefits based on anxiety, chest pains, heart palpitations, and anxiety attacks caused by alleged sexual harassment by a supervisor at work followed by retaliation by the employer. A workers' compensation judge awarded benefits, the WCAB reversed, and the Commonwealth Court affirms the denial of compensation benefits.

In order to recover benefits for a psychic injury, claimant had the burden of proving by objective evidence that she had suffered a psychic injury and that such injury was other than a subjective reaction to normal working conditions. To meet that burden, she had to demonstrate either that actual extraordinary events occurred at work or that abnormal conditions over a longer period of time caused a mental injury. Claimant alleged the sexual harassment together with later conduct by the employer. As to the claim of sexual harassment, the Commonwealth Court states that such claims do not fall within the scope of workers' compensation coverage since the injury is necessarily caused by the act of a third person intended to injure the employee because of personal reasons, not work related reasons. Employers, in fact, have in harassment tort cases repeatedly sought immunity refuge under the Workers' Compensation Act and have been routinely denied that protection. As to any remaining bases for the claim involving retaliation or comments by inmates or other prison employees, the Commonwealth Court notes that claimant failed to meet the strict burden of proof in psychic injury cases.

Rothrock v. Rothrock Motor Sales, Pa. Super., 810 A.2d 114 (2002)

Bruce Rothrock owned the business. Theodore Rothrock, his brother, was a supervisor at the business. Douglas Rothrock, Theodore's son, was an employee at the business. Douglas submitted a workers' compensation claim, alleging that he injured his back while moving a computer. Bruce demanded that Theodore force his son to withdraw the workers' compensation claim or both would be fired. Douglas refused to withdraw the workers' compensation claim and, in fact, was eventually awarded disability benefits. Bruce fired Theodore in retaliation for his failure to get his son to withdraw the compensation claim. Theodore brought a wrongful discharge action against the business and obtained an award. The award is affirmed by the Superior Court.

Pennsylvania is an "employment at will" jurisdiction. As a general rule, an employer may discharge an employee with or without cause, at pleasure, unless such a discharge violates a law, a contract, or public policy. Pennsylvania courts have created some public policy exceptions. A wrongful discharge occurs, for instance, when an employee is discharged for filing an unemployment compensation claim, when an employee refuses to submit to a polygraph test as a condition of employment, when an employee is discharged for performing his statutory duty of reporting violations involving nuclear materials, when an employee is discharged for serving on a jury, or when an employee is discharged for filing a workers' compensation claim. As an extension of that last exception, the Superior Court finds that wrongful discharge also occurs when a supervisor is discharged for failing to persuade an employee to withdraw a workers' compensation claim.

ATTORNEYS

Gorski v. Smith, Pa. Super., 812 A.2d 683 (2002)

Clients sued their law firm on breach of contract and negligence theories for inadequate representation during certain real estate transactions. Following a jury verdict in favor of the clients, the law firm appealed to the Superior Court, alleging, in part, that the breach of contract claim should fail because there had been no failure to follow a specific instruction of the client and that the negligence claim should fail because the jury found clients contributorily negligent.

With regard to the breach of contract claim, the Superior Court, citing *Bailey v. Tucker, Pa., 621 A.2d 108 (1993)*, holds that every contract for legal services contains, as an implied term of the contract, a promise by the attorney to render legal services in accordance with the profession at large. A client may state a breach of contract claim by alleging that the law firm failed to fulfill the contractual duty to provide legal services in a manner consistent with the profession at large.

With regard to the negligence claim, the Superior Court agrees that contributory negligence, rather than comparative negligence, applies. If the clients are contributorily negligent, in short, the negligence claim is barred. The Superior Court further clarifies, however, that a client cannot be deemed contributorily negligent for failing to anticipate or guard against attorney negligence in the performance of legal services. Instead, contributory negligence in such cases arises when the client misrepresents crucial facts integral to the representation, withholds information from the attorney, or fails to follow specific instructions from counsel.

The award in favor of the clients was affirmed.

Wishnefsky v. Riley and Fanelli, Pa. Super., 799 A.2d 827 (2002)

Wishnefsky, a non-lawyer, entered into an agreement with the defendant law firm to split fees as he referred business to the lawyers. The firm recovered \$150,000 in fees in a products liability case referred by Wishnefsky. The law firm refused to pay Wishnefsky's agreed contingent share. The law firm also refused to pay under a subsequent agreement which was going to pay a salary for six months followed by a severance package. Fee splitting with non-lawyers is not permitted under the Rules of Professional Conduct.

Carter v. SEPTA, Pa. Cmwlth., 809 A.2d 464 (2002)

A wrongful death suit resulted in a defense verdict but, under a high/low agreement, plaintiff received \$50,000. Since court approval is required in any settlement involving an estate, a petition for court approval was submitted to Orphans' Court. Under the petition, the estate would have received approximately \$15,000 after payment of costs and counsel fees. The Court, however, unilaterally increased the estate's share to \$32,500. Counsel under the revised order received approximately \$17,500 to cover costs and attorneys fees. The cost for expert witnesses alone exceeded \$21,000. On appeal, the Commonwealth Court affirms the Orphans' Court order. Any settlement that protects a contingency fee and recovery of costs first and the recovery to the estate second is the proper subject of close judicial scrutiny. In changing the terms proposed in the petition, the Court could also disregard the affidavit of plaintiff agreeing to those terms since plaintiff would have had little or no bargaining power.