

## **ANNUAL UPDATE OF THE LAW – CIVIL LITIGATION**

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## **VENUE - PRELIMINARY OBJECTIONS - CORPORATE DEFENDANT**

*O'Donnell v. McDonough*, 895 A.2d 45 (Pa. Super. 2006).

A Montgomery county resident was injured in a motor vehicle accident while driving a vehicle in Delaware County which was owned by a Pennsylvania corporation. Suit was instituted in Philadelphia County.

Both the defendant driver and defendant corporation filed preliminary objections to Plaintiff's complaint, seeking to transfer the case to Montgomery County. The trial court granted the request and transferred the case on the mistaken assumption that the accident had occurred in Montgomery County. The Superior Court reversed and remanded the case. New preliminary objections were filed by the Defendants which were sustained by the trial court and the case was transferred to Delaware County. Plaintiff appealed the transfer.

*Reversed.* The Superior Court held that it could revisit the issue of venue which had previously been litigated because in the first appeal, the Court had exclusively focused on the erroneous assumption by the trial court as to the accident's location. In addition, the appellate court held that the trial court abused its discretion in finding that venue was improper in Philadelphia because the corporate defendant's registered address was in Philadelphia even though its operations were based elsewhere. See *Pa.R.C.P. 2179(a)(1)*.

## **PRE-COMPLAINT DISCOVERY - AVAILABILITY AND RESTRICTIONS**

*McNeil v. Jordan*, 894 A.2d 1260 (Pa. 2006)

A son who had been excluded from his mother's estate filed suit against Defendants. He alleged that they intentionally interfered with his attempts to reconcile with his mother prior to her death and that they convinced her to discharge her attorney in favor of their own.

Defendants filed preliminary objections including a demurrer, which were granted with thirty days' leave to amend. Plaintiff sought discovery in order to prepare the amended complaint; said requests were opposed and Plaintiff filed a motion for pre-complaint discovery. The motion was denied but Plaintiff was given another thirty days to amend the complaint. Plaintiff would not amend his pleading and the action was dismissed with prejudice. Plaintiff appealed. The Superior Court affirmed and the Supreme Court granted allocatur.

*Reversed and remanded; the trial court is directed to assess whether Plaintiff*

*can establish probable cause that his requested discovery will permit the filing of a complaint capable of surviving a demurrer.*

The Supreme Court found that the doctrine of *res judicata* did not bar the Court from deciding this appeal and that the statute of limitations would not bar any claim raised in a proposed amended pleading where the amendment does not change the cause of action but merely amplifies that which has been previously pled.

The Supreme Court rejected the Superior Court's requirement that a pleader must establish a *prima facie* case before being able to get pre-complaint discovery sufficient to survive a demurrer. Pennsylvania R.C.P. 4011 and the Dragonetti Act are sufficient restraints on the wrongful use of civil proceedings. Instead, pre-complaint discovery is appropriate only where there is probable cause to believe that the discovery will achieve that end and that the information sought is material and necessary to the filing of the Complaint. The litigant must also demonstrate good faith.

Justice Castille joined in the majority opinion.

Justice Saylor concurred.

Justice Cappy dissented in an opinion in which Justice Eakins joined.

Justices Nigro and Newman did not participate in this decision.

#### **MEDICAL MALPRACTICE - EXPERT WITNESSES - QUALIFICATIONS - MCARE ACT**

*Smith v. Paoli Memorial Hospital*, 885 A.2d 1012 (Pa. Super. 2005)

Plaintiff-Administrator filed a wrongful death and survival action arising out of his wife's death, alleging the Defendants' failure to diagnose and treat her leiomyosarcoma condition. Defendant gastroenterologists filed a motion *in limine* seeking to preclude Plaintiff's experts from testifying on their purported lack of qualifications under the MCARE Act. The trial court denied Defendants' motion. Following a jury trial and a verdict in Plaintiff-Administrator's favor, Defendants filed a post-trial motion for a new trial and Plaintiff-Administrator filed a motion for delay damages. The trial court granted Plaintiff-Administrator's motion and molded the verdict but did not rule on the Defendants' motion which was denied by operation of law through the passage of time.

On appeal by the Defendants, the Superior Court had to decide whether Plaintiff-Administrator's experts were qualified under the Act.

*Affirmed. The denial of Defendant's post-trial motion was proper. The verdict was not excessive and therefore, the request for remittitur is denied.*

The Superior Court found that the court below properly used the experts' curriculum vitae and reports to decide the motion *in limine*. The standard of care for a

patient with obscure gastrointestinal bleeding was within their expertise. The experts' lack of familiarity with a particular medical algorithm was not sufficient to exclude them as being qualified as Defendants' experts were "substantially" familiar with the standard of care needed for the specific care at issue and practiced in a sub-specialty with a substantially similar standard of care from the care at issue. Board certification is not essential in order to be qualified under the Act.

### **MEDICAL MALPRACTICE - VOIR DIRE - EXAMINATION ON PUBLICITY CONCERNING "MEDICAL MALPRACTICE CRISIS"**

*Capoferri v. CHOP*, 893 A.2D 133 (Pa. Super. 2006)

Plaintiffs are the parents and a child in this medical malpractice claim. The jury found in favor of all Defendants and Plaintiffs filed a post-trial motion requesting a new trial which was denied. They appealed.

On appeal, Plaintiffs contended that the trial court's refusal to allow the reading of selected questions during *voir dire* concerning publicity about the "medical malpractice crisis" hampered their ability to screen potential jurors.

*Reversed. New trial granted.* The Superior Court held that given the amount of publicity at the time of the trial concerning the medical malpractice crisis, the parties should have been allowed to question prospective jurors about their attitudes regarding this issue to determine if the juror could be fair and impartial.

The trial court erred in not asking potential jurors appropriate preliminary questions designed to detect whether any jurors had been exposed to tort reform or medical malpractice publicity.

In addition, the Court ruled that there was no abuse of the trial court's discretion in allowing references to color photographs while only black and white photographs were available to the jury.

Judge Klein dissented; he was joined by Judges Joyce and Lally-Green.

### **MEDICAL MALPRACTICE - JUDGMENT OF NON PROS - CERTIFICATE OF MERIT**

*Harris v. Neuberger*, 877 A.2d 1275 (Pa. Super. 2005)

Defendant doctor and hospital appeal from an order granting Plaintiff's petition to open judgments of *non pros*.

Plaintiff, the deceased's administrator, filed a medical malpractice action and before doing so, obtained expert reports concluding that the Defendants had breached

their standard of care in treating the Deceased. Plaintiff failed to file the required certificate of merit within sixty days after filing the complaint and Defendants filed praecipes to enter judgments of *non pros*. After entry of said judgments, Plaintiff petitioned to open the judgments alleging substantial compliance with the underlying rules of civil procedure. The Court granted Plaintiff's Petition. Defendants filed a motion for a stay of proceedings and appellate review. The Superior Court granted the stay and later the petition for review.

*Affirmed.* Decisions on the granting of petitions to open judgments of *non pros* are within a trial court's discretion and subject to an abuse of discretion or error of law standard. Plaintiff's expert reports were furnished to Defendants and facially stated a cause of action.

Plaintiff's lack of compliance with Pa.R.C.P. 1042.3 in not filing the certificate of merit within sixty days of filing the action was reasonably explained in that he gave the expert reports to Defendants well before the time limitation had expired. In addition, counsel did not just furnish an affidavit certifying that the report existed - he provided the curriculum vitae of the experts along with the reports themselves. Therefore the purpose of the rule, *i.e.*, the prevention of the filing of baseless lawsuits, was served.

#### **DENTAL MALPRACTICE - JUDGMENT OF *NON PROS* - FAILURE TO FILE CERTIFICATE OF MERIT**

*Yee v. Roberts*, 878 A.2d 906 (Pa. Super. 2005)

Plaintiff petitioned to open a judgment of *non pros* which was entered under Pa.R.P.C.P. 1042.6 in this dental malpractice case for her failure to file a timely certificate of merit. After suit was filed, Defendants filed preliminary objections and Plaintiff amended the complaint. The Defendants filed a praecipe for the entry of a judgment of *non pros* for her failure to timely file a certificate of merit. Judgment was entered against the Plaintiff one day after the time for filing a certificate of merit had expired; Plaintiff filed her certificate of merit hours after judgment was entered. Plaintiff filed a timely petition to open which was denied by the trial court.

*Affirmed.* Under Pa.R.C.P. 3501, a party seeking relief from a judgment of *non pros* must show a reasonable explanation or excuse for the inactivity or delay. Plaintiffs' proffered explanation was that the filing of preliminary objections by the Defendants denied her the full sixty days within which to prepare a foundation for her certificate of merit.

The Superior Court found that the preliminary objections did not alter Plaintiff's duty to obtain a written statement from an expert within sixty days of filing suit. No extension of time was requested under Rule 1042.3(d).

Second, the trial court properly dismissed the count in the complaint alleging vicarious liability, finding that it was subject to the same certificate of merit requirements since expert testimony would be needed to establish the standard of care applicable to the tortfeasor as well as the training and supervision of that individual by the employer.

**MEDICAL MALPRACTICE - JUDGMENT OF *NON PROS* - FAILURE TO FILE  
TIMELY CERTIFICATE OF MERIT**

*O'Hara v. Randall*, 879 A.2d 240 (Pa. Super. 2005)

Plaintiff instituted a medical malpractice action against multiple defendants. Preliminary objections were filed and Plaintiff filed an amended complaint. A second set of preliminary objections were filed and Plaintiff again amended her complaint. No certificate of merit was filed within sixty days. Judgments of *non pros* were entered by the court as to some but not all of the Defendants. Some of the Defendants filed motions for reconsideration but said motions were denied. The aggrieved Defendants appealed.

On appeal, Plaintiff argued that she had until sixty days after the filing of her second amended complaint in which to do so.

*Orders vacated and the case remanded for the entry of judgments of non pros.* Under Pa.R.C.P. 1042.3, a court, upon good cause show, shall extend the time for filing the certificate of merit for not more than sixty days upon timely motion.

The sixty day time limit for filing a certificate of merit is not renewed by an amended complaint; the term "filing" means the initial filing with the court. No request for an extension to file the certificate of merit was made.

In addition, the Court noted that there is no violation of Pa.R.C.P. 1042.4 in Defendants' filing preliminary objections during the period of time during which Plaintiff had to file a certificate of merit.

**LEGAL MALPRACTICE CLAIM - CERTIFICATE OF MERIT -  
LEGITIMATE OR REASONABLE EXCUSE FOR NOT FILING CERTIFICATE**

*Almes v. Burket*, 881 A.2d 861 (Pa. Super. 2005)

Plaintiff filed a legal malpractice claim arising out of a real estate transaction. The sixtieth day for filing the certificate of merit was December 22. On December 18, Plaintiff's expert mailed his report to Plaintiff's lawyer. Due to his gravely ill mother-in-law who died and was buried on December 22, the attorney was out of town, returning to his office on December 26. He found his expert's report and a praecipe for the entry of a judgment of *non pros* dated December 22. Judgment was entered on December

26.

On December 31, Plaintiff's attorney filed a petition for relief with a certificate of merit and an affidavit of facts regarding his absence from the office between December 18 and December 22. The Petition was denied. Plaintiff appealed.

*Reversed order granting judgment of non pros.* The Superior Court noted that the first two prongs of Pa.R.C.P. 3051, i.e., that the petition was filed in a timely manner and that there was a meritorious cause of action had been met. The question before the Court was whether counsel's excuse was legitimate or reasonable. Generally, an attorney's misapprehension may be a legitimate excuse. In this case, the attorney was tremendously distracted and it could not be said that he was so derelict in his obligations that the oversight could not be excused.

Judge Melvin dissented.

### **PROFESSIONAL MALPRACTICE – CERTIFICATE OF MERIT – FEDERAL COURT**

*Schils America Acquisition Corp. v. Schils BV*, 2006 WL 2853885 (M.D.Pa. 10/3/2006) (Caputo, J.)

Bankruptcy trustee filed an adversary action against several defendants, including a law firm and an accounting firm, against which the plaintiff alleged professional negligence claims. Plaintiff filed Certificates of Merit for all professional negligence claims pursuant to Pa.R.Civ.P. 1042.3. Several Third Circuit decisions have held that the Certificate of Merit requirements in the Pennsylvania Rules of Civil Procedure are substantive, not merely procedural, and accordingly apply in federal court actions.

In this case, the Court granted a motion to intervene, so that there were two sets of plaintiff-parties, i.e., the plaintiff and the intervening plaintiff. The intervening plaintiff failed to file a Certificate of Merit, and both the accounting firm and law firm defendants filed motions for summary judgment to dismiss the intervening plaintiff's claims for this failure.

*Held*, in the circumstances of the case, an additional Certificate of Merit was not required. The Court denied the motions, citing *Harris v. Neuberger*, 877 A.2d 1275, 1278 (Pa. Super. 2005), for the principle that as long as the purpose of the rule is satisfied, i.e. that there is an assurance that a baseless professional malpractice action has not been filed, the interests of justice do not require an additional Certificate of Merit.

**MEDICAL MALPRACTICE - APPLICATION OF CERTIFICATE OF MERIT  
REQUIREMENT FOR CASES WHICH ACCRUED PRIOR TO THE MCARE ACT**

*Warren v. Folk*, 886 A.2d 305 (Pa. Super. 2005)

Decedent died of cancer and her husband filed a medical malpractice suit against various doctors, hospitals and health insurance carriers in federal court. The federal court dismissed the suit for lack of jurisdiction and Plaintiff transferred the case to state court. No certificate of merit was filed. A judgment of *non pros* was entered in Defendants' favor and Plaintiff filed a motion to strike the judgments, arguing that the alleged malpractice occurred before Rule 1042.3 became effective. The trial court denied the petition and Plaintiff appealed.

*Affirmed.* The MCARE Act was adopted by the Supreme Court on January 27, 2003 and was effective immediately. There is no improper application of the rule to causes of action which accrued prior to the effective date of the Act because no vested right is being affected or infringed upon. This is simply a procedural requirement.

**CIVIL PROCEDURE - JUDGMENT OF NON PROS -  
PROFESSIONAL LIABILITY CLAIMS**

*Verner v. Classic Communities Corporation*, 890 A.2d 1068 (Pa. Super. 2006)

The Plaintiffs instituted a professional liability claim against an architectural firm. The trial court entered a judgment of *non pros* for Plaintiffs' failure to file a certificate of merit.

*Affirmed.* On appeal the Superior Court held that claims against an architectural firm are professional liability claims requiring a certificate of merit. The Plaintiffs could not offer a legitimate excuse or reasonable explanation for their failure to file same and therefore, the judgment of *non pros* was proper.

**CIVIL PROCEDURE - TERMINATION OF ACTION BY COURT - LEGITIMATE  
EXCUSE FOR LACK OF PROSECUTION**

*Wheeler v. Red Rose Transit Authority*, 890 A.2d 1228 (Comm.Ct. 2006)

Plaintiff commenced a civil action by writ of summons. After two years, the court initiated proceedings to terminate the case due to inactivity. The trial court notified Plaintiff's counsel in writing sixty days prior to termination. Five months later, counsel petitioned to reinstate the case. The trial court found that there was no legitimate excuse for not filing a statement of intention to proceed and a petition to reinstate within thirty days following termination of the case. The petition was dismissed and Plaintiff appealed.

*Affirmed.* On appeal, counsel argued that service of the notice by the court was improper because it would have been mailed to a prior office address and he had moved twice since then. A representative from the prothonotary's office testified that notice was sent to counsel's two prior addresses and one did not come back, indicating service.

In addition, there was no due process violation as counsel was given two hearings at which time he could demonstrate a legitimate excuse but he did not do so.

### **CRIMINAL CONTEMPT CITATION ISSUED AT TRIAL - ATTORNEY CONDUCT**

*Yoskowitz v. Yazdanfar*, 900 A.2d 900 (Pa.Super.2006)

An attorney appealed a criminal contempt citation which was issued by the trial court in the middle of a jury trial. The court observed counsel conversing with his expert in the courtroom on a break during the witness' direct examination. The attorney stated that he was just telling his witness that he would not be using the video machine. The court's position was that counsel could only speak to his witness in front of the court and cited him for criminal contempt.

*Reversed.* To sustain a criminal contempt citation, there needs to be misconduct in the court's presence committed with the intent to obstruct the proceedings which obstructs the administration of justice. Here, cross-examination of the Appellant's expert had not started. The Pennsylvania Rules of Evidence do not address the right of an attorney to consult with his witness during direct examination. The Pennsylvania Trial Guide states that it is customary for a court to tell a witness not to discuss his testimony if he is in the middle of cross-examination but there is no similar limitation when a witness is in the middle of direct testimony.

The evidence did not show beyond a reasonable doubt that the attorney intended to significantly disrupt the trial.

### **PRODUCTS LIABILITY - VERDICT SLIPS - JUDGMENT N.O.V.**

*Straub v. Cherne Industries and Dealers Service*, 583 Pa. 608, 880 A.2d 561 (Pa. 2005)

Plaintiff was injured at work when a product used to temporarily seal the inside of sewer pipes during installation exploded. Plaintiff filed a civil action alleging, *inter alia*, negligence, strict liability and breach of warranties.

At trial, the court gave the jury three verdict sheets, one each for strict liability, negligence and calculation of damages. The jury found that the defendant was 100% negligent but found the product not to be defective. Defendant filed post-trial motions,

including a request for judgment n.o.v.

The trial court did not rule on Defendant's motion and it was denied by operation of law. The Superior Court reversed the trial court.

*Reversed.* Pennsylvania R.C.P.227.1 governs post-trial relief. Under the contemporaneous objection rule, the objection needs to be preserved when the verdict is entered. Since the Defendant did not object to the verdict sheets and the court's instructions, it had waived its argument that it was entitled to judgment n.o.v.

Justice Newman did not participate in the decision.

## **PRODUCTS LIABILITY - ASSUMPTION OF THE RISK DOCTRINE**

*Hadar v. Avco Corporation*, 886 A.2d 225 (Pa. Super. 2005).

Plaintiff was injured while operating a corn picker as a favor to his neighbor; he was somewhat familiar with the machine. He instituted a products liability suit against the manufacturer and distributor and added his neighbor as an additional defendant. Following discovery, Defendants moved for summary judgment based upon the assumption of the risk doctrine. Summary judgment was granted in their favor and Plaintiff appealed.

*Orders granting summary judgment reversed.* The appellate court agreed with Plaintiff that he did not assume the risk of the corn stalk becoming entangled and being pulled with such force so that an individual could not release his grip on it. The general risk of which Plaintiff admits he was aware was different from the specific risk he encountered.

Whether Plaintiff knew of the specific danger of a corn stalk getting caught and his hand being pulled into the machine was a jury question.

Judge Melvin dissented.

## **INDUSTRIAL ACCIDENT - EVIDENCE OF THE ABSENCE OF PRIOR ACCIDENTS ADMISSIBLE**

*Forest v. Beloit Corporation; Harnischfeger Industries, Inc.*, 424 F. 3d. 344 (3d. Cir. 2005)

The Plaintiff injured his arm at work when it became stuck in between two very large rollers. The trial court permitted two employees to testify that they were unaware of any prior accidents involving those rollers. The jury found that the Defendant's product was not defective and Plaintiff appealed.

*Reversed and remanded.* This case was analyzed by the federal court under Rules 402 and 403 of the Federal Rules of Evidence. The Defendant must lay a foundation before such evidence can be admitted. The foundation must demonstrate that the proffered testimony relates to substantially identical products used in similar circumstances, that the Defendant indicates the number of prior units sold and their usage history and that it is likely that the Defendant would have known of previous accidents had they occurred.

**CRIMINAL LAW - EVIDENCE -  
COMPUTER-GENERATED ANIMATION - ADMISSIBILITY**

*Commonwealth v. Serge*, 896 A.2d 1170 (Pa. 2006).

Defendant shot and killed his wife and was charged with first and third degree murder. Prior to trial, the Commonwealth filed a motion *in limine* seeking permission to present a computer-generated animation which depicted a reconstruction of the crime and which was used to impeach the Defendant's allegations that he had acted in self-defense. He was convicted of first degree murder. He appealed his conviction and alleged that the admission of computer-generated animation evidence was improper.

*Affirmed.* The Superior Court, in a case of first impression, found that the Commonwealth had met the foundational requirements for admitting computer-generated animation evidence. Such evidence is tested against the same standard for admissibility as is other evidence, i.e, whether the probative value outweighs the prejudicial effect of said evidence. See *Pa.R.E. 401, 402, 403 and 901*. Authentication is required as well.

After announcing the general standard for admissibility, the Court found that the Commonwealth had presented various witnesses to describe how the animation was created and that this evidence was properly admitted.

**MEDICAL MALPRACTICE - CORPORATE NEGLIGENCE CLAIM -  
IRRECONCILABLY CONFLICTING EXPERT OPINIONS**

*Brodowski v. Ryave*, 885 A.2d 1045 (Pa. Super. 2005).

Plaintiff was admitted to Defendant hospital on an emergency basis with varying symptoms. Two possible diagnoses were considered. Inexplicably, Plaintiff was then admitted to the psychiatric unit where she signed herself out and went to another hospital and was admitted for treatment. There, she was diagnosed with a thrombotic stroke. She alleged a failure to make a timely diagnosis and to administer a drug that could have slowed down the progress of the stroke. The trial court entered a nonsuit in favor of the emergency room doctor and cardiologist on the ground that the expert testimony was irreconcilably conflicting. The jury found that the remaining Defendants

were not liable to Plaintiff and she appealed.

*Reversed.* The Superior Court, *en banc*, held that the Plaintiff presented sufficient evidence upon which a court could find that the Defendant hospital had constructive notice that it lacked adequate policies regarding triage and shift changes in the emergency room and that the Plaintiff was improperly admitted to the psychiatric unit. Plaintiff should have been able to present evidence of a corporate negligence claim.

As to the compulsory nonsuit granted in favor of the emergency room doctors, Plaintiff's experts did not irreconcilably conflict on the emergency room doctor's duties and breach thereof.

The non suit as to the cardiologist in the emergency room was properly granted due to an irreconcilable conflict between the experts on the standard of care issue.

### **EVIDENCE - HEARSAY**

*Papach v. Mercy Suburban Hospital*, 887 A.2d 233 (Pa. Super. 2005).

Decedent sustained a subdural hematoma as diagnosed by a CT scan in a motorcycle accident. Thirteen days later, he was found on the ground. A second CT scan showed the subdural hematoma and swelling of the brain.

Plaintiff-Administrator did not produce an expert opinion as to the standard of care for a family doctor. The trial court granted the Defendant doctor's motion for summary judgment. At trial against the remaining Defendants, the court allowed evidence of an emergency medical services report from the second accident. A defense verdict was returned and Plaintiff-Administrator appealed.

*Affirmed in part and reversed in part.* On appeal, the Plaintiff-Administrator contended the he was not required to produce an expert opinion to establish the family doctor's negligence because one of the other Defendant doctors had told him on the telephone that there was a possibly abnormal CT scan that required follow-up. Plaintiff also claimed that the emergency medical services report was erroneously entered into evidence.

As to the family doctor, the Superior Court held that the non-suit was proper because the negligence claim was not so simple or did not involve such an obvious lack of skill or want of care that lay people would understand the issue. There was no obvious causal connection between the alleged negligence and the Decedent's death.

As to the emergency medical services report, the appellate court found that although it was not admitted into evidence, it was improperly used to cross-examine Plaintiff-Administrator's expert and during the direct examination of a defense expert.

The report contained information from unidentified individuals which was given to the ambulance crew; therefore, this information constituted inadmissible hearsay. The exception to the hearsay rule for statements in medical records was erroneously applied by the trial court. The information contained in the report was not produced by people engaged in the course and scope of their business and therefore, lacked trustworthiness. See *Pa.R.E. 803(6)*.

### **EVIDENCE - HEARSAY - APPLICABILITY OF EXCEPTIONS**

*Harris v. Toys "R" Us*, 880 A.2d 1270 (Pa. Super. 2005), *appeal denied*, 895 A.2d 1262 (Pa. 2006).

Plaintiff brought suit claiming that while shopping at one of Defendant's stores, an item fell from a tall shelf, striking her. Although she stated that she did not know where it came from, she testified that an unknown person, allegedly an employee of Defendant's store, came over to her and apologized for placing the item back on the shelf incorrectly. Plaintiff sought to introduce this statement at trial on the grounds that it was admissible as an admission by a party opponent, an excited utterance and as a present sense impression. The trial court granted a motion *in limine* and precluded the admission of said statement. Following a defense verdict, Plaintiff appealed, raising as an assignment of error the preclusion of this statement at trial.

*Affirmed.* The Superior Court found that the statement met the definition of hearsay and did not fall within one of the stated exceptions. Since the author of the statement was unknown, Plaintiff was unable to show that he was an employee of the Defendant acting within the scope or agency of that employment so the statement could not be construed as a party admission. In addition, the statement did not qualify as an excited utterance because there was no emotion in the speaker's voice and because there was no evidence that he had participated in or watched the event he was talking about. Lastly, the Court could not decide whether the statement was a present sense impression because the Plaintiff had failed to analyze the issue with any citation to appropriate authority and therefore, the Court deemed the argument to be waived.

### **EVIDENCE - MAILBOX RULE**

*Russock v. AAA Mid-Atlantic Insurance Company and Citizen's Bank*, 898 A.2d 636 (Pa. Super. 2006)

This declaratory relief action sought to determine Plaintiff's entitlement to automobile insurance coverage issued by AAA. Premium payments were to be made on-line through Defendant bank in accordance with an agreement with Plaintiff. The payment due date was June 13, 2003 and on June 3, Plaintiff requested Defendant bank to issue a payment through its service indicating that the due date was June 13, 2003. The check was issued and mailed by the bank. On June 20, 2003, the Plaintiff

was involved in an accident which he reported to his carrier; he later received a cancellation notice from AAA despite the fact that it had cashed the premium check. A bench trial was held and the Defendants were found not liable. Plaintiff's motion for judgment n.o.v., was denied and he appealed.

*Reversed.* The Superior Court held that it was error to deny Plaintiff's motion for judgment n.o.v. as the policy was not cancelled under these facts. The Plaintiff requested that the check be issued ten days prior to the due date; the check arrived four days after the due date and was credited on his policy. The Superior Court agreed with Plaintiff that the mailbox rule applied, i.e., that the payment was deemed to be received on the mailing date.

### **MEDICAL MALPRACTICE - SPONGE RETAINED IN BODY - JUDGMENT N.O.V. CORRECTLY REFUSED**

*Faherty v. Gracias*, 874 A.2d 1228 (Pa. Super. 2005).

Plaintiffs sued various medical professionals on the ground that the Decedent died from complications from a bacterial infection due to a sponge retained in his body after one of several surgeries. Decedent was involved in a motor vehicle accident that caused catastrophic injuries. Several sponges were left in his body to control internal bleeding. In a subsequent surgery during his hospitalization, the surgeon believed that he had removed all remaining sponges but it was not a high priority as this was not to be the definitive abdominal closure.

Following a defense verdict, Plaintiffs appealed the trial court's refusal to grant a judgment n.o.v. or a directed verdict as to the nurses' negligence.

*Affirmed.* The trial court correctly refused to enter a directed verdict or a judgment n.o.v. Given the physician's testimony that this was not the final abdominal surgery, the jury could have found that the nurses had no duty to ascertain the correct number of sponges left in the Decedent's body. The initial surgeries were focused on saving the Decedent's life and controlling bleeding. In addition, the risk of infection was present regardless of whether the sponge had remained in the body.

Judge Gantman concurred.

## **CIVIL PROCEDURE - JUDGMENT N.O.V. - PLAINTIFF'S CRIMINAL RECORD**

*Birt v. FirstEnergy Corp.*, 891 A.2d 1281 (Pa. Super. 2006)

Plaintiffs sued an electric company and various contractors for work-related injuries to one of the Plaintiffs. Prior to trial, the claims against all of the Defendants except for the electric company were disposed of. The jury entered a defense verdict. Plaintiffs argue that they were entitled to judgment n.o.v. and/or a new trial. One of the evidentiary errors cited by Plaintiff was the admission of one of the Plaintiff's criminal record and in allowing the cross-examination of Plaintiffs' economic expert with evidence that a Plaintiff had been convicted of insurance fraud in 2000.

*Affirmed.* Cross-examination of the injured Plaintiff's treating psychologist with evidence that the patient had been convicted of statutory rape more than ten years ago was proper under Pa.R.E. 609. The psychologist admitted that the Plaintiff had given different information to him concerning his criminal background in contrast to that provided to his social worker.

In addition, it was appropriate to admit one of the Plaintiff's convictions for insurance fraud under Pa.R.E. 609; it was also relevant to the economic expert's lost earning calculation. The economist admitted that a criminal record would have a bearing on the Plaintiff's ability to obtain employment.

The Court also noted that the Plaintiffs were not entitled to a missing witness instruction where the Defendant did not call one of its employees to the stand since that individual was not particularly within the control of either party.

The appellate court indicated the trial court properly admitted evidence of an OSHA citation to Plaintiffs' employer because the jury should have been able to consider whether the accident was in any way caused by improper workplace activities or whether the Defendant was negligent regardless of any OSHA violations.

Finally, the Court noted that an incident report did not qualify as a business record under Pa.R.E. 803(6) and 42 Pa.C.S. Section 6108 because the trial court still had the right to question its reliability and the document contained layers of hearsay; Plaintiffs did not provide the trial court with a justification for admitting the hearsay.

## **CIVIL PROCEDURE - MOTOR VEHICLE ACCIDENT - PERSONAL INJURY - LIMITED TORT - SERIOUS BODILY INJURY THRESHOLD**

*Long v. Mejia*, 896 A.2d 596 (Pa. Super. 2006).

Plaintiff instituted this personal injury suit arising out of a motor vehicle accident; his insurance policy contained a limited tort option. A bench trial was held and the court

found that the Plaintiff's injuries exceeded the limited tort threshold. Defendants appeal, alleging that Plaintiff failed to provide competent medical evidence and that the verdict was against the weight of the evidence.

*Affirmed.* The Superior Court focused not on the injury itself but on how that particular injury affected that particular plaintiff. The same injury may affect different people differently, especially given their occupation. Plaintiff's evidence was sufficient to show that his inability to use tools for his job as a laborer due to his accident-related injuries and condition met the threshold.

#### **CIVIL PROCEDURE - MOTOR VEHICLE ACCIDENT - FIRST PARTY BENEFITS**

*Swords v. Harleysville Insurance Company*, 883 A.2d 562 (Pa. 2005).

Plaintiff was injured while driving a vehicle owned by his father and insured by Defendant. He also owned a registered but uninsured vehicle. He sued the Defendant when the carrier denied his request for first-party wage loss benefits and declaratory relief. Plaintiff filed a motion for partial summary judgment on the declaratory relief portion of the complaint. The trial court granted the motion. The Superior Court, *en banc*, reversed and remanded the decision. Plaintiff appealed to the Supreme Court.

*Affirmed the Superior Court's decision.* The Court also corrected the Superior Court's decision in that it was meant to only apply to the declaratory relief count in the complaint. The Court held that Plaintiff was not entitled to recover first party benefits under his father's policy because he owned a registered vehicle which did not carry financial responsibility. The language contained in the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. Section 1714, is clear.

#### **CIVIL PROCEDURE - MOTOR VEHICLE ACCIDENT - PAYMENT OF FIRST PARTY BENEFITS NOT ADMISSION OF CAUSATION**

*Pantelis v. Erie Insurance Company*, 890 A.2d 1063 (2006).

The Plaintiff was injured in two automobile accidents within three months. Her carrier paid \$10,000 in first party medical benefits in the second crash. When the carrier denied Plaintiff's claim for uninsured benefits from the second crash, the case went to arbitration and the arbitrators awarded Plaintiff \$8,500. Plaintiff filed a Petition to set aside, modify or correct the award of arbitrators and the award was confirmed by the trial court. Plaintiff appealed.

*Affirmed.* The Superior Court rejected Plaintiff's argument that just because the carrier had paid first party benefits, it became obligated to pay uninsured motorist benefits. An insurer's payment of first party benefits does not by itself constitute a binding admission of causation. With regard to the uninsured motorist claim, the carrier

stood in the shoes of the uninsured tortfeasor and was able to raise any defenses that the tortfeasor might have properly asserted.

**CIVIL PROCEDURE - MOTOR VEHICLE FINANCIAL  
RESPONSIBILITY STATUTE - BAD FAITH - STATUTORY CONFLICT**

*Harris v. Lumberman's Mutual Casualty Co.*, 409 F.Supp.2d 618 (E.D. Pa. 2006) (Memorandum Opinion).

Plaintiff sued for first party medical and wage loss benefits and included a claim for bad faith based upon the carrier's denial of said benefits. The carrier moved for the dismissal of the bad faith claims on the ground that the Pennsylvania bad faith statute, 42 Pa.C.S. Sections 8371 and 1797 preempted Sections 1716 and 1797 of the Motor Vehicle Financial Responsibility Law.

As to the bad faith claim based upon first party benefits, the Court concluded that the two statutes are irreconcilable and therefore, the special provisions of the MVFRL preempted the general provisions of the bad faith statute unless the general provision had been more recently enacted or it demonstrated an intention that it should supercede the more specific statute. Since neither of those exceptions existed, Plaintiff's bad faith claim based upon the carrier's denial of medical benefits was preempted.

As to the bad faith claim based upon the denial of wage loss benefits, the Court found that Section 1716 of the MVFRL was reconcilable with Section 8371 of the bad faith statute because they each impose different penalties for different degrees of improper conduct. Therefore, the bad faith statute was not preempted by the MVFRL in this regard.

**PERSONAL INJURY - NEGLIGENT ENTRUSTMENT - COVERAGE DENIED**

*Wilcha v. Nationwide Mutual Fire Insurance Company*, 887 A.2d 1254 (Pa. Super. 2005).

A minor operating a dirt bike collided with a vehicle driven by Plaintiff. Plaintiff sued the minor's parents for negligent entrustment and supervision. The minor's parents submitted the claim to their homeowner's insurance carrier who denied coverage on the ground that the policy specifically states that there is no coverage for bodily injury or property damage arising out of the use of a motor vehicle that is owned, operated, rented or loaned to the insured. Plaintiff lost at trial and appealed.

*Affirmed.* The Superior Court found that one of the essential elements a plaintiff needs to prove in order to prevail on a negligence entrustment theory is the negligent operation of a motor vehicle. Therefore, coverage was properly denied.

## **DOCTOR'S OBLIGATION TO NOTIFY PennDOT OF PATIENT DISABILITIES - DUTY TO INJURED THIRD PARTIES**

*Hospodar v. Schick*, 885 A.2d 986 (Pa. Super. 2005).

An individual who had been diagnosed with a seizure disorder was involved in two motor vehicle accidents after he blacked out behind the wheel. Thereafter, he was treated by Defendant doctor who was aware of these incidents and that his patient had lost his driver's license as a result of the second accident. The physician was aware that the patient was at high risk for blacking out again while driving and that he could cause serious bodily injury to others if that were to happen. Defendant doctor filled out a PennDOT form indicating the he did not know if his patient was competent to operate a motor vehicle. When questioned by PennDOT, he stated that his patient was safe to operate a motor vehicle.

About five months later, the patient blacked out again while driving and killed two people. Their estates brought medical malpractice claims against the Defendant doctor who filed preliminary objections in the nature of a demurrer to the complaint. The trial court denied the preliminary objections but certified the issue for appellate review.

*Held*, that because the patient was aware of his condition, his doctor could not be held liable to third parties for damage he caused by virtue of his black-outs.

## **CIVIL LITIGATION - PERSONAL INJURY - LACK OF PROXIMATE CAUSE**

*Lux v. Gerald E. Ort Trucking, Inc.*, 877 A.2d 1281 (Pa. Super. 2005).

Police responded to an accident scene. When the truck driver who had caused the collision fled, one of the police officers left the scene to search for him. Another truck driver collided into the Plaintiff's rescue vehicle causing Plaintiff severe injuries.

Plaintiff claimed that the first truck driver was negligent because in fleeing the scene, he caused some of the police officers to leave the scene to look for him, thus causing the second accident.

Plaintiff filed suit against the Defendant truck driver who filed preliminary objections. The trial court granted the preliminary objections on the ground that the first truck driver's conduct was not the cause of Plaintiff's harm. Plaintiff appealed.

*Affirmed*. The Superior Court held that the second collision was caused by the second truck driver's falling asleep at the wheel. The Defendant's conduct in failing to use his flashers, driving without a license and fleeing the scene did not constitute a substantial factor in causing the second collision. No proximate cause existed to support Plaintiff's claim.

## **GOVERNMENTAL IMMUNITY - GOVERNMENTAL IMMUNITY THRESHOLD**

*Smith v. Endless Mountain Transportation Authority*, 878 A.2d 177 (Comm. Ct. 2005).

Plaintiff, who has a longstanding multiple sclerosis condition, resided in a nursing facility which made arrangements with the Defendant to transport her for a routine medical examination. An employee of Defendant placed her in her wheelchair in the back of the Defendant's van. En route, the wheelchair fell over inside the van and she struck her head on a metal chair lift, sustaining a cervical fracture and requiring treatment.

Plaintiff sued the van driver and the Defendant Authority, alleging that the latter was a Commonwealth agency. The Defendant Authority filed preliminary objections in the nature of a demurrer, asserting that it was not a Commonwealth agency but a local agency entitled to governmental immunity.

The trial court found that Defendant Authority was a local agency and ordered the Plaintiff to amend the complaint. Following discovery, the Defendant Authority moved for summary judgment. The trial court granted the motion on the ground that the Plaintiff could not meet the damages threshold set forth in 42 Pa.C.S. Section 8553(c)(2)(ii) and Plaintiff appealed.

*Affirmed.* The Commonwealth Court began by defining the damage threshold of a permanent loss of a bodily function as the inability to do or perform a bodily act which the individual was able to do or perform before sustaining the injury and that the loss of such ability is permanent.

Here, the Plaintiff's cervical fracture had healed. The Plaintiff had been confined to a wheelchair for years prior to the accident, so there was no proof that the injury interfered with her ability to perform her normal bodily functions. Therefore, the threshold was not met.

## **SOVEREIGN IMMUNITY - REAL ESTATE EXCEPTION - DANGEROUS CONDITION OF PROPERTY**

*Cowell v. Commonwealth, Department of Transportation*, 883 A.2d 705 (Comm. Ct. 2005).

Plaintiff and his deceased wife were driving under a bridge when a minor negligently cause an object to fall from the bridge, breaking his windshield and fatally injuring his wife. The road and bridge were both owned and maintained by PennDOT. There had been a prior history of similar occurrences and a barrier was due to be

installed, but it had not yet been erected.

Plaintiffs alleged that the Department's failure to install a barrier on the bridge to prevent falling objections or to warn motorists of the danger or to police the bridge were actionable. The Commonwealth filed preliminary objections in the nature of a demurrer which were sustained by the trial court and Plaintiff appealed.

*Affirmed.* The Commonwealth Court held that it was insufficient to allege a dangerous condition. There must be an artificial condition or defect of the land itself. It is not sufficient to allege that the land facilitated acts by third parties. The DOT's knowledge of prior incidents and its failure to correct the problem does not state a claim under the real estate exception to the sovereign immunity statute.

### **SOVEREIGN IMMUNITY - VEHICLE STRIKING TREE**

*Fritz v. Glen Mills School*, 894 A.2d 172 (Comm. Ct. 2006).

Plaintiff was delivering pizza for his employer when his vehicle left the road, striking a tree on property owned by a school; he has no memory of the accident. Plaintiff filed suit against his employer, the school and PennDOT. All Defendants filed motions for summary judgment; all were granted and Plaintiff appealed.

*Affirmed.* The Commonwealth Court affirmed the trial court's granting of summary judgment against all Defendants. The school was not responsible for the Plaintiff's loss of control of his car. The employer could not be held liable in negligence, fraud or negligent misrepresentation under the Workers' Compensation Act for failing to provide insurance or in promising to do so. As to PennDOT, because Plaintiff could not remember the accident, there was no way to know why his car left the road and struck a tree. Therefore, causation could not be established against PennDOT or the school.

### **SOVEREIGN IMMUNITY - LIABILITY FOR FAILURE TO MAINTAIN INTERSTATE HIGHWAY**

*Daubenspeck v. Commonwealth, Pennsylvania State Police*, 894 A.2d 867 (Comm. Ct. 2006).

Pennsylvania State Police responded to a motor vehicle accident that occurred when a motorist lost control of his vehicle on an icy road. After securing the accident scene, they requested that PennDOT correct the icy road condition; the police then left the area. Shortly thereafter, Decedents skidded on ice at the same location causing their deaths. Their estate representatives filed suit against the State Police who filed preliminary objections in the nature of a demurrer, arguing that the claims did not fall

within any exception to the governmental immunity statute. The trial court sustained the preliminary objections and Plaintiff appealed.

*Affirmed.* Generally, the common law duty of the police to protect the public does not extend to individual instances unless there is a special relationship arising from knowledge of an individual's circumstances or unique status and the police voluntarily assume a duty to protect that individual. Since no such relationship existed here, there could be no liability.

In addition, since the road was part of a federal interstate highway, Penn DOT had the duty to maintain it. The State Police did not have jurisdiction over that road and therefore, the claim did not fall within the real estate exception to the sovereign immunity statute.

### **DISCOVERY - SANCTIONS UNDER Pa.R.C.P. 4019 - *NON PROS***

*Sahutsy v. Mychak*, 900 A.2d 866 (Pa. Super. 2006), on remand from the Supreme Court at 585 Pa. 10, 887 A.2d 1217 (2005) for disposition on the merits.

The Sahutskys filed a legal malpractice action against Defendants. During that litigation, the Sahutskys' counsel failed to respond to letters inquiring as to the status of discovery, a motion to compel discovery, a rule returnable issued by the trial court and an order requiring them to file answers to discovery requests over an almost eleven month period. There was no contact from counsel. The trial court entered a judgment of *non pros* and dismissed the Sahutskys' complaint with prejudice. They moved to open the judgment but the trial court denied their petition.

*Affirmed.* The Superior Court held that where a case has been *non proessed* under Pa.R.C.P. 4019, the appellant must file a petition to open or strike before the order is appealable. Second, the Court held that actual prejudice need not be shown when a judgment of *non pros* is entered as a sanction for failure to comply with a judicial order. Last, the trial court is not required to give notice and provide a hearing before it may enter a judgment of *non pros* under Rule 4019.

The appellate court agreed with the trial court that the illness and death of the Sahutskys' counsel did not excuse the failure to comply where counsel indicated that he was tending to other work-related commitments during this time and where the court did not even receive a telephone call.

## **EVIDENCE - BLOOD ALCOHOL CONTENT OF PLAINTIFF DRIVER AND SUBSEQUENT D.U.I. CONVICTION**

*Lock v. City of Philadelphia*, 895 A.2d 660 (Comm. Ct. 2006).

Plaintiff was injured in a motor vehicle accident when a Philadelphia police car went through a stop sign and collided with him during a pursuit. Plaintiff was taken to the hospital, blood was drawn and he was arrested and convicted of driving under the influence. He sued the City for personal injuries. The trial court granted Plaintiff's motion *in limine* precluding the introduction of his conviction but allowed independent evidence of his alcohol consumption and blood alcohol content with regard to the City's argument that the Plaintiff was contributorily negligent. The jury found the Plaintiff and Defendant each to be 50% negligent; the court molded the verdict to reduce it accordingly and Plaintiff appealed.

*Affirmed.* The Superior Court held that the trial court properly admitted evidence of Plaintiff's blood alcohol level and the fact that it exceeded the legal limit. The Court also found that the \$1,032 pain and suffering award bore a reasonable resemblance to the damages proven for the permanent scar on the Plaintiff's knee considering the conflicting expert testimony on the nature, permanence and extent of his injuries.

## **JURY VERDICT - JURY INTERROGATORIES - 5/6 RULE**

*Fritz v. Wright*, 872 A.2d 851 (Pa. Super. 2005), *petition for allowance of appeal granted*, 884 A.2d 250 (Pa. 2005).

A jury found in Plaintiffs' favor in a personal injury action. In response to seven interrogatories, only 10 of 12 jurors agreed that the Plaintiff's contributory negligence was not a substantial factor in bringing about his harm. Ten out of twelve agreed on the amount of the Plaintiffs' damages but it was not the same ten jurors who had agreed on causation. Defendants appealed.

*Judgment vacated and remanded for a new trial.* The Superior Court noted that this was a case of first impression as to whether the verdict consists of severable verdicts, one for each interrogatory, or whether the verdict consists collectively of all interrogatories. The Court held that the verdict, which required five-sixths of the jurors to agree, is a collective verdict. There was no identical unanimity on each question since only nine of the twelve jurors agreed as a whole on the verdict. Therefore, there was no verdict at all. **OCTOBER, 2006: REVERSED, BY THE SUPREME COURT**

**PERSONAL INJURY - JOINT AND SEVERAL  
LIABILITY - STRICT LIABILITY AND NEGLIGENCE CLAIMS**

*Harsh v. Petroll*, 887 A.2d 209 (Pa. 2005).

Decedents were killed when Petroll drove his tractor-trailer into the family's Chevrolet Lumina which caught on fire, killing the occupants. Petroll was convicted of three counts of vehicular homicide. The Decedents' estates sued Petroll and General Motors claiming a design defect in the fuel distribution system that caused the fire, citing a strict liability, crash worthiness theory. The jury found the Lumina to be defective and that the defect was an additional substantial factor in causing the fatalities. The trial court directed a verdict against Petroll; the jury found Petroll's negligence was also a substantial factor. The trial court also found that the Defendants were jointly and severally liable to Plaintiffs. Defendants appealed, arguing that the trial court erred in applying principles of joint and several liability and in not separately apportioning their respective liabilities and damages. Petroll argued that the harms should be separated so as to relieve him of liability for the Decedent's deaths.

*Affirmed by the Commonwealth Court.* Defendants appealed to the Supreme Court.

*Affirmed by the Supreme Court.* The general rules of concurrent causation and joint and several liability apply here. Enhancement in crash worthiness cases is only used to delineate the basis for and extent of a manufacturer's liability. It does not operate to relieve a negligent tortfeasor from liability where that party's concurrent conduct also served as a substantial factor in creating the harm.

**PERSONAL INJURY - ARBITRATION  
AWARD - Pa.R.C.P. 1311.1 - DELAY DAMAGES**

*LaRue v. McGuire*, 885 A.2d 549 (Pa. Super. 2005).

Plaintiff appealed an arbitration award and pursuant to Pa.R.C.P. 1311.1, stipulated to a maximum recovery of \$15,000 and thereby introduced medical records at trial without having to bring in the treating physicians. The jury awarded Plaintiff \$600,000. Plaintiff filed a motion for delay damages which was denied.

*Reversed and remanded for calculation of delay damages.* The Superior Court held that plaintiff is entitled to delay damages under Rule 238 even if those damages will cause the total verdict to exceed the stipulated maximum verdict of \$15,000. The delay damages must be calculated on the \$15,000 maximum and not on the \$600,000 actually awarded.

**MEDICAID LIENS - ASSIGNMENT OF SETTLEMENTS**

*Arkansas Department of Health and Human Services, et al. v. Ahlborn*, 126 S.Ct.

1752, 164 L.Ed.2d 459 (2006).

Plaintiff sustained severe injuries following an automobile crash. When her private coverage was exhausted, she applied for Medicaid benefits through the Defendant agency. She also signed a lien form in favor of Defendant which then notified her attorneys that it had a claim for reimbursement from any settlement or award resulting from the accident. The agency had paid over \$200,000 in Medicaid benefits; of that, about \$35,000 was for medical care. The agency then placed a lien on the Plaintiff's settlement. Plaintiff sued, claiming that the Defendant should only be able to recover the \$35,000 paid for medical care and that the Arkansas recovery statute conflicts with the federal anti-lien statute. The District Court found in the agency's favor, holding that the state could recover the entire amount of benefits provided from the settlement regardless of what those benefits represented.

*Reversed by the Eighth Circuit Court of Appeals.* The Defendant agency appealed.

*Affirmed the Court of Appeals.* The Supreme Court held that the state's position conflicted with the federal anti-lien provisions of the Medicare laws. The settlement here was a compromised sum due to the limitations on insurance coverage. Since Plaintiff received only about one-sixth of what her claim was worth, the state's claim should be similarly reduced. The Court held that the agency could not assert a lien for an amount which was higher than the portion of the settlement allotted to medical bills.

### **MOTOR VEHICLE ACCIDENT - DEFINITION OF AN "INSURED"**

*State Farm Mutual Insurance Company v. Foster*, 889 A.2d 78 (Pa. 2005).

Plaintiff was a PennDOT employee who was injured in the course and scope of her employment by an uninsured motorist. A workers' compensation claim was filed and her personal insurance carrier was notified of the accident but the police were not notified and never investigated the accident. The carrier denied coverage for uninsured motorist benefits because pursuant to the terms of the policy, she was required to notify the police within thirty days. The trial court held that Plaintiff was not entitled to benefits because of her failure to report the accident to police under Section 1702 of the Motor Vehicle Financial Responsibility Law. She appealed.

*Affirmed in a memorandum opinion by the Superior Court.* It cited the case of *Brakeman v. Potomac Insurance Company*, 371 A.2d 193 (Pa.1977) for the proposition that a carrier cannot enforce the "as soon as practicable" reporting language in its policy unless it can show prejudice. The Court found that the 1984 amendments to the MVFRL effectively overruled *Brakeman*.

*Affirmed by the Supreme Court.* Plaintiff is not entitled to recover benefits because she never complied with Section 1702 of the MVFRL. However, the Court did

uphold the *Brakeman* requirement of prejudice as applied to the notification by an insurance carrier of an accident by its insured.

**MOTOR VEHICLE ACCIDENT -  
INSURED DEFINED- WARD OR FOSTER CHILDREN**

*Donegal Mutual Insurance v. Raymond*, 899 A.2d 357 (Pa.Super. 2006).

Defendant is a minor child who was placed with a foster family. He was returned home by Children and Youth Services but later on, moved back in with the foster family who notified CYS of the change. The next day, he was injured in a motor vehicle accident. The foster family was insured by Plaintiff; the policy provided for first party medical and underinsured motorist benefits. The Defendant made a claim under the foster family's policy, claiming that he was either a ward or a foster child at the time of the accident. The carrier denied liability. At trial, Donegal filed a motion for summary judgment, arguing that the Defendant was not a ward or foster child until CYS had consented to the arrangement or there was a court order. The Court, per Corbett, J., denied the motion, finding that the Defendant was a ward of the foster family. Donegal appealed.

*Affirmed.* The Superior Court found that the question was one of first impression in the Commonwealth of Pennsylvania, and affirmed Judge Corbett's holding. The policy defined "insured" to include any family member which includes any ward or foster child. Under Section 1702 of the Motor Vehicle Financial Responsibility Law, an insured is also a minor in the custody of the named insured or a relative of same.

**MOTOR VEHICLE ACCIDENT - COVERAGE - LOANER CAR**

*Progressive Northern Insurance Company v. Universal Underwriters Insurance Company*, 898 A.2d 1116 (Pa. Super. 2006).

The insured had an automobile insurance policy with Progressive. While his car was being serviced by Young Volkswagen, he was given a loaner car owned by the service station and insured by Universal. After he was involved in an accident with the loaner car, a third party claim was submitted for property damage to Progressive. Universal submitted a claim to Progressive for the property damage to the loaner car.

The trial court determined that both policies provided for liability and physical damage coverage to the insured. The central issue in the case was whether the insured was an insured under the Young Volkswagen policy with Universal. It was agreed that he was an insured under the Progressive policy. The trial court held that the insured was legally required to carry insurance and therefore, he was covered under the Universal policy, too. Both carriers appealed.

*Affirmed.* The Superior Court held that Section 1786 of the Motor Vehicle Financial Responsibility Law now requires coverage for each vehicle being operated. Since vehicle owners must provide coverage for vehicles that they own and operate or permit others to drive, the driver was an insured under both policies.

In addition, the Superior Court found that each policy contained language indicating that they would be excess to other applicable insurance policies, which is an irreconcilable conflict. However, the Court found that where both policies purport to be excess over the other, both policy provisions are to be disregarded and both carriers must share responsibility.

### **MOTOR VEHICLE ACCIDENT - UNINSURED/UNDERINSURED MOTORIST COVERAGE**

*Allstate Insurance Company v. DeMichele*, 888 A.2d 823 (Pa. Super. 2005).

Plaintiff's son was killed in an motor vehicle accident with an uninsured motorist and he presented a claim to his carrier, Allstate, for UM benefits even though the policy did not provide such coverage as of the date of the accident. At the time he took out the policy, Plaintiff rejected uninsured motorist coverage benefits. At trial, he claimed that the rejection was invalid because the carrier could not produce the forms which would show that it provided ongoing notice that there was no uninsured motorist coverage and that the rejection was knowing and intelligent. The trial court granted summary judgment in favor of Plaintiff and the carrier appealed.

*Reversed.* The carrier's failure to produce the notice is not dispositive and does not prevent the carrier from enforcing the rejection. The Court refused to reform the parties' contract to provide for uninsured motorist benefits contrary to the waiver.

### **MOTOR VEHICLE ACCIDENT - CHANGES TO LIABILITY LIMITS - UNINSURED/UNDERINSURED LIMITS**

*Blood v. Old Guard Insurance Company*, 894 A.2d 795 (Pa. Super. 2006, *en banc*).

When the Plaintiffs first applied for automobile insurance, they selected \$500,000 in liability and \$35,000 in UM/UIM coverage limits. They later requested a reduction in liability coverage to \$300,000 and completed a change request form; nothing on the form mentioned UM/UIM coverage limits. Their son was injured in an automobile accident and they sought \$900,000 in UIM coverage. The carrier denied the request, stating that the most they were entitled to was the original limit of \$35,000 and with the stacking provisions for three vehicles, a total of \$105,000. Plaintiffs filed a declaratory relief action and the carrier's motion for summary judgment was granted, prompting this appeal.

*Reversed.* The Superior Court *en banc* held that an insured can reject UM/UIM coverage but it first must be offered. The insured must be notified of his right to reject same. Without a rejection, UIM coverage is deemed to be the same as the bodily injury coverage offered by the policy. See 75 Pa.C.S. Section 1731. Plaintiffs did not reject UM/UIM coverage when they amended the policy, therefore, they are entitled to the full \$900,000 in stacked benefits.

Judge Melvin dissents.

### **MOTOR VEHICLE ACCIDENT - HOUSEHOLD EXCLUSION**

*Fulton v. Nationwide Mutual Insurance Company*, 895 A.2d 653 (Pa. Super. 2006), reargument denied on March 15, 2006.

Daughter was injured in a motor vehicle accident while driving her own vehicle insured with Nationwide; she lived with her father who also had coverage with Nationwide. Daughter made a claim for UIM benefits under both policies and Nationwide denied coverage on her father's policy based upon the household exclusion. The trial court found in Nationwide's favor and Plaintiff appealed.

*Affirmed.* The Superior Court noted that whether or not the carrier had knowledge of other vehicles in the home was not relevant to the availability of coverage.

### **MOTOR VEHICLE - REGULARLY USED NON-OWNED AUTOMOBILE**

*Ayers v. Prudential Property and Casualty Insurance Company*, 897 A.2d 512 (2006), unpublished opinion.

Ayers was a passenger in a co-worker's vehicle when she was injured in a work-related accident. She received the bodily injury limits from the other driver and UIM coverage on the car she was riding in. She then sought additional UIM benefits which covered her personal vehicle at the time of the accident.

Prudential denied the UIM claim on the ground that it was excepted from coverage by the "regularly used non-owned vehicle" exclusion. The trial court granted the carrier's motion for summary judgment and Plaintiff appealed.

*Reversed.* The question of what constitutes "regular use" is a jury question. The Court had to decide what constituted regular use of a non-owned vehicle so that a carrier is required to underwrite an unknown risk. The policy provided no definition of "regular use" and found that the Plaintiff was somewhere between an occasional occupant and a habitual one.

The carrier attempted to argue that the car pooling arrangement was not valid, but the Court noted that policy mentioned car pooling. Therefore, the carrier was aware of the risk and could have excluded it if it chose to.

### **MOTOR VEHICLE ACCIDENT - REGULAR USE EXCLUSION - PRELIMINARY OBJECTIONS**

*Decker v. Nationwide Insurance Company, 2005 CV 1863 (C.C.P. Lack.Co. 2006)*

Plaintiff was injured in a car accident while operating a third party's vehicle. He settled his third party and UIM claims before seeking additional UIM benefits from Nationwide, his own carrier. Nationwide denied coverage based upon the regular use exclusion in Plaintiff's policy. Plaintiff filed against the agent who sold him the policy and Nationwide, alleging misrepresentation and negligence. Preliminary objections filed by the Defendants were dismissed by the trial court.

Defendant agent contended that he had no duty to advise Plaintiff of the effect of an exclusion on coverage nor did he have a duty to sell him a policy without the exclusion. The trial court concluded that it could not be said as a matter of law that the Plaintiff had not stated claims for negligence and misrepresentation.

### **HOMEOWNER'S INSURANCE - UMBRELLA POLICY WHAT CONSTITUTES AN "ACCIDENT"**

*Donegal Mutual Insurance Company v. Baumhammers, 893 A.2d 797 (Pa. Super. 2006), en banc.*

The estates of several Decedents who were shot and killed by an individual brought a declaratory judgment action against the parents, Donegal, which had issued a homeowner's policy to the parents and USAA, which had issued an umbrella policy. The carriers denied liability on the ground that the shootings were intentional and did not constitute an "accident" or "occurrence" under the policy and filed motions for summary judgment. The trial court granted USAA's motion but denied that of Donegal.

*Affirmed.* The Superior Court found that the trial court had correctly found that Donegal had a duty to defend and indemnify the parents because their negligence is an occurrence under the policy. The Court also found that each shooting is an occurrence. The USAA policy contained an enforceable exclusion which precluded coverage because the son's conduct was criminal and intentional so the parents' negligence was not relevant.

## **ARBITRATION CLAUSES - UM/UIM POLICIES**

*Insurance Federation of Pennsylvania, Inc. v. Koken, Commonwealth of Pennsylvania, Department of Insurance, 889 A.2d 550 (Pa. 2005).*

On appeal from the Commonwealth Court, the Supreme Court held that insurance companies are not required to include arbitration provisions in uninsured and underinsured motorist policies, thus overturning the lower court's decision. The Court stated that the Insurance Commissioner does not have the authority to require arbitration in UIM cases and would be attempting to circumvent the language in the Motor Vehicle Financial Responsibility Law.

The Court went on to apply this decision to UM cases as well, effectively overturning *Prudential Property and Casualty v. Muir*, 513 A.2d 1129 (Comm.Ct. 1986).

## **ARBITRATION - CONFIRMATION OF AWARD - SERVICE ON DEFENDANT**

*Vogt v. Liberty Mutual Fire Insurance Company, 900 A.2d 912 (2006).*

Plaintiff was awarded \$75,000 by an arbitration panel. She filed a petition to confirm the award and the Court entered judgment the next day. Six months later, the carrier filed a petition to open or strike which was denied. The carrier appealed.

*Reversed.* Since this was common law arbitration, unless agreed otherwise by the parties, the notice of application for an order of court had to be served in the same manner as a writ of summons in a civil action. This was not done and instead, Plaintiff served the notice by certified mail. Since service of the notice was improper, the court did not have personal jurisdiction over the carrier and the action in confirming the award was null and void.

The Court noted that the award exceeded the policy limits. It also directed the trial court to take into consideration the fact that the petition to challenge the award was filed more than thirty days thereafter.

## **INSURANCE – BAD FAITH – BENCH AWARD**

*Bombar v. West American Ins. Co. 01-CV-1260 (Lacka. Co. 2005)(Minora, J.)*

In this case the Court issued a comprehensive opinion reviewing the law of bad faith and the duties of liability insurance companies.

Plaintiff - intervenor Suzanne Bombar suffered serious injuries, including the loss of her leg, in a forklift accident where she worked. She brought suit against Baker, the

manufacturer of the forklift that hit her, as well as its distributor, Upright Material Handling, Inc. ("Upright"), pursuing theories of negligence and strict product liability. After a jury trial, judgment was entered in Plaintiff's favor and against Upright alone in the amount of \$1.8 million.

After taking an assignment of rights from Upright, the plaintiff then pursued West American Insurance Company for failure to cover and defend Upright in the underlying action. Plaintiff's claims of bad faith also included failure to investigate the case as well as failure to make any effort to settle the matter within the policy limits.

*Held*, that because covered theories were clearly included in the underlying action, West American's policy obviously covered Upright, triggering Upright's duties to take reasonable steps to investigate, defend, and protect Upright's assets by settling the case within its policy limits. Instead, Upright was forced to hire private counsel to defend itself, and was also accordingly exposed to the ultimate jury verdict.

After a thorough review of all of the evidence, including West American's financial statements and expert review thereof, the Court entered an award of \$12 million in Ms. Bombar's favor. The Court has subsequently denied motions for new trial or judgment n.o.v. and the matter is currently on appeal to the Superior Court of Pennsylvania.

## **INSURANCE – BAD FAITH – PRELIMINARY OBJECTIONS – DISCOVERY**

*Brady v. Prislupki and Motorists Mutual Ins. Co.*, 2005 CV 4223 (Lacka. Co. 2006) (Minora, J.)

On November 16, 2005, Plaintiff was rear-ended and seriously injured by a drunk driver when she was a passenger in a vehicle owned by Prislupski. She sought underinsured motorist benefits from Motorists Mutual, and brought suit against it and Prislupski, seeking a declaration of coverage, as well as alleging counts of bad faith. Plaintiff alleged bad faith in failing to accept or deny a claim in a timely manner, failure to investigate, failure to review information submitted by the plaintiff, and failure to make a reasonable and timely settlement offer. The Court overruled Motorists Mutual's preliminary objection in the form of a demurrer, holding that the plaintiff had properly pleaded a cause of action sounding in bad faith.

The Court's opinion also addressed Motorist Mutual's appeal of Special Trial Master Richard Campagna's discovery ruling that denied Motorist Mutual's Motion for Protective Order. Motorist Mutual argued that discovery concerning the bad faith claims in the case should be stayed pending a determination of whether coverage existed. STM Campagna rejected that argument, and Judge Minora affirmed that ruling, quoting *Yacoub v. Cruciani*, 66 Pa.D.&C.4th 164 (Lacka. Co. 2004)(Nealon, J.) for the principle that the scope of discovery is to be liberally construed.

The court has made a *de novo* review of the pleadings on appeal of the STM denial of the relief requested by Defendant Motorists Mutual. The Court has read the pleadings, briefs and the Plaintiff's Motion to Compel per the authority granted under Lacka. Cty. R.Civ.Pro. 4000.1(b). Based upon our review, we find absolutely no basis to disturb the determination of the Special Trial Master Campagna. The purpose of the appointment of a special trial master/discovery master is to assist the court with particular discovery issues involved in a matter. We find there has been extraordinary effective assistance by the Special Trial Master and that there has been no abuse of discretion, nor does there exist any error of law made by the capable Special Trial Master appointed to assist all of our Court in discovery issues. Therefore, absent any remotely persuasive authority by the Defendant, we shall sustain Master Campagna's Decision, dated December 29, 2005.

#### **CIVIL PROCEDURE - STATUTE OF LIMITATIONS - UIM CLAIMS**

*Motorists Mutual Insurance Company v. Durney*, 04-CV-3232 (E.D. Pa. 2005), Memorandum Opinion.

Durney, having been injured in a motor vehicle accident, settled his third party claim and pursued an UIM claim with Motorists Mutual. For the next five years, Durney's attorney and Motorist exchanged documents and records. The carrier never denied coverage or told Durney that the statute of limitations was going to be raised as a defense. Motorist filed a declaratory relief action requesting that the court declare that it no longer had any duty to provide UIM coverage because the statute of limitations had expired. Durney counterclaimed for bad faith. The parties filed cross-motions for summary judgment.

The District Court, in turning to Pennsylvania law to determine when a cause of action accrued and the language in the policy that provided for arbitration, decided that the claim accrued and the statute began to run when Durney first learned of the disagreement between her and Motorist. That date was the filing of the declaratory judgment action. Accordingly, Durney's motion for summary judgment was granted and Motorist's was denied. The Court also denied Motorist's motion for summary judgment on the counterclaim for bad faith.

## **MOTOR VEHICLE ACCIDENT - BAD FAITH INSURANCE CLAIMS**

*Ratchford v. Florey Insurance Agency*, 2005 WL 3106478 (Minora, J.) (C.C.P. Lack. Co. 2005).

Plaintiff was injured in a motor vehicle accident about two weeks after buying the car he was driving. While at the dealership, he called his agent and asked to add the new vehicle to his policy with the full tort option. After the accident, the agency asked him to come to the office to sign the papers to make sure that all was in order and that the medical bills were paid. He filed a third party claim which is still pending. The limited tort defense was raised in that case but is likewise pending. Plaintiff sued the agency on the theory that they failed to provide him with the full tort option and the agency appealed on the ground that until the third party claim had been decided, this issue was not yet ripe for decision.

## **BAD FAITH – FAILURE TO MAINTAIN COVERAGE - ECONOMIC LOSS RULE**

*Lindsey v. Chase Home Finance, LLC*, 2006 WL 2524227 (M.D.Pa. 8/30/2006) (Vanaskie, C.J.)

Plaintiff had a policy of homeowner's insurance, including for flood damage, in place through her mortgage company, which withheld \$10.90 from monthly mortgage payments to pay the insurance premiums. After floods of September, 2004 and April 2005, plaintiff presented claims against the insurer, for severe flooding damage to her home in Factoryville, PA, whereupon she learned that the insurer had cancelled the policy for non-payment some time before.

Plaintiff brought suit in Wyoming County Common Pleas Court against the mortgage company for breach of contract, statutory bad faith in insurance practices, and negligence.

The defendant moved for dismissal of all claims pursuant to Fed.R.Civ.P. 12(b)(6).

*Held*, that the complaint properly set forth a claim for breach of contract, or at least breach of implied contract, while the counts for bad faith and negligence were dismissed.

Judge Vanaskie reasoned that the plaintiff could make out a claim for breach of contract based on the course of conduct of the defendant in making the monthly payments. However, the claim for statutory insurance bad faith failed because the mortgage company was not an insurer, and as such, 42 Pa.C.S.A § 8371 was inapplicable.

Likewise, the plaintiff's negligence action would be dismissed because: (1) under the "gist of the action" doctrine it duplicated the breach of contract theory with which plaintiff was being allowed to proceed; and (2) it violated the economic loss rule, which is that purely economic losses will not support negligence actions absent proof that the defendant's actions actually caused physical harm to the plaintiff or his property.

### **MOTOR VEHICLE ACCIDENT - BAD FAITH INSURANCE CLAIMS**

*Blitshtein v. Hartford Fire Insurance Company*, 2006 U.S. Dist. LEXIS 17960 (2006).

Plaintiffs were injured in a motor vehicle accident in 1999 involving an uninsured motorist. The claim was submitted in 2000 and denied by the carrier. They were awarded over \$87,000 in 2003. In November, 2005, a bad faith claim was filed.

*Held*, the bad faith claim is time-barred. The statute of limitations begins to run when the insurer provides clear notice of its intent to deny coverage, which, in this case, was in 2000.

### **MOTOR VEHICLE ACCIDENT - EXISTENCE OF GOOD FAITH DUTY OF CARRIER ON UM CLAIM**

*Condio v. Erie Insurance Exchange*, 899 A.2d 1136 (Pa.Super.2006).

Three people left a party early in the morning and got into a single vehicle accident. One was killed and two were injured. Sailer, one of the survivors, could not remember if she was driving but did not think she was. The vehicle, owned by Breen, was insured with a \$15,000/\$30,000 limit policy and was covered by a policy his mother had with Erie that provided UIM and UM coverage in the amount of \$100,000 per person and stacked for two vehicles. A policy endorsement made Breen ineligible to recover if he was driving.

Sailer sued Breen's estate on the ground that she was a passenger. The estate made a claim against Erie for UIM benefits and an arbitration panel was convened. Erie stipulated to full coverage if the panel determined that Sailer was driving; the panel found Sailer to be the driver and Erie paid the claim. The estate then sued Erie, alleging bad faith. The trial court granted summary judgment in favor of Erie. On appeal, the Superior Court reversed and remanded the case to the trial court, finding that Erie had not met its burden of showing that no genuine issue of material fact existed on the bad faith claim. On remand, the trial court entered a verdict for the estate and awarding it punitive damages, attorney's fees, interest and costs. Erie appealed.

*Judgment vacated; case remanded to the trial court for the entry of judgment*

*n.o.v. in Erie's favor.* The Superior Court agreed with Erie that a carrier has no heightened duty to investigate a first party as opposed to a third party claim. A carrier always has a duty of good faith and fair dealing. The estate did not present clear and convincing evidence that Erie lacked a reasonable basis for denying UIM benefits.

### **PERSONAL INJURY - NEGLIGENCE - ASSUMPTION OF THE RISK**

*Pakett, D.M.D. v. The Phillies, L.P., et al., 871 A.2d 304 (Pa. Super. 2005).*

Plaintiff attended a Phillies game and sat in a seat behind home plate, a seat which he had occupied six or seven times before. A player hit a foul ball and in trying to catch it with his bare hand, he missed it and the ball hit him in the right eye causing temporary blindness and requiring surgery. He sued the City and the Philadelphia Phillies for their alleged negligence in failing to erect and maintain a backstop which adequately protected spectators.

The trial court granted Defendants' motion for summary judgment, finding, that as a matter of law, neither Defendant had a duty to protect the Plaintiff or to warn him of the risk of being struck by a foul ball while attending a game.

*Affirmed.* The Superior Court affirmed the trial court's grant of summary judgment in Defendants' favor. Plaintiff had to have shown that the danger was not an inherent risk of the game or that the back stop deviated in some material way from established industry custom. He did not do so. Getting hit with a foul ball is a known risk in attending a baseball game. Placing a backstop behind home plate does not equate with an assumption of a duty by Defendants to use reasonable care in the design of the barrier beyond industry standards.

### **PERSONAL INJURY - NEGLIGENCE - ASSUMPTION OF THE RISK**

*Loughran v. The Phillies and Marlon Byrd, 888 A.2d 872 (Pa. Super. 2005).*

Plaintiff attended a Philadelphia Phillies game. He claims to have suffered a series of facial, ocular and head injuries when he was hit in the head by a ball thrown into the stands by Phillies player Marlon Byrd after the final out in an inning. He filed suit against both Defendants, who filed motions for summary judgment. The trial court granted said motions and Plaintiff appealed.

*Affirmed.* The Superior Court, in agreeing with the trial court, found that the Defendants had no duty to protect spectators such as Plaintiff from balls thrown into the stands by players - that is an inherent risk of the game. The Defendants did not deviate from any established custom in baseball, such as tossing balls into stands. This is a "common, frequent and expected" risk inherent in the game.

Judge Bender dissented.

### **NEGLIGENCE – BUSINESS INVITEE – ASSUMPTION OF RISK**

*Gordon v. Home Depot*, 2006 WL 2850628 (M.D.Pa. 10/3/2006)(Kosik, J.)

Plaintiff, her husband and daughter were business invitees at Home Depot looking at bookshelves to purchase. After they selected the shelf they wanted to buy, Plaintiff's husband went to look for a sales person. While she waited for him, Plaintiff leaned against one of the bookshelves. She described her position as a "sit-lean" or a "half-cheek lean." The shelf broke, and the plaintiff fell, sustaining injuries.

Immediately prior to the shelf breaking, plaintiff had warned her own daughter not to sit on the shelves.

Home Depot moved for summary judgment, arguing that the plaintiff had assumed the risk that the shelf would break, having demonstrated an actual awareness of the danger by warning her own daughter not to do what she was doing.

*Held*, that whether plaintiff was guilty of comparative negligence was a question of fact for the jury. The Court denied the motion for summary judgment, noting that the plaintiff had established a distinction between her posture and actually sitting on the shelf, against which she had warned her daughter from doing.

### **NEGLIGENCE - LANDOWNER LIABILITY - RECREATIONAL USE OF LAND AND WATER ACT - HYBRID PROPERTIES**

*Murtha v. Joyce*, 875 A.2d 1154 (Pa. Super. 2006).

The Joyces maintained a 150 acre land and home which they used for recreation; they also invited people to come up there. Murtha and a friend were visiting and she was injured while snow-tubing in the backyard area of the property. She sued the Joyces, who filed a motion for summary judgment alleging that the Rural Use of Land and Water Act, 68 Pa.C.S. Section 477-1, *et seq.* shielded them from liability. The trial court granted summary judgment in the Joyces' favor finding that Murtha was not charged for using the facilities so the Act applied.

*Reversed.* The Superior Court held that the Act did not apply here. The Act's goal was to encourage land owners to use their land and water for public recreational purposes by limiting their liability. Under the Act, the general rule is that the owner has no duty to keep the land safe or to warn of a dangerous condition. There are two exceptions: (1) wilful or malicious failure to warn or guard someone from a known danger, which was not applicable here; or (2) where the injured party is charged

admission, which did not happen here.

The Act is usually applied to unimproved or lightly developed property. The greater the land's development, the more likely the courts are to find a duty on the landowner to maintain the property and its structures. Here, this is a hybrid property, partly developed and partly not. However, Murtha was injured basically in the Joyces' backyard so this is really a garden variety landowner negligence case and the Act does not apply.

### **NEGLIGENCE - LANDOWNER LIABILITY - RECREATIONAL USE OF LAND AND WATER ACT - EASEMENT**

*Stanton v. Lackawanna Energy, Ltd.*, 584 Pa. 550, 886 A.2d 667 (Pa. 2005).

The Plaintiffs' son, then ten years old, was riding his motorbike on an undeveloped tract of land which was within an easement held by PP & L within a property owned by Lackawanna Energy. He had ridden there numerous times before. On the occasion in question, he was riding up a hill and at the crest, saw that the gate was locked and in trying to avoid it, swerved, hit a rock and was thrown off the motorbike and into the gate. He sustained numerous injuries. Plaintiffs filed suit alleging that the Defendants negligently placed or allowed the placement of the swing-arm gate and had negligently closed it when on prior occasions, it had been open. Plaintiffs settled with Lackawanna Energy. PP & L elected to file a motion for summary judgment under the Recreational Use of Land and Water Act. The trial court denied summary judgment, finding that PP & L's entitlement to protection under the Act was a jury question. The Superior Court reversed and remanded the trial court on permissive appeal. The Supreme Court accepted jurisdiction to decide whether PP & L, as an easement holder and not a landowner, is entitled to the Act's protection.

*Held, PP & L is entitled to the protections of the Act.* The Supreme Court found that the purpose of the Act was to encourage private owners to make land and water areas available to the public for recreational purposes by limiting their liability. The immunity provisions are inapplicable to willful or malicious failure to warn or guard against a condition, use, structure or activity.

PP & L was found to be an occupant of the property as it regularly maintained the facilities and used a dirt road along its utility line, thus showing that PP&L has possessory rights in and daily control over its easement and is therefore considered to be the landowner. As a matter of law, PP&L is protected by the Act.

## **MEDICAL MALPRACTICE - QUALIFIED IMMUNITY DEFENSE**

*Walsh v. Borczon, M.D.*, 881 A.2d 1 (Pa.Super.2006).

Patient had a long-term history of mental illness and treated with Defendants. She found out that she was pregnant and was advised to stop taking her medications, which she did. Her mental state worsened, and she was admitted to St. Vincent's Hospital for inpatient psychiatric treatment. She was discharge but unimproved. She resumed her medications and had an abortion. She sued the Defendants for negligence which she alleged resulted in the termination of her pregnancy and mental trauma. Defendants moved for summary judgment, contending that the patient had not shown that their care rose to the level of gross negligence and therefore, they were entitled to qualified immunity. The trial court granted summary judgment and Plaintiff appealed.

*Affirmed.* The patient failed to show that the Defendants acted in a grossly negligent way. Gross negligence has been defined as conduct which is substantially more than ordinary carelessness, inadvertence, laxity or indifference. The Defendants' behavior would have had to be flagrant and grossly deviating from the ordinary standard of care.

New counsel attempted to raise for the first time on appeal that part of the claim related to voluntary out-patient treatment and thus was not covered by the Act. The Court found that this issue had been waived.

## **MEDICAL MALPRACTICE - "TWO SCHOOLS OF THOUGHT" DOCTRINE - INFORMED CONSENT**

*Choma v. Iyer, M.D.*, 871 A.2d 348 (Pa. Super. 2005), *en banc*.

Plaintiff underwent breast reconstruction surgery using a procedure known as a TRAM flap procedure. Significant complications arose thereafter, including scarring and she sued Defendant Iyer, claiming that he was negligent in performing the procedure and that he had failed to obtain her informed consent.

At trial, the jury found in Defendant's favor and Plaintiff appealed.

*Affirmed.* There were two questions presented. Did the trial court err in charging the jury on the "two schools of thought" doctrine? Yes, because it did not apply here. The doctrine is a complete defense to a negligence claim and is applicable where there is a legitimate dispute over a course of treatment. That was not so here. Although TRAM flap surgery may be contraindicated in very obese patients, the question for the jury was whether the patient was obese. There were no two schools of thought. Since the charge was inappropriate, the case would be remanded for a new trial as to the

negligence claim.

As to the informed consent claim, there was a dispute at trial by the experts as to whether Plaintiff's pre-operative condition put her at greater risk for this surgery. This was a credibility issue for the jury that would not be overturned on appeal.

### **CONDEMNATION - PRELIMINARY OBJECTIONS**

*In re Redevelopment Authority of the City of Philadelphia*, 891 A.2d 820 (Comm.Ct. 2006).

In this case, the property owner was not living in the home but her daughter was and had lived there for over fifty years. The City wanted to condemn the property under eminent domain proceedings as the home had already been deemed to be in a blighted area and then wanted to turn it over to a purely private religious organization for a private school. The owner filed preliminary objections which were overruled by the trial court and she appealed.

*Reversed.* The Superior Court found that the trial court had committed four errors of law: (1) the City cannot transfer blighted property to a private developer just because the property is blighted; (2) a homeowner's failure to challenge a certificate of blight is not a waiver of her challenge to the taking of the property; (3) the trial court should not have rejected the owner's claim that the taking impermissibly mixed church and state; and (4) because the property is substandard and in a blighted area did not give the City the authority to take it. In addition, the Court noted that the daughter had an equitable interest in the property.

Judge Pellegrini dissented in an opinion which was joined by Leadbetter and Leavitt.

### **INTENTIONAL TORTS - FALSE IMPRISONMENT AND BATTERY**

*Angelopoulos v. Lazarus Pa., Inc.*, 884 A.2d 255 (Pa. Super. 2005).

Plaintiff was shopping in one of Defendant's stores when she found a Godiva chocolate display. It was a missing a lid and the wrapper was slashed open. Thinking they were free, she ate two pieces. A loss prevention associate approached her and asked her to come back to the office. Her purse and body were searched, she was handcuffed to a table, her personal identification and other items were taken and she was given a statement of admission to sign which she refused. The loss prevention specialists kept her handcuffed and eventually, Plaintiff signed a modified statement and was eventually released.

Plaintiff filed a complaint for false imprisonment and battery. At trial, a defense verdict was rendered. The jury indicated on one interrogatory that the store's policies and procedures in this case did not violate the Retail Theft Act. The trial court granted the Plaintiff's motion for a new trial on the ground that the jury's finding was against the weight of the evidence and Defendants appealed.

*Affirmed the granting of a new trial by the trial court.* The Retail Theft Act allows companies to detain a suspect without civil liability in order to identify the suspect, verify identity, determine whether he or she has kept unpurchased merchandise, inform the police and institute criminal proceedings. The only reason that the Defendant's personnel detained Plaintiff was to get her to sign the statement of admission. This behavior exceeded the bounds of decency and therefore, the jury's answer to the interrogatory was inconsistent with the law. The trial court was correct in granting a new trial.

### **CIVIL PROCEDURE - STATUTE OF LIMITATIONS**

*Geibe v. Flick*, (C.C.P. Lanc. Co. PICS No. 05-1210).

Plaintiff was injured in a car accident on February 14, 2001 and filed a praecipe for a writ of summons on February 10, 2003. The Defendant died on December 26, 2002 and an Administrator was appointed on February 20, 2004. On March 16, 2004, Plaintiff filed a second suit, this time a personal injury lawsuit against the Administrator. The Administrator filed preliminary objections, alleging that the statute of limitations had expired.

The Court of Common Pleas sustained the preliminary objections. Ordinarily, 20 Pa.C.S. Section 3383 extends the statute for one year after the date of a decedent's death. Since suit was instituted after that one year period and there was no fraud or concealment on the part of the carrier, the Administrator was not estopped from raising the statute of limitations as a defense.

### **CIVIL PROCEDURE - STATUTE OF LIMITATIONS - FAILURE TO SERVE DEFENDANT**

*McCreesh v. City of Philadelphia*, 888 A.2d 664 (Pa. 2005).

Plaintiff commenced an action against the City by filing a praecipe to issue a writ of summons on August 12, 2002. The incident had occurred on August 14, 2000. Plaintiff served the Defendant by certified mail on August 13, 2002. On November 8, 2002, Plaintiff filed a complaint and requested that the writ of summons be re-issued. They were hand served. Defendant filed preliminary objections, contending that the service of the first writ by certified mail did not comport with Pa.R.C.P. 400.1 The trial court overruled the preliminary objections. The Commonwealth Court reversed and

remanded and the Supreme Court granted review.

*Reversed.* The majority held that the Plaintiff had made a good faith effort to serve the City with the writ. In addition, the City had actual notice and was not prejudiced by the method of service.

Justices Newman and Eakin filed dissenting opinions.

### **CAPACITY TO SUE – UNREGISTERED FICTITIOUS NAME – ESTOPPEL**

*George Stash & Sons v. New Holland Credit Co.*, 905 A.2d 541 (Pa. Super. 2006)

Plaintiff lawn mowing business brought suit against a lawn tractor credit company for improperly repossessing lawn equipment. The trial court granted defendant's motion for summary judgment based on the plaintiff's failure to register as a fictitious name with the Commonwealth of Pennsylvania, Department of State. Under the Fictitious Name Act, 54 Pa. C.S.A. § 331, entities which fail to register forfeit their right to maintain civil actions in any tribunal in Pennsylvania.

*Reversed.* A panel of the Superior Court holds that where the defendant did business with the plaintiff and availed itself of the benefits of doing so, knowing full well with whom it was trading, it was estopped to deny the plaintiff's capacity to sue.

### **DISCOVERY – EXPERT WITNESSES – FINANCIAL INFORMATION**

*Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006)

A pedestrian brought a personal injury action against the motorist who struck him. The plaintiff served a subpoena on the defense medical expert. The defendant filed a motion for protective order, which was denied by the Dauphin County Court of Common Pleas. The Superior Court affirmed.

Reversing, the Supreme Court of Pennsylvania held that the party seeking the discovery must make a threshold showing that there are reasonable grounds to believe that an expert witness "may have entered the professional witness category."

In other words, the proponent of the discovery should demonstrate a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives. In the present case, we have no difficulty in supporting Judge Lewis's decision to authorize some supplemental discovery in Dr. Eagle's situation, where it is undisputed that

in some recent years he has performed 200 or more independent medical examinations.

905 A.2d at 495. In that event, the party seeking the discovery should use the “least intrusive” method of conducting the discovery, which consists of written interrogatories propounded under Pa.R.Civ.P. 4004, and inquiring as to:

the approximate amount of compensation received and expected in the pending case; the character of the witness’s litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, an/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness’s overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up the past three years, garnered from the performance of such services.

*Id.* The opinion does not foreclose the trial courts from allowing further discovery, including depositions, where there is an indication of evasiveness or untruthfulness. *Id.* at 496.

## **PRODUCTS LIABILITY – WARNING – PREEMPTION – PUNITIVE DAMAGES**

*Glodzik v. Whink Products Co.*, No. 98 CIV 4997 (Lacka. Co. 2006)(Nealon, J.)

Plaintiff was severely burned when her skin came into contact with defendant’s rust stain remover of which hydrofluoric acid was one of the ingredients. Defendant moved for summary judgment, alleging (1) that plaintiff misused the product as a matter of law by handling it without gloves, (2) the plaintiff’s failure to warn claims were preempted by the Federal Hazardous Substances Act labeling requirements, and (3) the plaintiff’s claim for punitive damages failed for lack of evidence of outrageous acts or reckless indifference.

*Held*, that (1) reasonable minds could differ as to whether the plaintiff’s handling of the product made her guilty of misusing it; (2) the FHSA did not expressly preempt state law tort claims, and its standards were not inconsistent with plaintiff’s theory of inadequate labeling, so that plaintiff was not seeking to impose a higher standard of labeling than the FHSA; and (3) issue of fact remained for trial as to whether Whink’s conduct exposed it to punitive damages, given that it had known for years that its product was extremely dangerous and prone to inflicting grievous burns on unsuspecting consumers. Judge Nealon’s analysis includes a citations to hydrofluoric burn cases in Pennsylvania law dating back to 1902, and also cites a 1995 Chicago

federal district court case against Whink Products itself, where that court likewise denied a motion for summary judgment on punitive damages.

The Court denied the motion for summary judgment in its entirety.

### **JURY VERDICT – FINDING ON STATUTE OF LIMITATIONS – NO INCONSISTENCY**

*Milan v. Petsmart Store #580*, 2006 WL 2065405 (Lacka. Co. 3/29/2006)(Nealon, J.)

Plaintiff brought suit against pet store alleging inter alia breach of contract theories, stemming from pet store's failure to compensate plaintiff for time and expenses for running a "pet adoption" program.

After trial, a jury found that a breach of contract had occurred, and awarded damages in connection with that breach. However, on a separate question in the verdict form, the jury found that the breach of contract had occurred more than four years prior to the time when suit was filed. The Court molded the verdict into a defense verdict, and plaintiff moved for a new trial or for judgment notwithstanding the verdict.

*Held*, that the jury's finding on the statute of limitations was not inconsistent with their responses to the questions on the breach of contract. Judge Nealon reasoned that the jury had been properly instructed, and had been specifically instructed that if they found against the plaintiff on the statute of limitations question, she could not recover.

Plaintiff's post-trial motions were denied.