**APRIL 2013 CASENOTES**

**<u>Progressive Preferred Ins. Co. v. Kalmanowicz</u>, No. 848 MDA 2012 (Pa. Super. Ct. March 21, 2013) (Memorandum) (Pennsylvania Superior Court Memorandum Upholds Regular Use Exclusion Even When Vehicle Not "Used" 100% Of The Time).**

Kalmanowicz was injured in a car accident while driving his employer provided vehicle in the course and scope of his employment. He settled the third party case and, since his employer's vehicle did not provide underinsured motorist coverage (UIM), he then sought UIM on his own personal policy with Progressive. Coverage was denied because the insurance policy had an exclusion that precluded UIM coverage if the insured was injured while operating a vehicle available for "regular use".

In this case, the employer provided vehicle being such a vehicle of "regular use". The insured argued that an issue of fact existed as to whether the vehicle was being used "regularly" because other people drove the vehicle and he did not operate it 100% of the time.

The Superior Court upholds the exclusion and holds that the regular use exclusion applied to the employee who used his employer's vehicle 30% of the time during his work day. The fact that other people used the vehicle was not significant and his use was not casual or incidental. Therefore, Kalmanowicz is not entitled to coverage.

**<u>Kaylor v. Donegal Mut. Ins. Co.</u>, No. 1068 WDA 2012 (Pa.Super. Ct. March 19, 2013) (Memorandum) (Pennsylvania Superior Court Memorandum Holds That Person Is A Resident Of House Even Though Staying At Personal Care Facility).**

This case involves a person (Kaylor) injured in a car accident who was seeking underinsured motorist (UIM) benefits under her son's policy as a resident of his household even though she was staying at a personal care facility when the accident happened. Donegal argued that Kaylor was not a resident of the household because she was not physically living in her son's home when the accident occurred.

The Superior Court finds that under the facts of the case "common sense" dictates that Kaylor is a resident of the household for underinsured motorist coverage, despite fact that she was living at a personal care facility at the time of her motor vehicle accident and not at the home.

The court writes that the insurer could have had more restrictive language and defined "resident" in the policy but it did not. Therefore, she is entitled to coverage.

**Robinson v. Travelers Indemnity Company of America, --- F.3d --- (3rd Cir. March 21, 2013) (Third Circuit Validates Underinsured Coverage Rejection Form Which Does Not "Specifically Comply" With Statute).**

The case involves the challenge to an insurance company's rejection of underinsured motorist form. In this case, the named insured (Robinson's employer) executed an underinsured motorist waiver but inserted the word "motorists" in the phrase "underinsured coverage" in the form mandated by the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). Robinson argued that the additional word invalidated the form under Section 1731 of the MVFRL because it was not in specific compliance with the MVFRL.

In the underlying district court Judge Ludwig from the Eastern District of Pennsylvania relied upon the Pennsylvania Superior Court opinion in Jones v. Unitrin, 40 A.3d 125 (Pa. Super. Ct. 2012) where the court invalidated a similar form when the insurance company used a rejection form which did not track the MVFRL mandate. In Robinson, as in Jones, Judge Ludwig held that the rejection for is not valid and Robinson was entitled to underinsured motorist coverage. Robinson v. Travelers Indemnity Company of America, No. 11-5267 (E.D. Pa. Feb 29, 2012).

The United States Court of Appeals For the Third Circuit vacates and reverses the Judge Ludwig's order. The Third Circuit reverses and finds that the addition of the word "motorists" to the form actually clarified the wording of the form and it does not want to "elevate form over substance in a hyperliteral interpretation" of the law. Also, the Jones case is distinguished since Jones was decided based upon subject matter and placement of an additional sentence as opposed to a clarification in Robinson's case.

**Jacobs v. Bilbay, No. 11-00, 118 (C.P. Lycoming Jan. 25, 2013) (Trial Court Finds Merely Pleading Intoxication Not Enough For Punitive Damages To Be Recovered At Trial).**

This case involves a car accident where the Defendant left the scene of the accident which occurred in Lycoming County. A suit was filed for

injuries and the Plaintiff also sought punitive damages. The Defendant filed a Motion in Limine to preclude the Plaintiff from presenting evidence of alcohol because liability was admitted and there was no evidence of intoxication.

The trial court grants the motion in limine and the Plaintiff is precluded from presenting evidence of Defendant's alleged intoxication and fleeing the scene of the collision. The court writes that merely pleading intoxication and careless and/or reckless conduct does not mean that the Plaintiff can introduce such evidence. The only evidence in the record of possible intoxication was that: (1) the defendant drank two beers before the collision, (2) the accident was at 2 am, and (3) plaintiff was scared . This is insufficient proof of intoxication since there is no precise amount of corroborative evidence to establish the requisite degree of intoxication.

The plaintiff failed to offer blood alcohol evidence, witness testimony as to alcohol on breath, slurred speech, stumbling, etc. Fleeing the scene did not create a jury issue on punitives as Defendant did not realize she had struck plaintiff and evidence of not stopping is not admissible for impeachment purposes in this case since such evidence has little or no probative value but is extremely prejudicial where the Defendant admitted liability.

Thanks to PAJ and listserve member Bill Mabius for bringing this to our attention.

Bumbarger v. Peerless, --- A.2d --- (Pa. Super. Ct. March 8, 2013) (Pennsylvania Superior Court Holds That Stacking Applies Under Sackett Because Of Ambiguous Policy).

The case involves the now famous Sackett line of cases and how they are applied to a policy which was initially issued as a single car policy with a rejection of stacking form signed but eventually became a four car policy with no additional rejection forms signed at any time thereafter.

The trial court held that stacking applied based upon Sackett III because cars were added to the policy and there was no additional rejection of stacking form signed. The Superior Court affirms, but on a different and more narrow basis. The Superior Court holds that stacking applies under any of the Sackett cases because the newly acquired vehicle clause was ambiguous.

The cases stand for the proposition that unless a new vehicle is added under the "newly acquired vehicle" clause of an insurance policy, then stacking automatically applies unless a new rejection of stacking form is completed. Then, in the event a vehicle is added under the "newly acquired vehicle" clause then a new rejection form is required under some circumstances as outlined in Sackett II. In Bumbarger's case, the "newly acquired vehicle' clause is ambiguous so the insured need a new form one way or another.