AUGUST 2013 CASENOTES

Swarner v. Mutual Benefit, --- A.3d --- (Pa. Super. July 19, 2013) (Pennsylvania Superior Court Invalidates Underinsured Motorist Household Exclusion In Case Arising Out Of Motorcycle Accident).

This published opinion shows the importance of reading the insurance policy. The Pennsylvania Superior Court reverses a trial court opinion and finds that a household exclusion in an insurance policy is not valid, under the facts of the case. In the case, the Plaintiff Swarner was a passenger on a motorcycle. The motorcycle hit Vehicle A as it made a left hand turn in front of Swarner who was thrown off the motorcycle and landed in the road.

After a brief period of time, while she was lying unconscious in the roadway, she was then hit by Vehicle B. Swarner settled for the bodily injury (BI) limits from both insurers for operators of Vehicles A and B and the underinsured motorist (UIM) limits on a personal motorcycle policy for the vehicle Swarner was operating. Swarner then sought UIM coverage on a personal household vehicle policy with Mutual Benefit which denied coverage asserting a household vehicle exclusion.

The trial court found in favor of the insurance company and upheld the exclusion by finding that the exclusion applied because Swarner was "occupying" the motorcycle when she was hit by the second vehicle. The Superior Court reverses and finds that because Swarner is not "occupying" the motorcycle when the second vehicle which caused injury struck her that the exclusion does not apply.

Stemrich v. Zabiyaka, Civil No. 1:12-CV-1409 (M.D. Pa. July 2, 2013) (Federal District Court Allows Amendment To Complaint For Punitive Damages).

This truck accident litigation involves a motion to amend a complaint to add punitive damages, after the deposition of the Defendant was taken and a safety expert report produced. Judge Rambo observes that the Plaintiff's trucking safety expert notes numerous violations of the Federal Motor Carrier Safety Regulations. This report in conjunction with the deposition testimony of the truck driver provides a sufficient basis to advance punitive damage claims against both the truck driver and trucking company.

Therefore, given the liberal right to amend a pleading in federal court, the Motion to Amend is granted.

Thanks for Michael O'Donnell of the O'Donnell Law Firm in Kingston.

Cornelius v. Harrisburg Police Bureau, --- A.3d ---, 1393 C.D. 2011 (Pa. Commw. June 5, 2013) (Pennsylvania Commonwealth Court Holds That An Innocent Bystander has A Cause Of Action Against A Governmental Entity If Injured As A Result Of A Police Chase).

The Commonwealth Court held an innocent bystander injured during a police chase retains a cause of action, and that even when the police vehicle does not make contact with the innocent bystander's vehicle or person, the negligent operation of the police motor vehicle in the manner in which the chase was conducted can fit within an exception to immunity.

In this case, Plaintiff was at an intersection, in a car, as a passenger. He was hit by a suspect fleeing from police who had their lights on, but allegedly not their sirens. The statute which allows police vehicles to exceed the speed limit says they must have their lights and audible sirens activated. At the demurrer stage, this was enough to create a question better left for a motion for summary judgment or a jury. The exception to the tort claims act seemed to create two classes of people: 1. the fleeing suspect who would not benefit from the exception, and 2. the innocent bystander who could proceed in the face of broad immunity.

The Commonwealth Court remanded the case back to Dauphin County, and affirmed the trial court's ruling that it was premature to end the case. This decision upheld the Commonwealth Court's decision in Aiken v. Borough of Blawnox, 747 A.2d 1282, (Pa. Commw. 2000); and was in accord with the Supreme Court's decision in Jones v. Chieffo, 700 (a.2d 417 (Pa. 1997).

Noone v. Progressive Direct Insurance Company, No. 3:12 CV 1675 (M.D. Pa. May 28, 2013) (District Court Holds That Amount Of Underinsured Motorist Coverage Available And Third Party Settlement Are Admissible In *Koken* Trial).

This case involves a underinsured motorist (UIM) claim and bad faith arising out of the handling of a car accident case. Since the insurance policy did not mandate arbitration the Plaintiff filed suit in court.

In anticipation of the pre-trial conference the insurance company filed several motions in limine seeking to preclude the Plaintiff from introducing pieces of information involving the underinsured motorist claim, coverage, premiums and the third party case.

Judge Munley denies Progressive's motion in limine seeking to preclude plaintiff's introduction of the amount of premiums plaintiff paid, the amount of UIM benefits available, and the amount plaintiff received from the tortfeasor.

Weilacher v. State Farm, 65 A.3d 976 (Pa. Super. Ct. April 25, 2013) (Pennsylvania Superior Court Finds No Written Request For Lower Underinsured Motorist (UIM) Coverage When A Form Is Never Signed And Remedy Is UIM Equals Liability Coverage).

This case involves the issue of a written request for lower underinsured (UIM) motorist coverage, or the alleged written request. In this case, a policy was issued in 1994 with bodily injury coverage of 25K. The insured rejected UIM coverage by signing the appropriate 1731 rejection form. Then, in around 2000, the insured added UIM coverage at 25K. The policy remained in effect and premiums were paid with BI being 25K and UIM at 25K.

In 2009 the insured increases the BI coverage from 25K to 500K but the UIM remained at 25K. There is a car accident in 2010 and the insured claimed to be entitled to 500K in UIM coverage because they never signed a written request of lower UIM limits. Therefore, Weilacher argued that the limits are automatically equal to the BI coverage of 500K. State Farm argued that under Blood v. Old Guard, 934 A.2d 1218 (Pa. 2007) the UIM limits were only 25K and the trial court agreed.

The Superior Court reverses and holds that because the insured never executed any written request for lower limits through the lifetime of the policy the UIM coverage is 500K. It distinguishes Blood because in Blood the insured at least executed a written request for lower limits earlier in the lifetime of the policy. Also, the Superior Court holds that there is a remedy for failing to obtain the required written request, and that is the UIM automatically equals the BI coverage.

Clark v. Progressive Advanced Insurance Company, No. 12-6174 (E.D. Pa. April 26, 2013) (Bad Faith Claim Dismissed Because Complaint Allegations Not Specific).

This case involves a bad faith claim filed under Section 8371 of the Pennsylvania Judicial Code and arises after the Plaintiff claimed there was an inadequate offer of monies by the insurance company in an underinsured motorist (UIM) case.

The Plaintiff's claims were that a UIM claim was submitted and then an offer made and rejected. The Complaint alleged that the offer was unreasonable. The Court summarizes the facts in the complaint as stating that a UIM claim was made after the insured complied with the terms of the policy and then rejected. The Court finds that only materials facts may be taken as true to determine whether a "plausible claim for relief" has been state. It then concludes that the "facts are not sufficient to state a plausible claim for relief under Pennsylvania's bad faith statute." The claim for bad faith is dismissed without prejudice.

Tubman v. USAA Casualty Insurance Company, No. 12-7121 (E.D. Pa. April 30, 2013) (District Court Dismisses Fiduciary Duty Claim In Bad Faith Underinsured Motorist Suit).

The case involves a multi-count complaint arising out of an underinsured motorist (UIM) case. Among the counts in the complaint are claims for breach of contract, statutory bad faith, breach of fiduciary duty, common law bad faith and a violation of the Unfair Trade Practices and Consumer Protection Act.

The District Court finds that because of its hybrid nature of being both a first party and third party claim, a UIM case does not provide a right to a fiduciary duty. Therefore, the claim for breach of fiduciary duty is dismissed. The Court also holds that a UIM claim, as stated, is not a case where both a statutory and common law bad faith claim can be simultaneously filed because the common law right is subsumed by the breach of contract claim. Thus, the common law bad faith claim is dismissed. Lastly, the Court finds that no claim for violating the Unfair Trade Practices Act can exist in this case.

Jackson v. Drew, No. GD-12-008737 (C.P. Allegheny April 24, 2013) (Allegheny County Trial Court Consolidates MVA Claims).

The Plaintiff Jackson was involved in two separate car accident in Allegheny County. He claimed the second accident exacerbated injuries from the first accident. After not being able to settle either case, he files separate suits against the other drivers. Both suits were filed in Allegheny County.

The Plaintiff then sought under Pennsylvania Rule of Civil Procedure 213 to consolidate the cases because of a concern that both Defendants in the cases would try to blame the other for any of the his injuries. Judge Wettick grants the motion and consolidates the cases since both accidents arise out of a common question of law or fact OR a showing that the actions arise from the same transaction or occurrence. He concludes that in this case "there is a common question of fact, namely what injuries were caused by which accident". This motion is not the same as a motion to join under Rule 2229(b) which must arise out of a series of transactions or occurrences.

Although this is not a Koken case one could arguable use it to support a motion to consolidate a third party and underinsured motorist claim.

Brogan v. Rosenn et al, No. 08 - CV - 6048 (Lack. Co. April 22, 2013) (Trial Court Denies Facebook Discovery Motion).

In this matter, the Plaintiff was seeking the Facebook login name, user name, and password of a deponent witness who happened to be a paralegal in a defendant insurance company's claims department. According to the opinion another insurance company witness testified that he had communicated via Facebook with that paralegal regarding depositions in the matter. The carrier refused to release the paralegal's login info, user name, or password. The Plaintiff filed a discovery motion to compel that information.

The trial court holds that in order to obtain discovery of private information on social media sites the seeker of the information must, at the very least, show that the information sought is relevant to the case at hand. One way to establish that predicate is to show that the publicly available information on the site at issue reveals information pertinent to the matter and arguably calls the claims or defenses at issue in the suit into question.

Importantly, the trial court also holds that social media discovery requests must be properly framed and limited so that only relevant and non-privileged information is sought and produced. In this matter, the Court found that the plaintiffs had not established the relevance of the information on the paralegal's private Facebook pages. Therefore, the demand for the paralegal's disclosure of the user name and password was overly intrusive and would cause unreasonable embarrassment and burden to the paralegal in violation of the Pennsylvania Rules of Civil Procedure.