MARCH 2013 CASENOTES

Grudkowski v. Foremost Ins. Co., NO. 3:CV-12-1847 (M.D. Pa. March 5, 2013) (District Court Holds That Antique Car Policies Do Not Require Stacking Under The Pennsylvania Motor Vehicle Financial Responsibility Law).

This case arose out of a car accident where the insured was seriously injured. Ultimately, the insured sought underinsured motorist benefits (UIM) from his insurance company under an antique/collector car policy. The insured had paid for stacking so even though he was not "occupying" the antique vehicle when the accident occurred he sought the UIM coverage via stacking. The insurance company denied based upon a provision in the policy which precluded stacking of the antique car policy even though the declaration sheet stated that stacking applied and there was a premium paid for stacking.

The issue framed by the court is whether an insurance company is required to provide stacking on an antique car policy. As noted,, the insurance company charged premiums for stacking and even listed $300,000 combined single limits stacked. Premiums were paid throughout for single limits stacked. The insured was then involved in a motor vehicle accident not operating or occupying the antique car and sought stacked coverage. Grudkowski filed suit arguing that the stacking coverage was then rendered illusory.

The Memorandum Opinion affirms that premiums were charged and the policy said there was stacking. The opinion also observes that the policy eviscerates inter-policy stacking but the court finds that under the applicable case law in St. Paul Mercury Ins. Co. v. Corbett, 630 A.2d (Pa. Super. Ct. 1993) the antique vehicle is not within the same class as motor vehicles and those policies are different under the MVFRL. Therefore, the company is allowed to write a policy which restricts the stacking coverage and requiring the insured to actually be in the vehicle when the accident occurs. In essence, the court is acknowledging the insurance company is reaping a windfall for illusory coverage but stating that it is for the legislature or insurance commissioner to address.

Shiner v. Ralston, --- A.3d --- (Pa. Super Ct. Feb 22, 2013) (Pennsylvania Superior Court Holds Sudden Medical Emergency Is Affirmative Defense - Defendant Burden).

In this lawsuit which arises out of a car accident the Pennsylvania Superior Court distinguishes, for the first time, the differences between the *sudden medical emergency* defense and the *sudden emergency* doctrines. After outlining precisely what each of the claims are that can be made by a defendant in a lawsuit, the court holds that the sudden medical emergency defense is an affirmative defense, separate and apart from the sudden emergency doctrine, and that the defendant must plead and prove the sudden medical emergency in order to be allowed to use it as a defense. The sudden emergency doctrine is totally different.

At the initial trial the Plaintiff Shiner presented expert evidence contradicting the defense claim that the defendants' decedent suffered from a sudden emergency, a cardiac syncope causing the accident but never proved causation. The trial court ruled that the plaintiff was required to prove the medical emergency did not cause the accident. Since the plaintiff did not then the plaintiff could not prevail.

The Superior Court reverses and holds that at no time is the Plaintiff required to provide expert evidence to disprove the defendant's sudden medical emergency defense. The burden is on the defendant to prove that the alleged sudden medical emergency was unforeseen. The trial court opinion is reversed and the case remanded.

Murphy v. Hampton et al, NO. 2012-3855 (Centre Co. Feb. 14, 2013) (Trial Court Denies Severance of Third Party and UIM Claims).

The plaintiff was seriously injured in an accident with a bus on May 11, 2012. A subsequent lawsuit was filed against the bus driver, his employer, Centre Area Transportation Authority (CATA) and the plaintiff's underinsured motorist (UIM) carrier Nationwide.

The Defendants filed preliminary objections to the jointly filed complaint. First, they argued improper joinder under Pennsylvania Rule of Civil Procedure 2229(b). Second, they argued for severance under Pennsylvania Rule of Civil Procedure 213(b) because they would allegedly be prejudiced by the introduction of evidence that the Defendants are insured.

First, the trial court finds that the cases are not improperly joined because the causes of action arise out of the same occurrence, same operative facts, and joinder avoids inefficiency and delay of two trials which would be nearly identical and promotes judicial economy. Second, the trial court rules that severance is not required and the Pennsylvania Rules of evidence, specifically Rule 411, do not require severance because there would not be any prejudice.

The preliminary objections are overruled. Thanks to PAJ board member and auto list serve member Charles Kannebecker.

Herd v. State Farm, --- A.3d --- (Pa. 2013) (Pennsylvania Supreme Court Holds That Attorney Fees Are Not Recoverable In A Peer Review Case).

This case arises out of a lawsuit where a chiropractor sued State Farm after his medical bills for treating a patient were not paid for auto accident related injuries. State Farm denied the bills after a peer review and herd sued the company. The trial court found that the provider was correct and as part of the decision the provider was awarded attorneys fees. State Farm appealed the Superior Court affirmed. State Farm appealed to the Pennsylvania Supreme Court.

In a 4-2 Opinion a majority of the Pennsylvania Supreme Court reverses the Superior Court opinion and holds that attorneys fees are NOT collectible where a provider challenges a peer review decision, even if the court finds treatment reasonable and necessary. The Majority basis its decision on reviewing the peer review statutes and observing that there is no explicit authorization for a court to award attorneys fees in the peer review statute and the American Rule applies.

Orsulak v. Penn National Mut. Cas. Ins. Co., No. 4225 Civil 2011 (C.P. Monroe Jan. 14, 2013) and Orsulak v. Windish, No. 55 Civil 2011 (C.P. Monroe Jan. 14, 2013) (Trial Court Enters Orders On Pre-trial Koken Issues).

These are two trial court opinions from Monroe County arising out of the same car accident. In the first case, Orsulak v. Penn National Mut. Cas. Ins. Co., No. 4225 Civil 2011 (C.P. Monroe Jan. 14, 2013) the trial court grants the underinsured motorist carrier's (UIM) request to sever jointly filed breach of contract and bad faith claims from a UIM claim. The court decides that the breach of contract and bad faith claims will be heard

after UIM claim concludes because evidence regarding the bad faith claim would confuse jury and could prejudice jury against UIM insurer.

The trial court also decides that the third party claim and UIM claim will be heard together and depending on the verdict, the bad faith claim may be moot. However, the court denies UIM insurer's request that the breach of contract and bad faith proceedings be stayed because the plaintiff has a right to move cases forward and a blanket "freeze" on all bad faith matters until the UIM claim concludes is not warranted. Certain discovery may need to be barred until the UIM claim concludes but the court can set parameters whereby such evidence is turned over immediately at the conclusion of the UIM case. Importantly, the mentioning of insurance and the identification of the UIM insurer will be excluded unless the UIM insurer intends to participate in the trial of the tortfeasor to comply with due process and to avoid a "double teaming" situation.

In the second companion case, Orsulak v. Windish, No. 55 Civil 2011 (C.P. Monroe Jan. 14, 2013) the trial court grants consolidation of the UIM claim and third party tort claim because there is no need to have separate trials on the same issues. The court also denies a request to have the UIM insurer be substituted as the subrogee in the underlying third-party case where the UIM insurer has tendered $25,000 representing the third-party liability limits but refuses to give consent to settle or waive subrogation rights. Since the UIM insurer agrees to be bound by the verdict up to the limits of UIM coverage the court sees no prejudice to the plaintiffs in continuing their action against the tortfeasor and there is no reason to force the UIM insurer to stand in the plaintiffs' shoes.

McWeeney v. Estate of Strickler. --- A.3d --- (Pa. Super. Ct. 2013) (Pennsylvania. Superior Case Holds A Named Driver On An Auto Insurance Policy Is Not Bound By Limited Tort).

This case addresses and answers the unsettled issue in Section 1705 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) of whether a person who is named as a driver on an insurance policy is bound by the owner of the policy's selection of limited tort. In this case, the fiancé of the owner of the policy was also a resident of the same household and named as a driver on the policy. The trial court reasoned that she was, therefore, also a "named insured" or, as a permissive driver, an "insured" who was bound by the limited tort selection under the terms of Section 1705 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL).

The Superior Court reverses the trial court and holds under the plain and unambiguous terms of the MVFRL the fiancé is neither a "named insured" nor an "insured" under Section 1705. Therefore, she is not bound by the limited tort selection and the trial court erroneously found that she was deemed bound by limited tort. The court writes that under the terms of Section 1705 "only one who is identified by name as an insured on the face of the policy is a 'named insured' for purposes of tort election." Also, to then hold that the permissive driver is also an "insured" bound by limited tort contravenes the intent of Section 1705. The MVFRL in Section 1705(f) limits the people who are considered bound by the limited tort selection and the permissive driver is not one of them. Therefore, the trial court order is vacated and the case remanded.

Essentially, due to the more restrictive terms of Section 1705 the named driver is not the named insured. This opinion may have been different if the definition of insured in Section 1702 was applied, but this is a Section 1705 limited tort case.

Thanks to PAJ member and Auto List Serve member Steven Stambaugh of York.

Wright v. Eastman, --- A.3d --- (Pa. Super. Jan. 22, 2013) (Pennsylvania Superior Court Reverses Summary Judgment In Pedestrian Case Involving Alcohol).

The case involves a pedestrian who was killed in a car accident after she was struck by a car. At the time of the accident the pedestrian had a .42% BAC and the trial court held that the Decedent's Estate failed to make out a material issue of fact to establish liability. Therefore, it granted the Defendant Eastman's Motion for Summary Judgment.

The Superior Court reverses and finds that the trial court improperly granted summary judgment and dismissed the case because it speculated on the believability and validity of the expert testimony, even though it is required to look at it in the light most favorable to it. The Superior Court notes that it is only reversing the entry of summary judgment and not making any rulings on admissibility of the expert testimony that might "be tested and resolved through a FRYE hearing", nor is it opining on the weight a jury should give the expert's reports or testimony.

It writes that "[w]e are merely applying the governing standard of review, de novo as is our task, and find that Appellant has made out a substantial

question of material fact as to each element of negligence. Consequently, the trial court erred as a matter of law in concluding otherwise."