THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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BAD FAITH CLAIMS REMAIN VIABLE SOURCES OF INCREASED COMPENSATION, AS PROVEN BY $18MIL LAWRENCE COUNTY SETTLEMENT

By: Dallas Hartman, Esq.

A Lawrence County family will receive $18 million in damages for their severely injured son after pursuing a claim for bad faith arising from Erie Insurance Exchange's ("Erie") handling of a single car accident, which occurred on February 22, 2003. I previously obtained a $15.6 million dollar verdict on behalf of David and Joyce Piper, as Guardians of Stephen Piper, back on March 15, 2007, in connection with the underlying motor vehicle accident. That verdict, one of the largest ever in Lawrence County, grew to over $20 million dollars based on the addition of post-judgment interest since the original verdict was entered. The Pipers, on behalf of their incapacitated son, thereafter pursued a bad faith claim directly against Erie. The $18 million dollar settlement is one of Pennsylvania's largest settlements arising from a bad faith claim in the past decade, second only to a $20 million dollar settlement in the 2007 *Tuski v. Princeton Insurance* case.

On February 22, 2003, Stephen Piper, 15-years old at the time, sustained catastrophic brain injuries, leaving him incapacitated and unable to care for himself. Stephen was a passenger in a vehicle being driven by his 17-year-old brother, Kyle. The two were on their way to a church youth group when Kyle hit a patch of ice and spun out of control, crashing into a telephone pole, essentially splitting the car in half. Stephen was transported from the scene to St. Elizabeth's Medical Center in Youngstown, Ohio, via Life-Flight, where he spent several weeks in a coma. Two months after the accident, Stephen was transferred to The Children's Institute of Pittsburgh, where he underwent extensive inpatient rehabilitation through September 2003. As a result of the injuries he sustained in the February 22, 2003 accident, Stephen has been left with diminished mental capacity and permanent bodily and cognitive disabilities. Stephen's injuries have prevented him from ever being able to live independently and have caused him to lose all wage earning capacity.

At the time of the accident, Kyle Piper was insured by Erie under a policy of insurance providing $100,000 in bodily injury coverage. Shortly after the accident, Erie knew that their insured, Kyle Piper, was at fault for the accident and that as of August 6, 2003, Stephen was still at The Children's Institute. In addition, Erie knew that more than five (5) months after the accident, Stephen was still unable to talk and could only walk about 100 yards at a time. In May of 2003, Erie set its reserves to settle the case at the policy limit of $100,000, but failed to offer that amount to settle Stephen's bodily injury claim. Instead of offering to settle Stephen's claim for the $100,000 policy, as one of her supervisors had directed, Erie claims adjuster Lauren Lackey advised me that she was still investigating this accident. By September of 2003, six months after the accident, the insurance company still refused to pay the $100,000 bodily damage settlement, even after they had received all relevant accident reports and medical records, including documentation demonstrating that, to that date, Stephen had incurred medical expenses in the amount of $708,232.60.

I continued to request that Erie offer the $100,000 in available bodily injury insurance coverage so that the family could pursue a claim for underinsured motorist benefits available under other vehicles owned by the Piper Family, which were also insured by Erie. When Erie finally offered to settle Stephen's claim against Kyle, Erie conditioned the third-party settlement upon Stephen also giving up any other claims he may have had against Erie, including any claims for underinsured motorist benefits. I cautioned Erie's adjuster that it was impermissible to tie the settlement of Stephen's claim against Kyle to Stephen's separate claim against Erie for underinsured motorist

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UPCOMING EVENTS FOR WPTLA

An **Erie Retreat** is scheduled for **Aug. 21-22**, which will include a dinner meeting, discounted room accommodations, and a 2-hour CLE program. Details coming soon.

The annual **President's Challenge 5K Run/Walk/Wheel** is slated for **Saturday, Sept. 13** at the Riverwalk on Pittsburgh's North-Shore. Mark your calendars for this fun event.

A **Legislative Meet 'n Greet** will happen on **Thursday, Oct. 2** in Pittsburgh.

National author **Phillip Miller** will present a **3-credit CLE** on **Friday, Oct. 10** in Pittsburgh.

President
Charles F. Bowers III

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A Message from the President …

By: Charles F. Bowers III, Esq.

Dear Fellow Members:

Trial is expensive. As litigators we have known this fact most of our professional lives. We know that in order to pursue our clients' claims and interests, we must expend large sums of money for physician records, reports, depositions, expert witness fees, and investigations. We are willing to advance these costs, for the most part, because we realize that we will recoup them from settlement funds or verdict award. And yet, as a whole, I feel that we fail to properly make our clients aware of the cost of pursuing claims and litigation. We all have been confronted by that situation where due to litigation costs and attorney's fees, the client ends up with less than the attorney's share of the settlement or verdict. Unfortunately, this situation leaves a sour taste in our clients' mouths, one that impacts all of us in a negative manner. This unfortunate situation is often times made worse when subrogation liens are present and must be repaid. Clearly, the nightmare scenario occurs when a case is settled, attorney's fees and expenses are paid, subrogation liens are satisfied and the client is left with a minuscule recovery or nothing. I know that we all try to avoid these situations, but sometimes even when we try to make it work, we end up with an angry and unhappy client.

So what is the answer? Should we refuse to accept these types of cases? Maybe. It is always prudent to determine if the claim or case is one that will be beneficial to all involved or a giant ball of ill will. Cut our fees? Waive our expenses? I know that each and every one of us have done all three of these things to satisfy our clients and still attempt to protect their rights and further their interests. Educating our clients and potential clients is the key. We must educate our clients from the initial meeting as to the potential pitfalls and problems that can arise in all personal injury cases. We must be honest about the likelihood for recovery and dampen unrealistic expectations. In auto cases, we must educate our clients and the general public to the fact that they must take the steps necessary to protect themselves with adequate automobile insurance, including increased liability limits and uninsured and underinsured coverage, as well as the selection of the Full Tort option. We must urge clients to protect themselves with increased liability limits on their homeowners and premises liability insurance. Only in this way can we hope to ensure that we are not doing a disservice to our fellow lawyers in the future.

We must vigorously fight for substantial reduction of subrogation liens or outright waiver where appropriate. We should be vigilant when incurring litigation costs to ensure that we are not wasting our client's money on unnecessary expenses. It is a fine line to walk between the need to properly present the claim and overkill.

Finally, we must do a better job in communicating to our clients the realities and potential expenses in pursuing claims and litigation. We must make the client aware of what doctors are charging for their reports and what they charge for an hour of their time to testify. In this way, an educated client will be a happier client and one who will understand the realities of litigation. As lawyers, we all will then benefit from an improved view of our chosen profession from our clients and the general public.

IMPORTANT NOTICE: CHANGES ARE COMING TO THE ADVOCATE!

THIS IS THE LAST PRINT EDITION OF THE ADVOCATE YOU WILL RECEIVE

On March 27, 2014, the WPTLA Board of Governors unanimously approved online publication and electronic delivery of The Advocate beginning in the 2014-2015 fiscal year. This marks great technological progress for our organization and will provide a significant benefit to our members. Publishing The Advocate online and using e-mail to notify our membership of a new edition of The Advocate being made available on the WPTLA website will save the organization approximately $8,000 - $10,000 per year in printing and mailing costs. It will also provide greater flexibility for content, as we will not be bound by the printer's page requirements/ restrictions. Most importantly, it will allow our members to easily access The Advocate, in a searchable format, from any computer or smart device, and will allow us to make all back editions of The Advocate available through our members-only portal.

Within the next few months, you will receive an e-mail from our Executive Director Laurie Lacher with instructions on creating your members-only login and password for the WPTLA website. The members-only section of the website will allow you to access the current edition of The Advocate, as well as prior editions. As we are currently in the process of developing the content for this portion of the website, older issues will become available on a rolling basis as we are able to format and upload them for the members' use.

Members will be notified that a new edition of The Advocate is available via e-mail. Laurie is diligently working to change the current format of e-mails so notice e-mails will contain article previews and links directly to the website content, similar to e-mails you may currently receive from AAJ and PAJ.

The first edition of The Advocate that will be published online is the Summer 2014 edition, which should be hitting your e-mail in August 2014. To ensure uninterrupted delivery of The Advocate, please be sure to set up your members-only login to the website when the login information is provided, and keep Laurie updated with any changes in your contact information.

Don't agree with what you've read? Have a different point of view?

If you have thoughts or differing opinions on articles in this issue of The Advocate, please let us know. Your response may be published in the next edition.

Also, if you would like to write an article about a practice area that you feel our members would benefit from, please submit it to our Executive Director, Laurie Lacher, at admin@wptla.org.

Contact our Editor Erin Rudert directly at erin@lawkm.com.

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BAD FAITH CLAIMS … *(Continued from Page 1)*

coverage from the Pipers by trying to force Stephen to release his underinsured motorist claims against Erie in order to receive the $100,000 in insurance coverage from Erie for Kyle's negligence in causing the February 22, 2003 accident.

Based on Erie's continuous insistence that the $100,000 bodily injury settlement of Stephen's claim include the release of any and all claims against Erie, Stephen's parents, David and Joyce Piper, were forced to file a lawsuit on behalf of Stephen, due to his incapacity, against his brother and their son, Kyle. The automobile case was eventually tried before the Honorable Thomas M. Piccione in March 2007. Shortly before the automobile case went to trial, Erie actually filed its own lawsuit against Kyle Piper, asking the court to declare that its handling of Stephen's claim against Kyle was not handled in a "bad-faith" or inappropriate manner. On March 15, 2007, a Lawrence County jury returned a verdict in favor of David and Joyce Piper, as Guardians, on behalf of Stephen Piper, in the total amount of $15,602,612.79. The verdict consisted of $735,000 for past medical benefits; $8,317,612.79 for future medical expenses; $2,300,000 for past and future lost wages; $1,500,000 for loss of enjoyment of life; $2,000,000 for pain and suffering; $250,000 for embarrassment and humiliation; and $500,000 for physical disfigurement. Attorney Charles Garbett, of Luxenberg, Garbett, Kelly & George, P.C., defended Kyle on behalf of Erie at the trial in the underlying automobile case.

In response to the claim brought against it for "bad-faith," Erie argued that adequate documentation of Stephen Piper's injuries was not made readily available at first and that the adjuster handling the case continued to investigate liability even after the Erie home office had suggested settlement of the claim. Claims Adjuster Lauren Lackey claimed that she was actually waiting for documentation of the ambulance trip from the night of the accident; however, Stephen was never taken anywhere in an ambulance. Likewise, Erie claims supervisor Bret Ellis alleged in his deposition that all that was necessary was "[s]ome form of medical documentation showing prognosis and diagnosis," however, no one from Erie ever conveyed that request to our office, nor was that request reflected in Erie's extensive claims notes. Moreover, the Life-Flight documentation, which was already in Erie's possession, should have sufficed to allow Erie to offer its policy limit.

As for the request that Erie be included on the release to settle Stephen's claim against Kyle, Erie claimed that the request to include Erie on the release was inadvertent, despite Adjuster Lackey's follow up letter confirming that Erie was to be included on any release.

Attorney Joel Feller, of the Philadelphia firm Ross Feller Casey, was subsequently brought in to assist Douglas Olcott and myself in the "bad-faith" claim when it became apparent that Erie was seeking to blame me, as plaintiff's counsel, for Erie's committal of "bad-faith" by alleging that I failed to provide them with documentation in a timely manner. However, a claim of "bad-faith" is based solely on the conduct of the insurance carrier. Nothing I did, or could have done, in any way influenced the decisions being made internally by Erie in their handling of Stephen's claim against Kyle, as was ultimately proven by documentation contained in Erie's own claims file, uncovered during the course of this litigation.

I'm glad to see that Stephen will now receive the compensation the jury previously felt he was entitled to receive back in 2007. It is a tremendous relief for Stephen's parents, David and Joyce Piper. David and Joyce now know that there is money available so that Stephen, who is currently 26 years old, will be provided with the type of care and assistance that he needs for the rest of his life, and that he won't ever have to be placed in a nursing home once they are no longer alive or physically able to care for him. This settlement will also now allow the entire Piper Family to heal and move forward after Erie's "bad-faith" conduct forced these parents to have to sue their own child, Kyle, in order to obtain the compensation that their other child, Stephen, was entitled to receive as a result of the severe injuries he received in this tragic accident. What Erie put this entire family through is unacceptable and this settlement holds Erie accountable for that conduct. Erie severely underestimated this family's resolve and the intelligence of Lawrence County's jurors. Erie never believed that a jury would award this type of money to someone who was suing his own brother. However, as can be seen by the amount of the jury's verdict, this jury understood how significant Stephen's injuries were, the costs associated with providing Stephen a lifetime of care, the economic loss suffered by Stephen due to his inability to work, and what it means for a fellow human being to sustain a loss of enjoyment of life, to endure pain and suffering, embarrassment, humiliation, and disfigurement. By not settling this claim, and by not accepting Erie's mistreatment of its own insureds, this family now has much more than $300,000 in insurance coverage that otherwise would have been available.

MEMBERSHIP IN WPTLA FOR 2014-2015

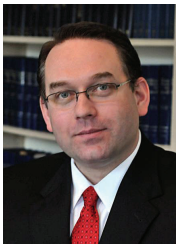
It is time to renew your WPTLA membership, if you have not done so already. Renewal information was mailed in late June, and is also available on our website at *www.wptla.org/join-wptl*a. The year runs July 1, 2014 - June 30, 2015.

We will be initializing a members-only section, available with a username and password. This section will house The Advocate as well as a listing of members. Completion of this section is targeted for mid-August.

Complete your renewal now so that you won't miss any event notifications or important information.

INAUDIBLE

By: Troy M. Frederick, Esq.



I am currently litigating a case in which the discovery of "inaccuracies" in a recorded statement, secured by a defendant's insurance company, has changed what my firm requests when we begin to represent new clients.

I represent a plaintiff who was injured while she was a passenger in the defendant's vehicle. The defendant was giving the plaintiff a ride back to her vehicle from a remote hunting camp in the middle of winter. The weather was cold but it had not snowed for a few days. To get from the hunting camp to the main road, where the Plaintiff had parked her vehicle, the defendant had to travel on an unpaved gas well road. My client was injured when the defendant lost control of his vehicle and slid into a vehicle that was approaching from the opposite direction.

The defense attorney and I exchanged written discovery and secured party depositions. During the depositions, an issue arose regarding something the defendant had said in his transcribed recorded statement, obtained by his insurance company, which caused me to request the audio recording of his statement. Throughout the defendant's transcribed recorded statement there were several places where the transcriptionist inserted the word "(inaudible)." This is of course very common. However, what I hope is less common is that there were a few places in the transcript where the transcriptionist inserted the word "(inaudible)" and the audio version was anything but.

During the depositions, the defense attorney, who is a true gentleman and who I have no doubt was unaware that the transcribed statement was inaccurate, attempted to muddy the waters regarding the condition of the unpaved roadway at the scene of the collision. The defense was attempting to establish that the defendant encountered an unexpected icy patch on the roadway that caused him to lose control when, in reality, the defendant had traveled over a mile on the roadway knowing that the entire roadway was a sheet of ice. This is where the "inaudible" portions of the transcript become relevant.

The transcript reads as follows:

> Q: Okay. And where was the other vehicle?
>
> A: Coming the opposite way. It was solid, there there is gas trucks following **(inaudible)** It's not a **(inaudible)** road. I think the gas company is required to ask **(inaudible)** but it wasn't asked.

The audio recording very clearly states the following:

> Q: Okay. And where was the other vehicle?
>
> A: Coming the opposite way. It was solid, there, there is gas trucks following **to the gas wells and it was solid ice man. It was packed solid.** It's not a **paved** road. I think the gas company is required to **ash the road** but it wasn't **ashed**.

Further along the transcript reads as follows:

> Q: Okay and any conversation with the other driver?
>
> A: Ah, yes.
>
> Q: And what was that?
>
> A: ah I just, we just made sure everybody was okay and ah, I basically slid over to his lane, you know, and it was my fault actually. I apologized you know, I mean, I don't know whether he was on, you know, the right side, you know, far over or where, but I basically slid over to his lane.
>
> Q: Okay.
>
> A: I am not blaming him or anything. I just **(inaudible)** because I actually the curve was in, you know, it was a left-hand curve.

As it stands, this exchange was good for my client's case. The defendant appeared to be taking responsibility even though he insinuated that he could not be sure the other driver was also not at fault. That being said, the audio recording very clearly states the following:

> A: I am not blaming him or anything**. I'll just have to take the blame** because I actually the curve was in, you know, it was a left-hand curve.

I cannot help but wonder, if the "inaudible" sections of the defendant's recorded statement had been accurately transcribed, this case would have made it as far into litigation as it has. The "inaudible" portions just happen to directly address key issues in this litigation. Those key issues also just happen to hurt the defendant's case. The clearly audible - "inaudible" sections just happen to make an already strong case that much stronger.

From this point forward, it will be my practice to request the audio recordings of any recorded statements that may be available. This "inaccuracy" has hopefully been nothing more than a fluke, but it is well worth the extra time to ensure that the "inaudible" portions of a recorded statement are actually inaudible.

COMP CORNER

By: Thomas C. Baumann, Esq.

SUPREME COURT ADDRESSES THE EFFECT OF APPLYING FOR JOBS ON EARNING POWER ASSESSMENTS

In an important opinion authored by Justice McCaffrey, The Supreme Court in *Phoenixville Hospital v. WCAB (Shoap)*, No. 32 EAP 2011, has significantly changed defenses in Earning Power Assessment Modification Petitions. Practitioners in the area will need to take this case into consideration whenever faced with a request for a meeting with an employer vocational expert.

In *Phoenixville Hospital*, the employer filed a Modification Petition based on two Labor Market Surveys. The employer vocational expert identified five (5) jobs as being "open and available." The relevant information about the jobs had been supplied to the Claimant. The Claimant testified that when she received notice of the first three (3) jobs, she applied for each of them on the same day. Her written applications were offered as exhibits in the case. She was never contacted by any of the three (3) employers. Later when she received the last two (2) positions, she also applied for them. She interviewed with both employers and was not offered a position. She was informed by one (1) employer that she was not qualified for the job.

The Workers' Compensation Judge (WCJ) found the Claimant's testimony that she had applied for all the jobs but had not been offered any to be credible. Finding that the Claimant had acted in good faith in applying for the positions, the Judge denied the Modification Petition.

The employer followed with an appeal to the Workers' Compensation Appeal Board (WCAB). Employer argued that the Judge utilized a requirement of *Kachinski vs. WCAB Zapco Construction Company*, 532 A.2d 374 (Pa. 1987). Any *Kachinski* requirements were moot in light of the more recent changes to Section 306(b) of the Pennsylvania Workers' Compensation Act. Those changes to the Act rendered irrelevant whether the Claimant had applied for jobs listed in a Labor Market Survey. Therefore, issues of good faith would also be irrelevant. The WCAB did not accept this analysis and upheld the decision of the WCJ noting:

> By taking the initiative and applying in good faith for the positions, [appellant here] put the Findings of the Labor Market Survey to the test and demonstrated that the jobs listed therein were not, in reality, available to her. Hence, we conclude that the positions do not exist for [appellant] and that the WCJ correctly [denied employers'] Modification Petition.

Defendant appealed to the Commonwealth Court. The Commonwealth Court found that the issue before it was whether the jobs in the Labor Market Survey were "actually open and available to anyone having the Claimant's physical limitations and qualifications at the time of the Labor Market Survey." The Court concluded that whether the Claimant had applied for the positions in good faith was not relevant. It ordered the modification of benefits finding that the work in the Labor Market Survey constituted jobs open and available at the time of the earning power assessment.

On appeal to the Supreme Court, that body accepted for review the issue of determining whether a job is “available” to a Claimant when a Claimant applies to each individual job contained in a Labor Market Survey and does not receive an offer of employment.

Claimant argued that Section 306(b) did not obliterate *Kachinski* principles. She cited *South Hills Health Systems v. WCAB (Kiefer)*, 806 A.2d 962 (Pa. Commwlth. 2002) as establishing that jobs in Labor Market Surveys must actually "exist" and be open and available to a Claimant.

Amicus Curiae, the Pennsylvania Association for Justice, filed a Supporting Brief. The Association argued that when there is an application with no offer of employment, this constitutes a test of the credibility of the Labor Market Survey.

Employer argued that the Amendments to the Act replaced the *Kachinski* requirements. It argued that the Commonwealth Court’s interpretation of the employer's burden on earning power assessment was correct.

The Supreme Court noted that the Amendments to the Act following the *Kachinski* decision neither incorporated nor abrogated the case's requirements. It noted that the specter of *Kachinski* hovered over the case at hand. It noted that "proof required to reduce or suspend the Claim-

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COMP CORNER *(Continued from Page 6)*

ant's benefits must rest upon the existence of meaningful employment opportunities, and not the simple identification of jobs found in want ads or employment listings." It agreed with the Commonwealth Court in *South Hills* that "employer must prove the existence of **open** jobs that the Claimant is capable of filling, not merely the existence of jobs that are already filled . . ." (emphasis in original). Given this burden, the Court concluded that "a claimant indisputably may show that the employer's Labor Market Surveys were simply based on unsubstantiated, erroneous, conflicting, false, or misleading information, and evidence regarding the Claimant's actual experience with the employers identified in the employer's Labor Market Surveys may lend support to establishing contentions along these lines." Additionally, because "an employer is required to establish the existence of substantial gainful employment that is compatible with the Claimant's residual productive skills, education, age and work experience, it would be **directly** relevant for a Claimant to show that an employer rejected the Claimant's job application precisely because the work is incompatible with the Claimant's residual productive skills, education, age or work experience." Slip Opinion at page 22 (emphasis added). The Court concluded that the Claimant's effort to obtain the jobs identified in the Labor Market Survey is "undeniably relevant to rebut the employer's argument that the positions identified were proof of the potentiality of a Claimant's substantial gainful employment." Slip Opinion at page 24. Such proof, the Court noted was not "dispositive" of the issues. The Court then reversed the Commonwealth Court's determination that the Claimant's benefits should be modified.

Going forward, one must ask what will be the response of vocational experts. Will vocational experts timely provide notice of available jobs to be included in the Labor Market Survey as they are discovered? If the expert fails to do so, can Claimants argue that the employer's expert has sabotaged the Claimant's ability to apply for positions on a timely basis? Should all Claimants' attorneys recommend to their clients that he/she apply for each position included in a Labor Market Survey regardless of when notification of the positions is given? Should Claimants' attorneys when meeting with the vocational expert hired by the employer address the issue of notifications of the job at the time of the vocational interview? Will employer vocational experts attempt to prove "bad faith" on the part of Claimants who do apply for positions in Labor Market Surveys? If so, should Claimants' attorneys work out ground rules regarding applications and interviews subsequent to this decision? Will Claimants be called upon to produce evidence from potential employers why a job offer wasn't made?

The Act was amended to included earning power assessments based on Labor Market Surveys to provide employers a cheaper mechanism to file a Modification/Suspension Petition. Employers disliked the fact that a Modification/Suspension Petition based on job availability could be defeated if the Claimant applied appropriately for all positions. The amendments to Section 306(b) were seen as a mechanism to more cheaply win Modification Petitions and/or leverage the case for settlement. Will *Phoenixville Hospital* change that to any great extent?

The author believes that employers will continue to utilize earning power assessments with no less frequency. The procedure still remains much cheaper than *Kachinski* to leverage the case. Given the settlement culture that has arisen in the practice of Workers' Compensation, *Phoenixville Hospital* is not likely to change what has happened to a great deal. However, it may increase the value of cases for settlement. The author believes that it will certainly aid in the defense of cases that cannot be easily settled. It offers another arrow in the Claimant's quiver but at the same time may cause counsel more work. Many Claimants' attorneys spent much effort cajoling clients to follow through with job applications and interviews. While the full extent of that labor is not likely to return, counsel will need to prepare to revisit some of that effort in the future.

BY THE RULES

By: Mark E. Milsop, Esq.

ELECTRONIC FILING IN THE APPELLATE COURTS

The Pennsylvania Supreme Court entered an Order dated January 6, 2014[1] allowing electronic filing in the appellate courts. According to the Order, attorney participants must create an account prior to filing.

Registration can be accessed at http://ujsportal.pacourts.us/AttorneyServices.aspx.

Attorneys are responsible for the actions of any individual whom they authorize to use their account. Signatures shall use the /s/ format.

Service upon attorneys who have established an account will be made automatically by the system. Service upon those without an account must be made by paper. If you use the electronic filing system, you must accept automatic service by the system. In addition, if you are a registered user, the Court may use the system to serve you with any notice that would otherwise be required to be served by mail. As a bonus, those served in this manner do gain three extra days to the same extent as if service were made pursuant by Pa.R.A.P. No. 121(e).

The applicable filing fees will be payable through the system. There will be a small additional electronic convenience fee. It appears the system accepts Visa, MasterCard, Discover, American Express, and ATM cards.

In order to preserve your filing date, the transaction must be completed by 11:59:59. This means that it will be prudent to begin the filing process well in advance of that time. It is noteworthy that the time the process is started is of no consequence, it is the time when the process is completed.

Finally, the electronic filing system **does not** exempt you from a paper filing. You **must** submit a paper version within seven days of the electronic filing as long with as many copies as the court requires.

At this time, electronic filing appears to be available for the Supreme and Commonwealth Courts, but not the Superior Court.

[1] The Order is No. 418 on the Pennsylvania Supreme court's Judicial Administration Docket and may be accessed by the court's website.

RULE 238

The prime rate for 2014 remains at 3.25%.

RIGHT TO ORAL ARGUMENT

The Pennsylvania State Rules Committee has published proposed recommendation No. 258. This recommendation would rescind Rule 211, which is the rule that grants a party the right to argue any matter before the Court[2]. The official comment period ended February 28, 2014. However, it is urged that those who know members of the committee or the Court personally express their dissatisfaction with this proposal, even outside of the comment period. Moreover, if it is adopted, you are urged to vigilantly make sure that your local rules continue to provide for oral argument.

It is my opinion that this rule change would work against those who have been injured. The absence of oral argument may have a tendency to make the issues seem less important. They may also heighten the role of law clerks, some of whom will lack a practical understanding of the issues[3]. Although I do not harbor a delusional view that every case I have turns on my eloquent articulation of the law, if argument makes a difference in 10% of the cases, it is worth it.

PA.R.C.P. NO. 230.2 SUSPENDED

The Pennsylvania Supreme Court entered an order on April 23, 2014 suspending Pennsylvania Rule of Civil Procedure 230.2. Rule 230.2 was the rule that established the procedure

[2] Rule 211 currently provides:

> Oral Arguments
>
> Any party or the party's attorney shall have the right to argue any motion and the court shall have the right to require oral argument. With the approval of the court, oral argument may be dispensed with by agreement of the attorneys and the matter submitted to the court either on the papers filed of record, or on such briefs as may be filed by the parties. The person seeking the order applied for shall argue first and may also argue in reply, but such reply shall be limited to answering arguments advanced by the respondent. In matters where there may be more than one respondent, the order of argument by the respondents shall be as directed by the court.

[3] This is in no way meant as a general attack on judicial law clerks. Most are terrific and well-intentioned people. However, the concern is that there are some whose recommendations to their judges will fail to take into account some practical considerations that may surface during oral argument.

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BY THE RULES … *(Continued from Page 8)*

for counties to terminate cases for inactivity in a fair and orderly manner. That rule created a procedure whereby a Notice of Intent to Terminate was to be sent, following which an attorney could avoid termination by filing a Notice of Intent to Proceed. The rule also provided a simplified procedure for reinstating a terminated case.

The Order suspending the rule is currently under review. The Order further provides that "this order does not affect the trial courts' ability to proceed pursuant to Pa.R.J.A. No. 1901."

This writer is also aware of anecdotal evidence that shortly after the April 23rd Order, at least 3 Western Pennsylvania Counties have sent out a round of Notices of Intent to Terminate. Some of these notices schedule a call wherein the attorney of record must personally appear and object to termination. In another County, such cases will be scheduled for a status conference (in my opinion, a very fair approach). If you have received such a Notice, I would encourage you to file a written response in addition to your appearance in Court.

Obviously, all of this activity suggests that other Counties may be following suit. It is recommended that you review your inventory and make sure that there has been recent substantive docket activity.

Friday, Oct 10, 2014

3 Credit CLE Seminar, featuring

Phillip Miller, co-author of

Advanced Depositions Strategy and Practice

"This ... is a must-have in any plaintiff lawyer's library. Phillip and Paul are masters at the art and science of deposition taking, and this ... DVD with video examples teaches time-proven techniques that lead to killer depositions. And we all know killer depositions lead to better settlements and verdicts!"

—Mark R. Kosieradzki, past chair, AAJ Nursing Litigation Group; faculty member, AAJ Advanced Deposition College

Register now at www.wptla.org/events/

9:00 am - 12:30 pm
Omni William Penn Hotel, Pittsburgh

SPONSOR SPOTLIGHT

NAME: Lisa Caligiuri

BUSINESS/OCCUPATION: Injured Workers Pharmacy - Account Manager for Western PA

FAMILY: I have two daughters, Jenna (10) and Danielle (8).

INTERESTS: I love spending time with family and friends, traveling, and being active.

PROUDEST ACCOMPLISHMENT: My two respectful, intelligent, kind, and beautiful children.

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: I bit the dust while walking into the lobby of a huge orthopedic practice and of course, in front of a dozen of people.

FAVORITE RESTAURANT: Little Tokyo

FAVORITE MOVIE: Rudy

FAVORITE SPORTS TEAM: Pittsburgh Steelers

FAVORITE PLACE(S) TO VISIT: California

WHAT'S ON MY CAR RADIO: 80's, 90's, and House Music

PEOPLE MAY BE SURPRISED TO KNOW THAT: I worked at an Advertising Agency when I started my career.

SECRET VICE: Impractical Jokers and Pinterest

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

SUPREME COURT OF PENNSYLVANIA

Physicians facing medical malpractice allegations are not entitled to a "safe harbor" based on a purported "error in judgment."

Passarello v. Grumbine, 2014 Pa. LEXIS 373 (Feb. 7, 2014)

The plaintiff-parents brought suit on behalf of their infant son who died from a viral infection of his heart while under the care of defendant-pediatrician. Plaintiffs presented expert testimony at trial that the defendant deviated from the standard of care by failing to send decedent for further testing after four visits/office contacts over the week leading up to his death. Defendant presented expert testimony that she complied with the standard of care because she had reached an alternate diagnosis "that fit the symptoms and made sense." The trial resulted in a defense verdict. The central issue on appeal were jury instructions related to the "error in judgment" defense.

The charge at issue was read as follows to the jury at the time of trial:

> Under the law[,] physicians are permitted a broad range of judgment in their professional duties and physicians are not liable for errors of judgment unless it's proven that an error of judgment was the result of negligence.

The Superior Court vacated the jury's verdict and remanded the case to the trial court based on the application of *Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. 2009) (en banc), which was decided shortly after the conclusion of the trial in *Passarello*. The Superior Court in *Pringle* held that an error in judgment charge, such as the one given in *Passarello*, should never be given as it "wrongly suggests to the jury that a physician is not culpable for one type of negligence, namely the negligent exercise of his or her judgment." The instruction incorrectly "injects a subjective element into the jury's deliberations" because it "improperly refocuses the jury's attention on the physician's state of mind at the time of treatment," rather than on the standard of care, which is objective.

The Supreme Court affirmed the decision of the Superior Court, specifically upholding the Superior Court's conclusion that "error in judgment" charges should never be given in medical malpractice cases. The majority of the Justices determined that the liability of physicians for damages in medical malpractice cases should be determined by a reasonable physician in the same position as the doctor against whom recovery is sought. Plaintiffs will no longer have to face the argument by the medical community that the health care provider is entitled to a "safe harbor" based upon an "error in judgment." The Court agreed that such a defense is too subjective, and places the focus on the doctor's state of mind, subjective intent, personality, remorse, of other factors that distract the jury from the proper, objective standard of care.

The Court's opinion thoroughly addresses standard jury instructions, the history of the Pennsylvania Standard Jury Instructions, medical malpractice law in other states, and the overall history of medical liability claims and the evolution of the modern standard of care for such claims.

A UIM carrier is entitled to a setoff equal to funds received from all tortfeasors, not only automobile tortfeasors.

AAA Mid-Atlantic Ins. Co. v. Ryan, 2014 Pa. LEXIS 196 (Jan. 21, 2014)

The plaintiff was driving through an intersection when his vehicle was struck by the defendant's vehicle. The plaintiff brought suit against the defendant vehicle operator, as well as PennDOT and the City of Philadelphia. PennDOT was ultimately dismissed from suit.

After PennDOT's dismissal, the plaintiff settled with the defendant vehicle operator for the BI limits of $25,000. The parties agreed to transfer the matter to binding arbitration, where an award of $500,000 was entered, apportioning liability as follows: vehicle operator = 50%; plaintiff = 35%; city = 15%. The award was molded, resulting in a net award of $325,000. As this was a pre-Fair Share Act case, the City of Philadelphia paid $300,000.

While the third-party claim was pending, the plaintiff had filed a UIM claim against AAA, the plaintiff's UIM carrier. The AAA policy contained a limit of liability clause:

> B. The limit of liability shall be reduced [] by all sums paid

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HOT OFF THE WIRE!! *(Continued from Page 10)*

> because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid for an "insured's" attorney either directly or as part of the amount paid to the "insured." It also includes all sums paid for the same damages under Part A of the policy.
>
> * * *
>
> D. No one will be entitled to receive duplicate payments for the same elements of loss.

AAA denied the plaintiff's UIM claim, and the claim thus proceeded to arbitration. The arbitration panel determined that the above clause was void and unenforceable and that AAA was liable up to its limits for all amounts for which the defendant vehicle operator was underinsured, disregarding payments made by the City.

The trial court reversed, finding that the clause was enforceable and that AAA was entitled to an offset against the full recovery.

On appeal, the Superior Court reversed the trial court, finding the above language to be void as against public policy and recognized that the ruling would permit plaintiff a double recovery but viewed the result as "the lesser of two evils." Judge Strassburger dissented, noting that plaintiff had received full compensation and was not entitled to recover against the UIM carrier.

Ultimately, the Supreme Court reversed the Superior Court. The Court noted that "there exists a long-standing prohibition in this Commonwealth against double recoveries." The Court determined that the language above does not in any way "frustrate" the MVFRL's public policy of protecting the plaintiff from inadequate compensation. The Court noted that "'underinsured motorist coverage serves the purpose of protecting innocent victims from underinsured motorists who cannot adequately compensate the victims for their injuries.' *Eichelman*, 711 A.3d at 1010. As the Ryans were fully compensated for Mary Ryan's injuries, the purpose of the MVFRL is not furthered by allowing the Ryans to recover additional damages from AAA." (Citation in original.)

SUPERIOR COURT OF PENNSYLVANIA

Delay damages are to be assessed against damages awarded for future medical expenses.

Roth v. Ross, 2014 PA Super 20 (Feb. 7, 2014)

The plaintiff's vehicle was rear-ended by the defendant's vehicle. After a three-day jury trial, where the defendant had conceded liability but contested causation, the plaintiff was awarded $60,000, which included $40,000 for pain and suffering and $20,000 for future medical expenses. The plaintiff then moved for delay damages, and the trial court only awarded delay damages for the portion allocated to pain and suffering.

On appeal, in a matter of first impression, the Superior Court determined that delay damages should have been assessed against the entire verdict, noting that the award for future medical expenses should have been deemed "monetary relief for bodily injury," as set forth in Pa.R.C.P. 238(a)(1).

A complaint filed against a deceased person is a nullity; the only remedy available to a plaintiff is the filing of a new suit against the deceased's estate.

McClean v. Djerassi, 2013 PA Super 330 (Dec. 27, 2013)

On April 6, 2010, the plaintiff slipped and fell on a sidewalk. The record owner of the property abutting the sidewalk was the defendant. The defendant subsequently died on November 11, 2011. On March 29, 2012, the plaintiff sued the defendant. On December 11, 2012, the plaintiff filed a motion for leave to amend the complaint, seeking to substitute the defendant's estate as the defendant. The motion was granted and on January 21, 2013, an amended complaint was filed, substituting the estate as the proper defendant.

The estate then filed preliminary objections to the amended complaint, contending that the original complaint was a nullity as it was filed against a dead person. The order granting the plaintiff's motion to amend was vacated, and the motion to amend was denied, and the amended complaint was struck. Subsequently, the estate's preliminary objections were sustained and the amended complaint was dismissed with prejudice.

On appeal, the plaintiff argued that the estate, by failing to substitute itself as the owner of the

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HOT OFF THE WIRE!! *(Continued from Page 11)*

property after the defendant's death, unintentionally or fraudulently concealed the defendant's death, thus tolling the statute of limitations.

The Superior Court rejected the plaintiff's argument. Relying on *Thompson v. Peck*, 181 A. 597 (Pa. 1935), the court concluded that the original complaint against the defendant was "void and of no effect," as the defendant was deceased at the time of filing. Relying further on *Thompson*, the court noted that a complaint against a deceased defendant cannot be cured by amendment, and the only recourse is to file a new complaint against the estate. The court noted that pursuant to Probate Code § 3383, the statute of limitations was tolled for an additional year, to November 13, 2012, and the plaintiff could have filed suit against the estate during this additional year.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA

On a motion for removal, the removing party has the burden of demonstrating, by a preponderance of the evidence, that the amount in controversy exceeds $75,000.

Brewer v. GEICO, No. 13-1809 (W.D. Pa. Jan. 22, 2014) (Fischer, J.)

On August 10, 2012, the plaintiff was riding his motorcycle when an unidentified driver pulled out in front of him, causing him to crash his motorcycle. At the time of the crash, the plaintiff had $15,000 of uninsured motorist (UM) coverage through GEICO.

The plaintiff filed suit against GECIO in the Court of Common Pleas of Westmoreland County, Pennsylvania, seeking damages "not in excess of $30,000." The parties proceeded to arbitration, an award was issued in the plaintiff's favor, and the plaintiff appealed the arbitration award. The plaintiff subsequently filed an amended complaint, adding a count for bad faith conduct, requesting "damages, attorney's fees, costs and punitive damages."

GEICO then removed the case to federal court. The plaintiff filed a motion to remand, claiming that he was not seeking damages in excess of $75,000, therefore the federal court lacked jurisdiction. During a status conference, the plaintiff agreed to enter into a stipulation that the combined award to be recovered would not exceed $75,000.

The issue before the district court was whether "the Defendant met his burden of showing by a preponderance of the evidence that the amount in controversy exceeded $75,000 on the date the case was removed." The court determined that the defendant had not met this burden, and that an averment of good faith by the defendant that the amount in controversy exceeds $75,000 is not sufficient to demonstrate proper removal.

In reviewing the record, the court determined that the maximum amount recoverable by the plaintiff on the breach of contract claim was the policy limit of $15,000. The court found that the defendant failed to produce any evidence that the bad faith claim was worth in excess of $60,000, noting that there was no evidence of the plaintiff's injuries, the plaintiff's counsel's hourly rate, the potential attorney's fees that the plaintiff had already accumulated, or case law with similar facts demonstrating an award of bad faith damages in excess of $60,000.

In dicta, the court noted that remanding the case "will also have the effect of promoting the interests of comity and equity," suggesting that it will be more convenient for the plaintiff to litigate the case in Westmoreland County, that the case had already travelled through the courts of Westmoreland County, and that the Westmoreland County court had already scheduled a pre-trial conference prior to the removal. Finally, the court noted that a state court judge was just as competent as a federal court judge in dealing with a breach of contract/bad faith claim.

COURT OF COMMON PLEAS

Whether the use of a GPS while operating a vehicle amounts to "reckless behavior" depends on the circumstances of the case, including the extent of the driver's distraction, the distance travelled by the vehicle while distracted, the type of GPS in use, and its placement in the vehicle.

Rockwell v. Knott, No. 12 CV 1114 (Lackawanna Co. 2013) (Nealon, J.)

The defendant was operating a van owned by his employer, New Prime, when he turned left in front of the plaintiff, causing the plaintiff's vehicle to strike the defendant's vehicle. The plaintiff, in his Complaint, alleged that the defendant caused the collision because the defendant was "fidgeting with his GPS unit, taking his eyes off the road." The plaintiff was seeking to recover punitive damages, alleging that the defendants knew the presence, use, and lack of training regarding the GPS unit resulted in willful, wanton, or reckless behavior. The defendants were seeking the dismissal of the punitive damages claim via a motion for partial summary judgment.

Judge Nealon concluded that whether use of a GPS while operating a vehicle is "reckless behavior" depends on the circumstances of the case, including the type of GPS in use, its placement in the vehicle, "and

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HOT OFF THE WIRE! *(Continued from Page 12)*

the concomitant operation of the vehicle." Other important evidence includes "the extent of the driver's distraction, and the distance travelled by the vehicle during that period of diversion." Here, the record did not support the punitive damages claim because the evidence was at odds with the plaintiff's allegation that the defendant was distracted "for a substantial and significant amount of time."

This case offers a comprehensive review of the state of "distracted driving" cases nationwide.

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- John P. Gismondi Civil Litigation Certificate candidate
- Class of 2015 President
- Human Communication Studies B.A. from Shippensburg University of Pennsylvania

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- Civil Litigation Certificate Program
- University of Virginia, B.A., 2010

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WHEN NEGOTIATIONS BREAK DOWN – A PRACTICAL LESSON

By: Michael Calder, Esq.

You've made an initial settlement demand and now you receive a low offer from defense counsel. You call your client to discuss the offer, knowing that the figure is far below her expectations. Unsurprisingly, your client is not happy with the offer and asks you what to do. You suggest telling defense counsel that you cannot accept the current offer but you lower your demand in an effort to secure an increased offer. This, you tell your client, does not mean you can't go back at a later point in time and accept the last offer. Or does it?

I recently had a case where this very scenario played itself out. It was only a "small case" (HA! We all know there is no such thing…) that involved a woman who was injured when a series of light bulbs spontaneously exploded in a stand-up tanning booth, requiring an emergency room visit, several stiches, a tetanus shot and follow-up treatment with a primary care physician. This case should be easy to settle, right?

Prompt, informal resolution efforts broke down when I received an initial settlement offer that was less than the amount of the healthcare subrogation lien my client had to repay. I sent defense counsel a set of Interrogatories and Requests for Production of Documents. His client's non-responsiveness led to an uncontested Motion to Compel. At this point in time, settlement efforts were ongoing as per usual negotiation "rules" – or so I thought. I had made a series of reductions to my demand in response to a series of increases in the defendant's offer. And then came the Motion for Sanctions…

After receiving a second set of Preliminary Objections instead of the already-overdue discovery responses (I gave defense counsel an extension of time to file an Answer and received POs, again - no good deed goes unpunished), I filed a Motion for Sanctions. The day before scheduled oral argument, I received an email from defense counsel pleading for me to delay presentation of the Motion to accommodate his schedule and to "take this small matter off of his plate." At this point, only $1,000 stood between my demand and his offer. In lieu of delaying oral argument, I suggested that we each concede $500 from our respective positions to settle the case. Again, no good deed goes unpunished.

On the way home from the argument the next day, I called my client and received her very reasonable instructions to accept the last offer that had been made. Without thinking twice that a problem may exist, I emailed defense counsel to accept the offer and to provide him with details for the release and settlement draft. I then read, with complete astonishment, defense counsel's response in which he informed me that: a) he never made the offer I attempted to accept (the offer was made during a telephone call); and that b) even if he did offer that amount, my reduced demand constituted a rejection of his last offer.

I filed a petition to enforce the settlement based on defense counsel's verbal offer and my acceptance of that offer. During oral argument on Plaintiff's Petition for Rule to Show Cause Why a Settlement Should Not be Enforced, I argued that longstanding "industry custom" among personal injury attorneys is for an initial demand to be met with an offer, resulting in a reduced demand and a subsequently increased offer – and that this process continues until each side reaches its limit. All the while, I argued, either party has an opportunity to accept the other side's last offer unless it was accompanied by a specific condition such as expiration within a certain time period (such as 90 days) or at upon the occurrence of a certain event (such as jury selection).

Defense counsel argued that reduced demands constitute counteroffers which serve to contemporaneously reject any outstanding offer. The Court agreed with me that, subject to very exceptional circumstances, negotiations occur in the fashion I presented. However, the Court held that customary practices in personal injury settlement negotiations are still subject to traditional contract principles, thereby requiring the Court to hold that my reduced demand constituted a counter-offer and rejection.

The logic in this ruling presents a legitimate problem for plaintiff and defense counsel alike. Taking this holding to its logical end, every offer constitutes a rejection of the standing demand and every reduced demand simultaneously rejects the last offer. Contract principles would seem to allow "classic" negotiation practices to prevail so long as they are agreed upon by both parties, but based upon my experience I would strongly suggest reducing these agreements to writing if you are not certain that defense counsel will abide by traditional negotiation practices. And the moral of the story is…there is no such thing as a small case!

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The additional money these members pay annually helps the Association in serving the membership and their clients.

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BAD FAITH: YOU'LL KNOW IT WHEN YOU SEE IT

By: Charles Garbett, Esq.

When I was a college student - and, later, a law student - I remember reading about the legal battles concerning pornography and censorship. There appeared to be a universal agreement that pornography was wrong. In addition, all authorities appeared to agree that pornography was not protected by the First Amendment. However, try as they might, no one seemed able to give a workable definition to the term "pornography." Most definitions were either too expansive, too rigid, or just plain unintelligible. Many found comfort in Justice Potter Stewart's observation that, while he could not define pornography, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184 (1964). (A law school classmate of mine took this one step further. While he could not define pornography either, he insisted that: I know it when I *feel it.* But that's another story.)

I find the present efforts to put an easy handle on the term "bad faith" filled with similar frustrations. However wanting the general definitional framework may be, a case-by-case approach may help put some meaning into these otherwise vague terms.

I. Bad Faith: What is it?

In 1990, the Pennsylvania Legislature formulated a statutory remedy for insurance "bad faith" conduct. 42 Pa.C.S. § 8371. However, the statute did not define the type of conduct that constitutes "bad faith." Lacking a specific statutory definition for bad faith, our courts have relied upon certain rules of statutory construction and attempted to describe - in general terms - what conduct might be deemed "bad faith."

The Pennsylvania Rules of Statutory Construction provide that words and phrases that "have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning. . . ." 1 Pa.C.S. § 1903. Relying on that rule of construction, the Third Circuit adopted the definition of "bad faith" listed in *Black's Law Dictionary* in *Polselli v. Nationwide Mutual Fire Insurance Company*, 23 F.3d 747, 751 (3d Cir. 1994):

> "Bad Faith" on the part of an insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self interest or ill will; mere negligence or bad judgment is not bad faith. *Black's Law Dictionary* (6th Edition 1990).

Okay, it's a start. But when you use such terms as "dishonest purpose," are you not really saying that this conduct amounts to fraud? Even when the definition has just said that a refusal to pay need not be fraudulent? Not very helpful, in my opinion.

Our state Appellate Courts (and later the Third Circuit) soon backed away from this requirement that the Plaintiff prove a "dishonest purpose." In *Terletsky v. Prudential Property & Casualty Company*, 437 Pa. Super. 108, 649 A.2d 680 (1994), the court held that in order to recover for bad faith, the Plaintiff was required to:

> (1) Show that the insurer did not have a reasonable basis for denying benefits under the policy; and
>
> (2) That the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.

Id. at 688.

In *W.V. Realty, Inc. v. Northern Insurance Company*, 334 F. 3d 306, 311-312 (3d Cir. 2003), the Third Circuit held:

> The term "bad faith" is not defined in the statute, but the Pennsylvania Superior Court has defined it as any frivolous or unfounded refusal to pay proceeds of a policy. To make a claim of bad faith, a Plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy; and (2) knew or recklessly disregarded its lack of reasonable basis in denying the claim. *Accord*: *Hollock v. Erie Insurance*, 2004 Pa. Super. 13, 16-17 (2004).

Most insurers continue to argue that a bad faith claim requires proof of a "dishonest purpose." However, these arguments have been specifically rejected in the following cases: *Klinger v. State Farm*, 115 F.3d 230, 233-34 (3d Cir. 1997); *Post v. St. Paul Travelers Insurance Company*, 629 F. Supp. 2d 477 (E.D. Pa. 2009); *Itaatiyeh v. Liberty Mutual*, 185 F. Supp. 2d 436 (E.D. Pa.); *Greene v. USAA*, 936 A.2d 1178 (Pa. Super. 2007), appeal denied 598 Pa. 750, 954 A.2d 577 (2008).

Thus, the need to prove fraud, dishonesty

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BAD FAITH … *(Continued from Page 16)* or a "dishonest purpose" has been removed and replace by a "rule of reason" analysis.

II. Case Law.

Sounds great! But what does it mean? Recent cases can give some meaning to these general bromides.

- An insurer's own Claims Practice and Procedure Manuals may be considered in determining whether the insurer has acted in bad faith. *Bonenberger v. Nationwide*, 2002 Pa. Super. 14, 791 A.2d 378, 381(Pa. Super. 2002).

- Although delay alone does not necessarily constitute bad faith, unreasonable delay in claims handling may be a factor in determining whether the insurer acted in bad faith. *Ania v. Allstate*, 161 F. Supp. 2d 424, 430 (E.D. Pa. 2001).

- A lack of a good faith investigation, and a failure to communicate with the claimant can form the basis for a bad faith finding. *Romano v. Nationwide*, 435 Pa. Super. 545, 646 A.2d 1228, 1232 (1994).

- Taking inconsistent positions when handling the uninsured portions of the claim as compared to the position taken by the same carrier concerning the first party benefits portion of the claim can be evidence of bad faith. *Hollock v. Erie Insurance*, 54 Pa. D&C 4th 449, 509 (C.P. Luzerne 2002), aff'd 2004 Pa. Super. 13, 842 A.2d 409 (2004), appeal denied 588 Pa. 231, 903 A.2d 1185 (2006).

- Conduct that violates the Unfair Insurance Practices Act and the regulations promulgated there under is evidence of bad faith. *Romano*, 646 A.2d at 1233.

- Where an insurer's evaluation is "less than honest, intelligent and objective," this can be considered evidence of bad faith. *Puritan Insurance Company v. Canadian Insurance Company*, 775 F.2d 76, 79 (3d Cir. 1985).

- Under Pennsylvania Law, an insurer is required to evaluate each claim in an honest, intelligent and objective manner. *Empire Fire and Marine Insurance Company v. Jones*, 739 F. Supp. 2d 746 (M.D. Pa. 2010); *Hanover Insurance Company v. Ryan*, 619 F. Supp. 2nd 127 (E.D. Pa. 2007).

This list should not be considered exhaustive. However, it should raise the following points when preparing any bad faith action:

1. Counsel should have a working familiarity with the Unfair Insurance Practices Act, 40 P.S. § 1171.1, et seq., and regulations promulgated thereunder, 31 Pa. Code § 146.1, et seq.

2. Requesting the insurer's Claims Practice and Procedure Manuals should be part of the initial discovery requests.

3. A complete copy of the claims file (to include meta data) should also be part of the initial discovery requests.

4. The need for expert testimony should be considered. Keep in mind that when the standard calls for "good faith investigation," then the testimony of an experienced claims handler may well assist the trier of fact. While much of the current case law discusses the refusal of courts to admit testimony which amounts to legal opinion and argument, there does not appear to be a rejection of expert testimony in the context of what is or is not the "standard" for claims investigations in the insurance industry.

Also, keep in mind that bad faith claims are limited to claims between an insurer and its insured. As such, the insurance company does assume a fiduciary status toward its insured. *Brown v. Progressive Insurance Company*, 860 A.2d 493 (Pa. Super. 2004), reargument denied, appeal denied 582 Pa. 714, 872 A.2d 1197 (2005) (citing *Romano v. Nationwide*, 435 Pa. Super. 545, 646 A.2d 1228 (1994)).

While there is no fixed or rigid definition for the term "bad faith," the appellate cases noted above have laid out broad standards under which an insurer's conduct can be measured. As is evident from the summaries, the "Rule of Reason" will probably control most bad faith determinations. But, this is nothing new to the trial bar. As lawyers, we have probably grown to realize the limits of our language in defining and delineating human conduct. Like Justice Stewart, we may not be able to completely define the term "bad faith," but we know it when we see it. Or, as my law school classmate would say, ...

An **Erie Retreat** is scheduled on **Aug. 21-22** for all members.

Dinner on Thurs begins at 7:30 p.m. Discounted room accommodations are available for Thurs night. 2-hour CLE program from 10-12 on Friday. Register now at *www.wptla.org/events/*.

Each year, WPTLA sponsors a Scholarship Essay Contest for high school seniors in the Western District of PA. Three winning essays are chosen by a committee as the best of those submitted. These winners are invited to attend the Annual Judiciary Dinner, where they are presented with a certificate of their achievement, along with a $1,000 scholarship award. Below is the third of 2013's three winning essays.

The concept of "Rule of Capture" has existed for many years. In some ways, it protects the rights of people regarding the resources on their land. However, in essence, the "Rule of Capture" paradigm is a legalized form of theft, standing in contrast to millennia of widely accepted theories of ownership. A person's property is their own, and the act of assuming control over another's property is intrinsically unethical.

In some cases, the "Rule of Capture" concept actually makes sense. In the example of reservoir-like underground reserves that are drawn upon by multiple wells, the rule prevents a large landowner from claiming a part of all local harvests of the resource. Unfortunately, reservoirs of liquid are not the only valuable things found beneath the surface, and the extraction of these resources has long been of contention. The extraction of metal ores and coal beneath a property requires well-defined mineral rights and protects the land owner from the illicit extraction of their prospective wealth from beneath their feet.

In Pennsylvania, the debate over the "Rule of Capture" concept comes to a head in the extraction of natural gas contained within the local Marcellus Shale deposits. The hydraulic fracturing process is able to access and extract the natural gas from beneath a nonconsenting landowner's property. Because of the "Right of Capture," the landowner is helpless while their rightful property is invaded and pillaged for its resources. Even though an independent citizen is likely unable to capture and harness their property's natural gas content, the outright theft of resources cannot be justified.

The differences between the extraction of petroleum and the extraction of natural gas through hydraulic fracturing are intrinsic to this argument. When petroleum is extracted, it is merely sucked from the ground. It is not the drillers fault if the large reservoir of oil stretches under a neighboring property. The property's own oil cannot be extracted without extracting oil from other properties. Hydraulic fracturing, however, is much more involved. Pipes are run underground, determining an area of extraction. The resulting cracks allow the natural gas to escape and be captured. In this case, it *is* the fault of the driller if natural gas is extracted from neighboring property. There is a conscious effort involved in running a pipe towards another property. There is no "accident" involved.

Extraction of natural resources is a purely elective activity. If a person does not want something on their property to be harvested they have the right to leave it be. The ability of another to extract the resource is not a sufficient excuse for theft of both resources and, possible, environmental stability. In any other case, unapproved extraction of resources would be deemed as theft and the extractor would be penalized. Theft is theft, regardless of "how" the theft occurred. Nobody has the right to infringe upon another person's rights, including their right to personal property.

Another issue arises in the potential ecological impacts of hydraulic fracturing. Though the existence of a significant environmental impact is unconfirmed and differs based on who contracts a particular study, there is a legitimate public concern. Under "Right of Capture," a property may be exposed to any possible negative effects of the extraction process. Such exposure would be justified if it only affected a property where drilling has been allowed. But when a drilling operation branches into neighboring property, significant ethical questions arise. Groundwater may be contaminated by the operations (as it "coincidentally" tends to when hydraulic fracturing begins in an area), and the water may become unsafe for consumption by plants and animals, and people alike. It is not ethical to put another person at risk of health problems and financial ruin in an attempt to obtain a higher profit for oneself.

As a law in Pennsylvania, "Rule of Capture" allows for corporate practices that may harm the state's people. Especially under current economic conditions, any economic stimulus is usually welcome. However, this does not justify legalized theft of resources and environmental endangerment. There is no problem with the act of hydraulic fracturing on land where the activity has been agreed to by the landowner. However, when others' property is taken, the "benevolent" driller becomes a public enemy. "Right of Capture" allows a company to bypass the obtaining of legal mineral rights but still obtain all the benefits of having the rights.

This is not a question of the rights of corporations or of the potential profit margins. This is a question of ethics; whether or not theft is legal when a profit is on the line. In my opinion, such abuse of property rights and landowning individuals must be suppressed. In general, "Rule of Capture" is an acceptable policy when applied to most classical purposes. However, in this new age, we must work to adapt 19th century concepts to match current technology and society. "Rule of Capture" was defined when its only applications included classic wells and hunting rights. With hydraulic fracturing, we must make the decisions of whether to continue the practice of outdated policies or to adapt and work towards a common solution. This is an issue that will not be solved with great ease, and both drillers, landowners and lawmakers must work together in order to find a consensus that will allow us to move forward.

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...Through the Grapevine

Member **Elizabeth (Beth) Jenkins** has opened her own law practice specializing in medical malpractice and personal injury. Her new office is located at 100 Ross St, Ste 104, Pittsburgh, PA 15219. P: 412-246-4775 F: 412-246-4778 Email: ejenkins1123@comcast.net

Member **Matthew R. Wimer** has moved his office to 333 Pennsylvania Ave, 2nd Fl, Oakmont, PA 15139 P: 412-820-1234 F: 412-820-9470

President's Club Member **Geroge R. Farneth** has a new firm, Farneth Tomosovich, LLC. He can be found at Frick Bldg, 429 Grant St, Ste 1000, Pittsburgh, PA 15219 P: 412-802-2682 F: 412-802-2691 www.farnethtomosovich.com

Board of Governors Member **Peter D. Giglione** is now a partner with The Massa Law Group, P.C. Pete can now be reached at One Gateway Center, Ste 700, 420 Ft Duquesne Blvd, Pittsburgh, PA 15222 P: 412-338-1800 F: 412-338--357 Email: pgiglione@mbp-law.com
Westmoreland County Court of Common Pleas has a new President Judge in The Honorable Richard E. McCormick, Jr., when he was unanimously elected to take the place of retired Judge Gary P. Caruso.

Congratulations to Member **Kelly L. Enders**, who has been named a partner at Caroselli Beachler McTiernan & Conboy. Kelly has worked at CBMC since she obtained her J.D. in 1998.

Member **David Patrick King** has opened his own firm, and can be reached at Law Offices of David P. King, Esq., P.O. Box 1016, 23 Beaver Dr, DuBois, PA 15801 P: 814-371-3760 F: 814-371-4874 Email: dpking2100@gmail.com

Member **John T. Tierney III** is now working from 401 Shady Ave, Apt B601, Pittsburgh, PA 15206.

Our condolences to the family, friends and co-workers of the late Senior Judge Thomas G. Peoples, Jr., of the Court of Common Pleas of Blair County.

President's Club Member **Phillip L. Clark, Jr.** is now with Leymarie Clark Long, P.C., located at 1429 New Butler Rd, Ste 8, 2nd Fl, New Castle, PA 16101. P: 724-923-4500 F: 724-698-7665 Email: phillip@lclpc.com

Member **Melissa Ruefle Spencer** can now be reached at 3401 Lockridge Rd, Pittsburgh, PA 15234. P: 412-343-1688
Email: melissaruefle@yahoo.com

Member **Cindy Berger** was elected President of the National Organization of Social Security Claimant's Representatives. NOSSCR is the largest organization of attorneys advocating for the rights of claimant's trying to receive SSD benefits.

Board of Governors Member **Erin K. Rudert** is now working with Kraemer Manes & Associates, US Steel Tower, 600 Grant St, Ste 660, Pittsburgh 15219. P: 412-626-5590 F: 412-345-5151 Email: erin@lawkm.com

Our condolences to the co-workers, friends and family of Past President **Veronica A. Richards**, on the tragic passing of her nephew, Johnny Richards; of Past President **John E. Quinn** on the passing of his father, James Quinn; and on the sudden passing of WPTLA Member **Martin E. Lazzaro**, Esq.

Congratulations to **WPTLA Secretary Elizabeth A. Chiappetta** and her husband Tim, on the birth of their first son, Beau. Beau was born on July 8, and he and mom are doing wonderful.