DRI NOVEMBER 8, 2018 - PERSONAL INJURY PRACTICUM

UPDATE ON THE LAW

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I. FIRST PARTY CLAIMS

A. Statute of Limitations in Uninsured Motorist Claim

In Erie Insurance v. Bristol, No. 124 MAP 2016, (November 22, 2017) (Mundy, J.), the Supreme Court reversed the affirmance by the Superior Court of a trial court's order granting summary judgment to Erie, Bristol's UM insurer. The trial court had determined that the 4 year statute of limitations barred a UM claim which was subject to mandatory arbitration where the plaintiff and insurer named arbitrators but no petition to compel arbitration was filed prior to the expiration of the 4 year statute of limitations. The Superior Court rejected the argument that the extrajudicial contacts, including the agreement to arbitrate and appointment of arbitrators tolled the statute.

In allowing the appeal of the Superior Court decision, the Supreme Court framed the issue as follows:

> In uninsured motorist claims subject to mandatory arbitration, is the statute of limitations tolled only by the commencement of an official judicial action or may extra-judicial actions also toll the statute of limitations.

Erie Insurance v. Bristol., 439 MAL 2016, 2016 Pa. LEXIS 2974, (December 29, 2016).

After a thorough analysis of the decisions by the lower courts, the Supreme Court determined that "applying ... general contract principles to the enforcement of an insured's UM/UIM claim, the statute of limitations would begin to run when the insured's cause of action accrued, i.e., when the insurer is alleged to have breached its duty under the insurance contract." Bristol, No. 124 MAP 2016, at 14.

After analyzing decisions from other jurisdictions and considering the policy arguments of the parties, the Supreme Court further held and "conclude[d] the proper circumstance to start the running of the limitation period is an alleged breach of the insurance contract, which will be occasioned in this context by a denial of a claim or the refusal to arbitrate."

Id. at 20. As Erie had never refused to arbitrate and had not denied coverage, no cause of action had accrued and the statute of limitations had not expired. The matter was remanded to the trial court for further proceedings.

II. THIRD PARTY CLAIMS

A. Movement of vehicle no longer required to establish automobile negligence claim against a governmental entity.

In Estate of Edwin Medina Flores by Victoria Balentine, as Administratrix, v. Chester County Authority, No. 119 MAP 2016 (August 21, 2018) (Mundy, J.), the Pennsylvania Supreme Court granted allowance of appeal to consider whether the Commonwealth Court erred in holding that the involuntary movement of a vehicle does not constitute operation of a motor vehicle for purposes of the vehicle liability exception to governmental immunity under 42 PA C.S.§8542 (b)(1). In ruling that movement of a vehicle, whether voluntary or involuntary, is not required by the statutory language of the vehicle liability exception, the Supreme Court reversed the Commonwealth Court's decision and allowed the matter to proceed to trial. In understanding the Court's ruling and the depth of the decision, the underlying facts must be considered.

On August 15, 2012, the plaintiff's decedent was working on the 1200 block of Kurland Street, in West Chester, PA. At the time of the injury, he was in a 4' x 4' ditch between the sidewalk and the curb. A city inspector approached the work site and parked his vehicle approximately 10 feet from the ditch. The vehicle was parked partially within the roadway. A few minutes after parking, the inspector's vehicle was rear-ended and pushed forward into the ditch, striking and killing Medina Flores. Medina Flores' estate brought a civil action against multiple parties including the inspector's employer, Chester Water Authority. Following depositions, CWS filed summary judgment on the basis that neither the motor vehicle exception nor the traffic control device exception to the Tort Claims Act applied. The Court agreed and dismissed the action against CWA. On appeal, the Commonwealth Court affirmed the granting of summary judgment, noting that, because the CWA vehicle was not in "operation", its involuntary movement after being struck in the rear could not constitute operation for purposes of the tort immunity exception.

In reversing the Commonwealth Court, the Pennsylvania Supreme Court essentially overturned 30 years of precedent on this issue including numerous prior decisions where immunity was held to apply in accidents involving vehicles that were stopped or parked. In this case, the Pennsylvania Supreme Court ruled, "where a government vehicle obstructs a roadway, in whole or in part, we can assume, absent evidence to the contrary, that a government agent operated the vehicle to arrive at that position."

In Medina, the Court found that, if the plaintiff could establish at trial that his injuries were caused by an illegally parked government vehicle, even if the operation of the vehicle, itself, did not cause the injury, the government would not avoid liability simply because the government vehicle was not "in motion" at the time of the injury. In so ruling, the Court adopted the definition of the "operation of a vehicle" first put forth by Justice Sandra Newman in her dissenting opinion in the case of Warrick v. Procor, 739 A.2d 127, 129 (Pa. 1999). In Warrick, Justice Newman reasonably concluded that the operation of a vehicle is not simply defined by its movement but, instead, "reflects a continuum of activity". The operator of such a vehicle must make a series of decisions and actions when taken together moves the vehicle from one place to another. Such decisions as where to park, where and when to turn, whether to engage brake lights, whether to use appropriate signals and whether to turn lights on or off are all part of the "operation" of a vehicle. Warrick at 128. In so adopting Justice Newman's definition, the Pennsylvania Supreme Court concluded that the definition of operation requires a reasonable standard that comports with the intent of the legislature behind the Tort Claims Act and avoids what the Supreme Court deemed to be illogical results over the past 30 years of precedent that flowed from the prior emphasis on movement as the determining factor in whether an exception to the immunity act was met.

B. Failure to Create Contemporaneous Record of Objections to JuryInstructions Waives Issue for Post-Trial Relief

In Jones v. Ott, et al., No. 12 WAP 2017 (Pa. Supreme, August 21, 2018) (Wecht, J.), the Supreme Court determined that the plaintiff had failed to preserve her challenge to the trial court's jury instructions, and thereby waived her right to post-trial relief.

In the subject negligence action, the plaintiff sought to recover damages for injuries she sustained when her vehicle was rear-ended by a car operated by the defendant while in the course and scope of his employment. Prior to the commencement of the trial, the plaintiff filed proposed points for charge which included three proposed instructions related to negligence *per se*. The trial court conducted a charging conference which was not stenographically recorded. Following the conference, the trial court did not issue a written ruling upon the parties' proposed instructions. The trial court's charge to the jury did not include any of the proposed negligence *per se* instructions which the plaintiff had proposed. Following the charge to the jury, the trial court asked the parties if "there was anything with respect to the charge that either party wanted to put on the record." Id. at 2. Plaintiff's counsel asserted that he had "no issues with the charge." Id. at 3. Following a verdict in favor of the defendants, the plaintiff filed a post-trial motion seeking a new trial due to the trial court's failure to include a negligence *per*

se instruction in its charge to the jury. Defendant countered by asserting that the plaintiff had waived her challenge by failing to raise a timely and contemporaneous objection at trial to the jury charge. The plaintiff argued that she had preserved her objection by filing proposed instructions and filing a timely post-trial motion. The trial court denied the post-trial motion and the plaintiff appealed.

The Superior Court affirmed the trial court's denial of post-trial relief, and found that the plaintiff had failed to preserve her claim "because the charge conference was not transcribed, and because there is no record of any trial court ruling upon the parties' proposed points for charge[.]" Id. at 7. The Supreme Court then "granted allowance of appeal in order to address whether a litigant preserves a jury-charge challenge pursuant to Pennsylvania Rule of Civil Procedure 227.1 when, notwithstanding her failure to object to the charge at trial, she previously filed proposed points for charge and later filed a post-trial motion challenging the trial court's failure to include specific points." Id.

The Supreme Court affirmed the Superior Court's order affirming the trial court's denial of post-trial relief by finding that the plaintiff had not satisfied Rule 227.1, which provides in pertinent part:

> Post-trial relief may not be granted unless the grounds therefor,
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> (1) If then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
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> (2) are specified in the [post-trial] motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Pa.R.C.P. 227. 1(b) (1) – (3). The Supreme Court cited the note to the Rule, which states, "[i]f no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief." Pa.R.C.P. 227. 1(b), note. The Supreme Court further emphasized that the rules of appellate procedure likewise mandate that a "general exception to the charge to the jury will not preserve an issue for appeal." Jones, *supra*, at 10 *citing* Pa.R.A.P. 302.

Ultimately, the Supreme Court determined that "[t]aken together, our rules of civil and appellate procedure, and our longstanding principles of preservation and waiver, dictate that, while a jury-charge challenge can be preserved under Pa.R.C.P. 227.1 by making proposed instructions part of the record and by raising the issue in a post-trial motion, the challenge is waived when the appellant fails to

secure a record ruling from the trial court upon the proposed charge." Id. at 10-11. The Supreme Court specifically ruled that to preserve a jury-charge challenge for appellate consideration, a party must either lodge a timely and contemporaneous objection on the record to the jury charge, or "make requested points for charge part of the record...,obtain an explicit trial court ruling upon the challenged instruction, and raise the issue in a post-trial motion." Id. at 11. In that such efforts were lacking on the record before it, the Supreme Court denied appellate relief to the plaintiff. Lastly, the Supreme Court noted that even if they were not inclined to impose waiver based on the plaintiff's reliance on prior conflicting case law which had been issued before the enactment of Rule 227.1, the express waiver by the plaintiff's counsel in open court to any challenge to the jury charge also precluded relief. The order of the Superior Court affirming the trial court's denial of post-trial relief was affirmed.

C. Failure to give Negligence Per Se Jury Instruction warrants new trial

In Groves v. Port Auth., No. 195 C.D. 2017, 2018 Pa. Cmmw. LEXIS 42, (January 12, 2018)(Simpson, J.), the Commonwealth Court reversed the trial court's denial of post-trial motions and held that a new trial was required where the trial court failed to give a negligence *per se* instruction to the jury regarding the provisions of the Vehicle Code *vis á vis* the duties of pedestrians. In Groves, the pedestrian plaintiff reached an intersection at which the plaintiff encountered a stopped vehicle on the pedestrian crosswalk. As the plaintiff stepped around the stopped vehicle in order to cross the intersection, the plaintiff was struck by a Port Authority bus.

At trial, there was conflicting evidence presented regarding the plaintiff's location at the time of the collision and whether or not the plaintiff was struck within the crosswalk or outside of the same. The defendant requested a negligence *per se* jury instruction citing various Motor Vehicle Code provisions related to a pedestrian's duty of care in entering a roadway and crossing an intersection. The trial court denied the requested negligence *per* se jury instruction because the plaintiff did not receive a citation. The trial court did, however, charge the jury on general negligence, comparative negligence and apportionment of comparative negligence. The Commonwealth Court reversed and held that evidence of a statutory violation may constitute negligence *per se* regardless of whether the statutory violation resulted in a criminal conviction or whether the subject statute provides criminal sanctions. The Commonwealth Court further determined that the negligence *per se* instruction, along with the Vehicle Code provisions regarding the pedestrian's duty of care, were relevant to the jury's apportionment of comparative negligence. A new trial was ordered.

D. Plaintiff deemed Licensee when using premises for her own purpose

In Hackett v. Indian King Residents' Association, No. 3600 EDA 2017 (Pa. Super. August 29, 2018) (Shogan, J.), the Superior Court affirmed a jury verdict in favor of the defendant homeowners' association. The plaintiff, a resident of one of the townhouses within the Indian King mixed townhouse/single-family-home development, suffered significant injuries when she tripped and fell over branches which were laying on common area steps leading to her residence. In arguing that she was entitled to a new trial, the plaintiff challenged, *inter alia*,[1] the trial court's charge to the jury that the plaintiff was a licensee, rather than an invitee.

The plaintiff posited that the defendant's business centered upon its management of the subject property, including the maintenance of its common areas. While the plaintiff did not own her residence[2], she paid maintenance fees to the defendant and argued that her payment cemented her status as an invitee.[3]

The defendant countered that the nature of the plaintiff's entrance upon the land, rather than the nature and scope of the defendant's business, was the determining factor in concluding that the plaintiff was a licensee, and not a business invitee. The defendant explained that the homeowners' association was created by a Declaration of Covenants, Conditions and Restrictions under the Planned Community Act, 68 Pa.C.S. §§ 5101-5414. The defendant highlighted that the foregoing declaration had specifically granted owners and residents, such as the plaintiff, a right and easement to enjoy the common areas, including the steps upon which the plaintiff fell. The defendant emphasized that at the time of her fall, the plaintiff was present on the common area steps for her own benefit and pleasure, and not for any purpose linked or related to the defendant's business. The defendant further argued that the plaintiff had entered the subject common area due to her longstanding permission from the defendant, and not as a result of an invitation from the defendant, thereby rendering the plaintiff a licensee.

In considering the parties' arguments, the Superior Court cited Stapas v. Giant Eagle, Inc., 153 A.3d 353, 359 (Pa. Super. 2016) for the proposition that the duty of a landowner to a third party entering the land "depends upon whether the entrant is a trespasser, licensee, or invitee." The Superior Court then examined, *inter alia,* the language of the Restatement (Second) of Torts §330, which defines a

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[1] The additional challenges set forth by the plaintiff were not decided by the Superior Court based on waiver and mootness.

[2] The plaintiff's townhouse was owned by her former spouse.

[3] The plaintiff further argued she was entitled to invitee status under the Uniform Condominium Act, 68 Pa.C.S. §§ 3101 *to* 3414, but the Superior Court determined that said statute was inapplicable to the parties in that the defendant was not a condominium association and because the plaintiff had failed to cite case law showing the statute's applicability to the facts of the case.

licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." The Superior Court further reviewed Comment "h" to Section 330, which sets forth that "persons included" within the licensee category are individuals "whose presence upon the land is solely for [their] own purposes, in which the [land owner] has no interest, and to whom the privilege of entering is extended as a mere personal favor to the individual, whether by express or tacit consent or as a matter of general custom." Restatement (Second) of Torts, Section 330, Comment h, 1. Based on the foregoing analysis, the Superior Court determined that the trial court did not err in finding that the plaintiff was a licensee at the time of her fall, and, therefore, the trial court did not err in charging the jury accordingly.

In agreeing with the trial court, the Superior Court determined that the plaintiff was neither a business invitee nor a public invitee at the time she fell. The Superior Court reasoned that at the time of her fall the plaintiff was not a business invitee because she was not "on the property by invitation or for a purpose related to [the defendant's] business dealing...[]... Rather, she was returning to her home after visiting a relative." Hackett, *supra,* at 10, *see also* Restatement (Second) of Torts, Section 332, definition of invitee.[4] The Superior Court further reasoned that the plaintiff was not a public invitee because "there was no evidence offered that [the plaintiff] entered the property upon invitation or for a purpose for which land is held open to the public." Id. Accordingly, the jury verdict entered in favor of the defendant was affirmed.

E. Independent Medical Examinations

In Shearer v. Hafer, No. 93 MAP 2016, 2018 Pa. LE S 353, (January 18, 2018)(Todd, J.), the Pennsylvania Supreme Court addressed, the collateral order doctrine and whether a plaintiff in a personal injury action has the right to have counsel present and to record a neuropsychological examination requested by the defendant. The plaintiff, Shearer, claimed cognitive injuries following a motor vehicle accident and had identified her own neuropsychologist to testify at trial. Pursuant to Pa.R.A.P. 313, a non-final (interlocutory) order may be reviewed if: (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that, if review is postponed until final judgment in the case, the claim will be irreparably lost. The Court held the discovery order is "clearly separable from the [underlying] negligence claim". However, the Court held the discovery order

[4] An invitee is "either a public invitee or a business visitor." A "public invitee" is a person "who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." A "business visitor" is a person "who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings with the possessor of land." Restatement (Second) of Torts, Section 332, (1) – (3).

at issue failed to satisfy the second and third prongs of the test, In this regard, the Court held the right to counsel involved was not a constitutional right but rather a statutory "counsel and layperson representation". Thus, "it is not of the magnitude of those issues which are "deeply rooted" in public policy going beyond the particular litigation at hand." Based on the forgoing, the decision of the Superior Court was vacated. The Court determined that the claimed right to the presence of a representative at the examination would not be irreparably lost if review was postponed until after the entry of the final judgment.

It is noteworthy that the Majority Opinion did not address the merits of the issuance of the protective order which precluded defense counsel's presence and the audio recording of the defense neuropsychological examination. The Concurring Opinion, however, did caution trial courts that such claims for protection should be examined with "careful scrutiny."

F. Claim Dismissed against Individual Who Sent Text to Distracted Driver

In Gallatin Gargiulo, et al., No. 10401 of 2015 CA (Pa.Com.Pl. Feb. 2, 2018) (Lawrence Cty.) (Hodge, J.), the Court of Common Pleas of Lawrence County granted the Motion for Summary Judgment and dismissed the claims against the individual texted a distracted driver. The distracted driver struck the motorcycle operated by the plaintiff's decedent who sustained fatal injuries.

The Estate of the motorcyclist filed a Complaint alleging, *inter alia*, that the actions of the defendant who texted the distracted driver aided and encouraged the distraction of the striking driver in violation 75 Pa.C.S.A. § 3316 which prohibits operating a motor vehicle while using an interactive wireless communications device to send, read, or write a text-based communication while the vehicle is in motion. The Complaint further averred that the defendant who sent the text was liable under §876 of the Restatement (Second) of Torts, which imposes liability on a person who encourages another in violating a duty.

During the discovery stage of this litigation, the individual who texted the distracted driver was deposed. The foregoing deposition revealed that the individual who texted the distracted driver did not know where the distracted driver was at the times the texts were sent, and did not know what the distracted driver was doing at the time the individual sent the text messages to the distracted driver. Based on the foregoing, the Court granted summary judgment and dismissed the claims against the individual who sent the texts because the individual was unaware that the defendant driver was operating a motor vehicle during the time in which the texts were exchanged.