

General Liability Update

for

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TABLE OF CONTENTS

I.	Agency	1
II.	Arbitration	1
III.	Civil Rights/Equal Protection	3
IV.	Commercial Law	4
V.	Consumer Law	6
VI.	Contracts	8
VII.	Corporations	11
VIII.	Covenants	12
IX.	Damages	13
X.	Defamation	17
XI.	Environmental Law	17
XII.	ERISA	18
XIII.	Experts	21
XIV.	FELA	24
XV.	Health Care Law	24
XVI.	Indemnification	25
XVII.	Insurance	
	A. Auto	
	1. Arbitration	26
	2. Lapse	27
	3. UM/UIIM	
	a. Coverage	28
	b. Stacking	32
	B. Bad Faith	33
	C. Breach of Contract	38
	D. CAT Fund	39
	E. Exclusions	41
	F. Fraud	43
	G. Health	44
	H. Homeowners “insured location”	44
	I. Homeowners “occurrence”	45
	J. Medical Malpractice “occurrence”	46
XVIII.	Intellectual Property	47
XIX.	Jurisdiction	49
XX.	Labor and Employment	50
XXI.	Landlord/Tenant	53
XXII.	Legal Malpractice	55
XXIII.	Libel/Slander	56
XXIV.	Medical Malpractice	57
XXV.	Municipal Law	60
XXVI.	Negligence	63

XXVII.	Products Liability	64
XXVIII.	Res Judicata	68
XXIX.	Statute of Limitations	69
XXX.	Unemployment Compensation	73
XXXI.	Venue	78
XXXII.	Wrongful Employment Practices	
	A. Age-Related Cases	80
	B. Disability-Related Cases	81
	C. Race/Origin-Related Cases	83
	D. Gender-Related Cases	85
	E. Miscellaneous Issues	86

CASE LAW UPDATE

I. AGENCY

A bank teller, who was shot by a security guard during a robbery committed by the guard, brought a negligence per se action against security company, alleging that the security company negligently hired the guard without conducting proper criminal background checks. The trial court entered judgment for the bank teller, to which the security company appealed. On appeal, the Superior Court reversed the decision and held that the security company was not liable to the bank teller for negligence per se on the basis that the wrongful action of the guard was a superceding cause of the bank teller's injuries, and the security company's compliance with the criminal background requirements of the Private Detective Act would not have changed the hiring decision, as the guard had no criminal record. - **Mahan v. Am-Gard, Inc., 841 A.2d 1052 (Pa. Super. 2003).**

II. ARBITRATION

In a civil suit, plaintiffs moved to supplement the record with a memorandum allegedly disclosed to a third party by a partner in defendant limited liability partnership (LLP). Defendants filed a cross-motion to compel the return of the document, which they alleged was protected by the attorney-client privilege. Plaintiffs' counsel allegedly obtained the memorandum from a third party as part of the settlement process in a different lawsuit. Defendants, who sought an order compelling return of the memorandum, alleged that it was protected by the attorney-client privilege. Plaintiffs replied that the instant court was not the proper forum to determine the status of the document and that any privilege protecting the memorandum was waived when the document was disclosed to a third party. The court disagreed with both the plaintiffs' contentions. The district court found that the instant court was the proper forum to resolve defendants' claims regarding the use of the memorandum in the instant action. A decision to limit plaintiffs' use of the document in the instant case would have no effect on the rights of the parties in the settled lawsuit. Second, regardless of how the memorandum was disclosed to the third party, the common interest doctrine prevented the disclosure from waiving the attorney-client privilege. Further, even disclosure to the third party was inadvertent or involuntary, analysis of the Fidelity factors indicated that such a disclosure did not constitute a waiver of the attorney-client privilege. The court denied plaintiffs' motion to supplement the record and granted defendants' motion to compel return of the memorandum. - **Miron v. BDO Seidman, 2004 U.S. Dist. LEXIS 22101 (2004).**

Appellee township authority sued appellants, a contractor and two engineers, for breach of contract, breach of implied warranties, and negligence. The contractor appealed the order of Court of Common Pleas of Bucks County, Pennsylvania, which overruled its preliminary objections that the complaint was improper because the parties' contract

required that all disputes arising under the contract be submitted to arbitration. The authority's suit was based on tanks that were designed and built to completion. The authority alleged that the tanks had structural problems resulting in cracking, which required significant repair and remediation. On appeal, the contractor argued that the contract language required arbitration. The appellate court concluded that the matter at issue concerned the ultimate work product and its performance. Absent any applicable waiver provision and absent any explicit contract language requiring any demand for arbitration be made prior to final payment, the arbitration provision of the parties' contract governed the matter. In addition, because the matter concerned a claim not made by the contractor, the release was inapplicable. Also, it was apparent from a reading of the complaint that the negligence action brought by the authority necessarily involved the contract and the same factual averments relating to the failure of the project. Thus, it was improper for the trial court to rule that the arbitration provision did not apply to the negligence claim. The appellate court concluded that all claims between the authority and the contractor had to proceed to arbitration. Accordingly, the Superior Court of Pennsylvania reversed the order of the trial court, and the matter was remanded to the trial court to issue an order directing the matter to arbitration. - **Warwick Township Water and Sewer Authority v. Boucher & James, Inc., et al., 851 A.2d 953 (Pa.Super. 2004).**

Appellant Beaver Falls Municipal Authority appealed the order of the trial court denying the Authority's motion for summary judgment and granting the motion for summary judgment filed on behalf of appellee contractor in the breach of contract action. The contract between the Authority and the contractor contained an exclusive arbitration provision that required the parties to subject all their claims regarding the contract to arbitration. A dispute arose between the contractor and the Authority regarding the contract, however, the parties did not arbitrate the dispute. Instead, an agreement, memorialized in a letter, was negotiated that resolved the matter. Thereafter the Authority refused to pay a balance owed under the agreement. The contractor filed suit and the Authority sought to compel arbitration. The trial court refused to do so, finding that the contractor was not suing under the original contract but under the settlement agreement. The Court found that the trial court erred in granting summary judgment in favor of the contractor because the record contained no clear evidence of the parties' intention to supplant the original contract. The original contract stated that all modifications issued subsequent to the contract were to be considered part of the contract. Because the letter agreement did not expressly reject the arbitration clause in the original contract, the arbitration clause remained valid. Therefore, the order was reversed, and the matter was remanded to the trial court for referral of the matter to arbitration in accordance with the contract. - **McCarl's, Inc. v. Beaver Falls Municipal Authority, 847 A.2d 180 (2004).**

III. CIVIL RIGHTS

Plaintiff retiree sued defendants, a City and its Police Pension Fund Board, in a Pennsylvania state court under 42 U.S.C.S. § 1983, alleging due process violations, and under state law. Defendants removed the action to federal district court and the parties filed cross-motions for summary judgment. The retiree, who had worked as a police officer, submitted a letter of resignation and notified the Board that he wished to vest his accrued pension benefits. The Board denied his application to vest benefits because it was not submitted at least 30 days prior to his termination date, as required by state and local law. Although in his state court complaint the retiree sought to overturn the Board's decision, after removal he asked that the administrative appeal remain pendent in state court. The district court found that the retirement payments did not constitute "property" for purposes of the Due Process Clause, as the retiree had no present entitlement to the payments. The retiree's claim for the payments was a protected property interest, but he had not suffered a deprivation of that interest because his claim had not been decided by the state courts. As a matter of federal law, the retiree had shown insufficient evidence of a "special relationship" requiring defendants to alert him prior to his retirement concerning the notice requirements. The district court declined to exercise pendent jurisdiction over the state law challenge to the Board's decision. Accordingly, the United States District Court for the Middle District of Pennsylvania granted defendant's motion for summary judgment and denied the retiree's summary judgment motion as moot. The case was thus remanded back to state court. - **Pappas v. City of Lebanon, et al., 331 F. Supp. 2d 311 (M.D. Pa. 2004).**

Plaintiff brought action in the City of Philadelphia under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act of 1973, and state law in United States District Court. The United States intervened as a plaintiff to bring an independent action against the City under the ADA and Rehabilitation Act. Plaintiff, who suffered from AIDS, claimed that two city paramedics refused to provide him with medical assessment and treatment after they responded to a 911 call that Plaintiff was having a heart attack. Defendant City filed a motion for judgment on the pleadings based upon the two-year statute of limitations applicable to the ADA and Rehabilitation Act claims. Plaintiff argued that the statute of limitations was equitably tolled based upon the City's conduct, and thus, those claims were not time-barred. The court noted that the Doctrine of Equitable Tolling functions to stop a statute of limitations from running where the claim's accrual date has already passed and is appropriate only where the principles of equity would make the rigid application of a limitation unfair. The Doctrine is appropriate in three circumstances: (1) where the defendant has actively misled a plaintiff respecting the plaintiff's cause of action, (2) where the plaintiff in some extraordinary way has been prevented from asserting rights, or (3) where the plaintiff has timely asserted rights mistakenly in the wrong forum. The court ruled that the Plaintiff's federal claims were time-barred, holding that the Doctrine of Equitable Tolling was not applicable because none of the above circumstances were

present. The court further held that the fact that state law required that his state law claims be brought first to the Pennsylvania Human Relations Commission did not prevent Plaintiff from timely filing suit on his federal claims. Accordingly, Plaintiff's federal claims were dismissed. The court elected to retain supplemental jurisdiction over Plaintiff's state law claims because they were based on the same set of facts as the United States' claims. - **Smith v. City of Philadelphia, 345 F.Supp. 2d 482 (E.D. Pa. 2004).**

IV. COMMERCIAL LAW

Plaintiff investors sued defendant real estate partnerships and officers for breach of fiduciary duty, breach of contract, unjust enrichment, conversion, and civil RICO claims. Defendants moved to dismiss based on the ground the suit was barred by res judicata and/or collateral estoppel on the basis of a prior arbitration award. The claims for additional relief arose out of the same facts and series of transactions as the other claims. Neither party challenged the arbitrator's award, and the defendants had applied to confirm the award. Given that 42 Pa. Const. Stat. § 7341 dictated that an arbitrator's award was binding and could not be vacated or modified absent the required showing and that an order confirming an arbitration award that went unchallenged was entered upon a party's application after 30 days under 42 Pa. Const. Stat. § 7341, whether or not the award had yet been confirmed, it would be in order to comply with the statute. Thus, the award was final judgment on the merits in a prior suit based on the same cause of action. Although the officer had been dismissed from the arbitration, he was in privity with the general partner, and there was sufficient identity of parties and causes of action to invoke res judicata. - **Brody et al. v. Hankin et al., 299 F. Supp. 2d 454 (2004).**

Defendants, a bank and two of its employees, challenged an order of the trial court which finalized a decree nisi that held defendants jointly and severally liable to the estate of a decedent, after finding that the employees exercised undue influence over the decedent to cause him to name them as the sole beneficiaries of a bank account that contained the bulk of his assets. The decedent, with the assistance of the bank employees, opened an account which provided ostensibly that the principal was held by the decedent in trust for the bank's employees as beneficiaries. On appeal, the Superior Court affirmed the order finding that (1) the orphan's court's finding that decedent was in precipitous mental decline both before and after he opened the account was supported by overwhelming evidence, including testimony from multiple witnesses such as decedent's treating physician; (2) the evidence was equally sufficient to sustain the finding that the bank's employees were engaged in a confidential relationship with the decedent because it demonstrated that the decedent reposed extraordinary trust and reliance in the employees, wholly consistent with the formation of a confidential relationship, to provide effective stewardship of his life savings. Finally, the court found the bank could be held liable for

negligently allowing the account to be created and then negligently permitting the employees to dissipate assets because the employees' activities that formed the basis for liability were demonstrably within their scope of employment. - **Owens v. Mazzei, et al, 847 A.2d 700 (Pa. Super. 2004).**

Eye Care firm challenged the Order which granted summary judgment in favor of doctor. The firm had brought an action in equity against the doctor to compel the doctor 's compliance with a covenant not to compete. The firm had purchased another eye care organization with whom the doctor had entered into an employment contract. The employment contract contained a covenant not to compete provision. After the purchase, the doctor was employed by the firm and received his paychecks from it. On the date of sale, the firm's CEO executed a document wherein the firm agreed to bind itself to all the terms and obligations of the employer, the firm's predecessor, under the employment contract with the doctor. The doctor resigned, and the firm brought suit to force the covenant not to compete. The trial court granted the doctor's summary judgment upon determining that no valid, enforceable assignment of the employment contract had occurred. The Superior Court, in affirming the decision, found that pursuant to the assignability provision, the firm did not become the doctor's employer under the terms of the employment contract until it delivered the assumption of assignment to the doctor. The doctor's continued employment with the firm in the absence of an employment agreement did not obviate the requirement of delivery, and the delivery made two years after the purchase was ineffective in perfecting the assignment. The Court held that a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, when the covenant is included in a sale of assets. Therefore, the Court determined that the Eye Care firm failed to execute a valid assignment of the employment agreement and the covenant not to compete contained within the agreement was thus rendered unenforceable. - **Savage v. Tanner, 2004 Pa. Super 118, 848 A.2d 150 (2004).**

Former employers sued defendants, former employees, and their corporation alleging that the employees violated non-competition agreements which prohibited them from competing with the employer directly or indirectly, or aiding its competitors for a period of one year following the termination of their employment. The employer moved for a Preliminary Injunction, claiming that the enforcement of the non-competition agreements was necessary for the protection of its competitive advantage, as well as its client accounts and customer relationships. The court initially held that the non-competition agreements were enforceable because they were ancillary to the acquisition of the employer by another company, they were supported by adequate consideration, and their temporal and geographic scope was reasonable. The court then held that the employer failed to meet its burden to show a likelihood of success on the merits because mere preparations by the

employees to potentially aid competitors of the employer did not rise to the level of breach of their restrictive covenants as the employees' corporation had no product available for sale, and neither solicited the employers' customers nor made any sales. The court further held that the employer could not demonstrate irreparable injury caused by or resulting from the employees' actions because the employer offered no evidence of the actual or imminent loss of customers. The court finally held that it was unnecessary to address the balancing of the equities or the public interest and, therefore, the employers' Motion for a Preliminary Injunction was denied. - **Vaid Corporation v. Cordial, et al**, 299 F.Supp. 2d 466 (2003).

V. CONSUMER LAW

Plaintiff filed a complaint in the court's original jurisdiction against defendant company for failing to satisfy its obligations under the Tobacco Settlement Agreement Act (TSAA), Pa. Stat. Ann. tit. 35, § 5671-5675. The company filed a motion for summary judgment and requested sanctions contending that the TSAA applied to manufacturers of cigarettes and that it was a mere importer. The company had contracted with a foreign manufacturer for the production of the cigarettes that it sold in the United States. The Commonwealth contended that the company was a non-participating manufacturer to the settlement agreement and, thus, was required to establish escrow funds. The court first held that the company was not entitled to summary judgment based on the Commonwealth's failure to respond to its summary judgment motion within the 30-day period of Pa. R. Civ. P. 1035.3(d) because, although Pa. R. App. P. 121(c) did not excuse the Commonwealth's noncompliance, the court could exercise its discretion to allow the non-moving party to respond after the 30-day period had elapsed. However, the court held that the company was entitled to summary judgment as an importer of cigarettes, not a "tobacco product manufacturer" within the meaning of Pa. Stat. Ann. tit. 35, § 5673, because the TSAA was precise in its definitions and not ambiguous. Thus, the company had no obligations under the TSAA. Finally, the court declined to grant the company's request for sanctions under Pa. R. Civ. P. 1023.1(d) because the case was one of first impression. Therefore, the Court granted summary judgment to the company, but it refused the company's request for sanctions. - **Commonwealth of Pennsylvania v. Jash International, Inc.**, 847 A.2d 125 (2004).

Appellant customers appealed a trial court order which dismissed with prejudice their Second Amended Class Action Complaint against Appellee Rental Center. The Complaint asserted claims under the Goods and Services Installment Sales Act (GSISA), Pa.Stat.Ann.tit. 69, §1101 et seq. and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). The customers rented numerous items from the Rental Center, eventually purchasing each item. Their rental payments were applied to the purchase price of those items. The customers filed their fraud action against the Rental

Center after it failed to apply rental payments against the purchase of a used computer and the bedroom set. The customers' original Complaint sought recovery under the UTPCPL and RPAA, 42 Pa.Cons.Stat. §6901 et seq. The Second Amended Complaint dropped the RPAA action and substituted a GSISA action based on a ruling by a trial court in another action. The trial court that considered the Rental Center's demurrer to the Second Amended Complaint ruled that contrary to its sister's court's ruling, the RPAA applied to the customers' action. The Second Amended Complaint was then dismissed with prejudice. The appellate court reversed. The ruling that the RPAA applied was correct. The Second Amended Complaint stated a prima facie case both under the UTPCPL and the RPAA. Therefore, the customers should have been granted leave to amend their Complaint in response to the ruling that the RPAA applied. - **Griffin v. Rent-a-Center, Inc., Pa.Super. 29, 843 A.2d 393 (2004).**

Plaintiff car buyer sued defendant car manufacturer. The trial court granted the defendant's motion for summary judgment and dismissed the four count complaint. The plaintiff appealed, arguing that the trial court erred in dismissing her breach of express warranty claim and Lemon Law claim. In granting the motion for summary judgment on the Lemon Law claim, the trial court found that the car was not a new motor vehicle and thus was not covered by the Lemon law. In addition, the trial court found that the buyer did not produce sufficient facts as to whether a nonconformity manifested in the car within the first 12,000 miles. In reversing the trial court, the Superior Court noted that the car had 9,628 miles on it when purchased, was sold to the buyer at a substantial price lower from a new car price, that the dealership's owner used the car and the car was not titled before the buyer purchased it. On these facts, the car was a new motor vehicle under the statute because it should have been deemed a dealer's car. Further, the buyer's summary judgment evidence established that the car manifested a nonconformity within its first 12,000 miles of use, as he brought the car back four times for repairs thereafter, and the manufacturer failed to repair the nonconformity. This sufficiently established a nonconformity as defined by the statute. Therefore, the Superior Court reversed the trial court and remanded. - **Meyers v. Volvo Cars of North America, Inc., 852 A.2d 1221 (Pa Super 2004).**

Plaintiff placed an ad to sell a horse. The ad stated the horse was an 11 year old mare and continued on to further describe the horse. Defendant answered the ad with her mother and a more experienced rider to examine and ride the horse. A short time later, plaintiff and defendant entered into a contract to purchase the horse, which stated the horse was 11 years old and being purchases "as is." After defendant tendered her check to plaintiff and took possession of the horse, she ordered the bank to stop payment and attempted to return the animal. Plaintiff refused and filed a Complaint in breach of contract. A district justice ruled in favor of the plaintiff as did an arbitration panel on appeal. This was also appealed and defendant raised in her new matter and counter-claim, fraud

misrepresentation and mutual mistake, because the horse was really 16 years old. On motion for summary judgment the trial court ruled in favor of plaintiff because the horse was purchased as is. The Superior court held that under the UCC the term "as is" in a contract disclaims implied warranties. However, the court found that the inclusion of "11 years old" in the contract was an express warranty, that was unwaived. - **Morningstar v. Hallett, 858 A.2d 125 (Pa.Super. 2004).**

Appellant football franchise sought review from an Order of the Commonwealth Court of Pennsylvania which reversed the trial court's order with respect to the trial court's dismissal of a class action complaint claims of breach of contract, declaratory relief and violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), which were asserted by the Appellee stadium builder licensees. The licensees received an SBL brochure and thereafter entered into a SBL agreement to buy season tickets at the franchise's new stadium. However, the licensees' assigned seats allegedly varied from the diagram that they had been given with the SBL brochure. The licensees filed a class action, alleging that the franchise breached its contract, as well as claims for fraud, negligent misrepresentation, violations of the UTPCPL and for declaratory relief. The trial court sustained the franchise's preliminary objections and dismissed the entire complaint. On appeal, the Commonwealth Court reversed dismissal as to the breach of contract UTPCPL violation, and declaratory relief, and further review was sought. The Supreme Court of Pennsylvania held that the parole evidence rule barred any consideration of the SBL brochure, as that document was similar to an option contract. The SBL agreement's integration clause made reliance on any term in the brochure unreasonable, and no ambiguity as to seat location was found. Accordingly, the Supreme Court held that a claim was not stated under the UTPCPL, even if the SBL brochure was found to constitute a good or a service. Furthermore, the declaratory relief claim failed, as the agreement superceded the brochure. Therefore, the Supreme Court reversed the Order of the Commonwealth Court with respect to its reversal of the trial court's dismissal of the claims for breach of contract, violation of the UTPCPL, and declaratory relief, finding that dismissal was proper. - **Yocca, et al v. The Pittsburgh Steelers Sports, Inc., 854 A.2d 425 (2004).**

VI. CONTRACTS

Plaintiff, a 16 year old basketball player, signed an exclusive endorsement agreement with defendant sports marketing company while living in Serbia and unrepresented by counsel. Two years later, when it was clear that he was going to be a desirable selection in the National Basketball Association draft, he sought to restructure his agreement, but the company refused. Plaintiff then disavowed the agreement as soon as he turned 18, but found that other possible endorsement contracts were hindered when other companies received letters from the defendant claiming that it had an exclusive contract with plaintiff. Plaintiff brought an action against defendant for tortious interference with a prospective contract wherein he claimed that he would suffer irreparable harm if the defendant sports

marketing company continued to send out letters. In connection with that action, plaintiff filed a motion for a preliminary injunction to enjoin any further contacts with the company's competitors regarding its claims to have an exclusive endorsement contract with the plaintiff. The trial court granted plaintiff's motion, from which defendant filed an appeal to the Superior Court of Pennsylvania. On appeal, the Superior Court looked only to whether the elements required for such relief were present and whether it was required to prevent an actionable harm. The court recognized that business opportunity and market advantage losses aptly be characterized as irreparable injury for purposes of equitable relief. The court further noted that, under Pennsylvania law, the contract of a minor is voidable if the minor disaffirms it at any reasonable time after the minor attains majority. The public policy consideration underlying this rule of law is that minors should not be bound by mistakes resulting from their immaturity or the overbearance of unscrupulous adults. The Superior Court found that the plaintiff had a high likelihood of succeeding on his underlying claim of tortious interference with a prospective contract and would suffer irreparable harm if the company continued to send out letters. The court further concluded that plaintiff had a right to disavow the contract with the defendant. - **Milicic v. Basketball Marketing Co., Inc., 857 A.2d 689 (Pa.Super. 2004).**

Appellant landowner appealed the trial court order granting summary judgment in favor of appellee civic association in the association's action seeking owed dues, late fees, and attorney fees for the maintenance of common areas in the subdivision. Pursuant to a covenant in the landowner's deed and similar covenants for other landowners in the subdivision, the association was formed. The association adopted bylaws that required the landowner to pay annual dues, assessments, and charges. The association argued that the landowner failed to make the agreed upon payments. The landowner alleged that he was not legally responsible for assessments to the property under the doctrine of frustration. The landowner submitted an affidavit indicating that he purchased the lot in 1969 in order to build a home on the property. Thereafter, he learned that he could not build on the land, because the lot failed to "perk". The Commonwealth Court found that there was nothing frustrating the performance of the contract between the association and the landowner. The landowner's inability to build on the land did not frustrate either party's ability to fulfill the contract. The landowner bought the property without making the ability of the land to "perk" part of the contract or bringing a claim against the sellers for any alleged wrongful action. As such, the court affirmed the lower court's decision granting summary judgment. - **Pocono Springs Civic Association, Inc. v. Rovinsky, 845 A.2d 200 (Pa. Cmwlth. 2004).**

The plaintiff, teacher, appealed the order of the trial court which granted summary judgments to the defendants, Pittsburgh Board of Public Education, the School District of the City of Pittsburgh and the individual board members in the teachers' action, alleging

that the failure of the board, district and members to hire her as a teacher breached her contract with them. Pa.Stat.Ann.tit. 24 §21-2110(a) required the School District to keep lists of eligible teachers in order of rank or standing. Under Pa.Stat.Ann.tit. 24 §21-2110(b), no one was hired to teach in the district whose name was not within the top ten percent of the names on the list. The teacher was in the top ten percent of the eligibility list in 1996, but she was not hired. Others who were not within the top ten percent were hired. The teacher argued that this was a breach of contract. The teacher argued that the form was an offer under the requirements of Pa.Stat.Ann.tit. 24 §21-2110. The Court found that the form was not an offer, but was, at most, an invitation to apply. The form contemplated the need for the board, district and its members to make a further manifestation of intent. Furthermore, the form was too uncertain in terms to constitute an offer, especially with regard to the timing of performance. The teacher could have been kept on the list indefinitely as long as she completed a form each year indicating that she wanted to remain on the list. Therefore, the order was affirmed. - **Reed v. Pittsburgh Bd. of Pub. Educ., 862 A.2d 131 (Pa.Cmwlth.2004).**

Plaintiff assignee appealed the order of the Court of Common Pleas of Monroe County which granted defendant buyer's preliminary objections in the nature of a demurrer and dismissed the assignee's claim for equitable enforcement of an option agreement for the purchase of land. The sellers and the buyer each held an undivided one-third interest in 281 acres of land. In 1997, the sellers were unable to meet their mortgage obligations and the buyer offered to satisfy their liabilities in exchange for title to the entire parcel, subject to an option agreement that allowed the sellers to repurchase the land. The option agreement expired December 31, 2000. One year later, the buyer transferred the land to his daughter, who sold some of the timber. On December 20, 2000, the sellers assigned their rights to the assignee. Two days before the option was to expire, he filed suit against the sellers for specific performance of the option agreement. The trial court dismissed the complaint, concluding that the assignee had not attempted to exercise the option. Two years later, he again filed suit for specific performance, but the trial court found his complaint insufficient and dismissed the action with prejudice. On appeal, the court affirmed, finding that the trial court properly concluded that because the assignee had failed to exercise the option during the life of the agreement, he forfeited any right to relief he may have had. - **Villoresi v. Femminella, 2004 Pa. Super., 256, 856 A.2d 78 (2004).**

Plaintiff appealed the order of the trial court that refused to enjoin the defendant property owners from selling certain realty to anyone other than the plaintiff. The plaintiff had a right of first refusal of the purchase of the owners' property unless the owners sold the land to their child. The neighbors received notice from the owners that they had an offer to purchase their property. The neighbors exercised the right of first refusal. The owners

later disclosed to the plaintiffs that they did not realize that the person who had made the original offer to purchase the property was the son of one of the owners. The owners stated that they were going to proceed with the sale to the offeror. In denying the plaintiff's request for an injunction against the sale, the trial court found that the case involved a mutual mistake that subjected the agreement to rescission. The neighbors appealed, and the Superior Court determined that there was no mutual mistake and the sale agreement between the parties was improperly abrogated. The neighbors were unaware of the offeror's identity. If there was any mistake by any of the parties, it was attributable to the owners. The owners should have inquired into the identity of the offeror. The Superior Court remanded the case for entry of an order affirming the agreement between the plaintiff and the defendant. - **Vonda v. Long, 852 A.2d 331 (Pa Super 2004).**

Plaintiff railway company sought recovery from defendant railroad under an agreement between the parties for its portion of new circuitry and solar paneling system on a shared railway signaling system. The railroad filed a motion for partial summary judgment and claimed that the purpose of the contract was frustrated by storm damage. The agreement governed the parties' responsibilities regarding the maintenance of a signaling system which serviced a stretch of track. A severe storm disabled the system. Following the damage, the parties could not agree on whether to continue the sharing agreement with a new system or to rebuild the damaged system. The railroad argued that the purpose of the agreement was to maintain the system as it existed at the time of the agreement, and once the existing system was destroyed, the purpose was frustrated. The context of the formation of the agreement reinforced that the only reasonable interpretation was that it was based on the premise that the pole line system could be repaired. Additionally, there was no genuine issue of material fact that the storm prevented the parties from maintaining the pole line system. As the court found that the damage to the pole line in the storm caused the system to deteriorate beyond the point where maintenance was practical, and also concluded that the purpose of the contract was to maintain the system as it existed at the time of the agreement, the court held that the purpose of the contract was frustrated by the storm damage. The railroad's partial motion for summary judgment was granted, and the company's claims were dismissed. - **Norfolk Southern Railroad Company v. Reading Blue Mountain & Northern Railroad Company, 346 F. Supp. 2d 720 (M.D. Pa. 2004).**

VII. CORPORATIONS

Appellant filed an action raising a single breach of contract claim against appellee company, as well as "alter ego" allegations against appellees, related individual and entities. The trial court entered a judgment in favor of all appellees, except the company, after finding that appellant could not pierce the corporate veil. Thereafter the appellant

challenged the court's decision. The trial court found that appellant knew that the company would have assets only if a deal with a third party was consummated and that neither the third party agreement nor any of the other evidence supported appellant's position that the corporate entities were misused. The Court agreed with the trial court and affirmed the decision. The Court first held that the trial court did not err in failing to submit the alter ego issue to the jury because (1) although the company's certificate was filed in Delaware, Pennsylvania law applied where the issue was procedural and the contract provided that disputes would be determined according to Pennsylvania law; (2) Pa. Const. art. I, § 6 did not afford appellant the right to a jury trial on the issue of piercing the corporate veil because appellant failed to identify any specific cause of action for corporate disregard which predated the Pennsylvania Constitution or existed at common law; and (3) the trial court did not abuse its discretion in resolving the corporate piercing claim. In addition, the Court held that the trial court properly refused to pierce the corporate veil because appellant failed to show misuse of corporate form or demonstrate prejudice. Therefore, the Court affirmed the trial court's judgment. - **Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC, et al., 2004 PA Super 100, 846 A.2d 1264 (2004).**

Supreme Court reviewed granting of summary judgment in favor of corporate defendant pursuant to the newly enacted statute that limits the successor asbestos related liabilities of certain Pennsylvania corporations. 15 Pa.C.S. Section 1929.1. In reversing the order granting summary judgment, the Supreme Court held the application of the statute in this case to be unconstitutional under Article I, Section II of the Pa. Constitution. Under Article I, Section II, a statute may not extinguish a cause of action that has occurred before the statute is enacted. The plaintiff's cause of action in this case occurred before Section 1929.1 was enacted, making the statute's application here unconstitutional. - **Aeropoli v. ACS Corp., et al., 842 A.2d 919 (Pa. 2004).**

VIII. COVENANTS

Appellant property owners appealed from the reversal by the Superior Court of an order entered by the trial court, which had granted judgment in favor of the owners, in appellee fire department's suit to quiet title to its parcel of real estate and for declaratory relief seeking to have a restrictive covenant prohibiting the sale of alcoholic beverages declared invalid. The department argued that the owners no longer obtained a benefit from the restrictive covenant. The state's highest court held that the department had constructive notice of the recorded covenant when it purchased the parcel. The existence of three liquor-serving businesses outside of the tract did not warrant a finding of changed circumstances to invalidate the restriction. Further, the changes in the immediate neighborhood did not affect the benefit conferred upon the owners by the restriction. Notwithstanding that the majority of owners in the tract agreed to release the restriction and that the owners who

objected testified that they did not rely upon the restriction when purchasing their property, the restriction benefitted the owners by hindering the nuisances that resulted from the sale and consumption of alcohol. Furthermore, alcohol had never been sold in the restricted tract. The trial court had competent evidence to conclude that the entire restrictive plan had not been abandoned and that the alcohol restriction still had significant value to the owners. The intermediate court erred by substituting its factual determinations for those of the trial court. The intermediate court's order was reversed. The case was remanded for the intermediate court to consider the department's remaining unaddressed issue concerning the applicability of the principles of estoppel, laches, and waiver to the case. - **Vernon Township Volunteer Fire Department, Inc. v. Connor, et. al., 855 A.2d 873 (Pa. 2004).**

IX. DAMAGES

Plaintiff companies sued defendant manufacturer for breach of warranty, fraud, negligence, negligent misrepresentation, and malfunction. The manufacturer moved for summary judgment, which was granted in part and denied in part. A mistrial was declared on the basis that the non-production of certain reports was prejudicial to the manufacturer. The manufacturer moved for summary judgment on the remaining claims. Although evidence in the earlier summary judgment consideration was that a generator failure had been due to a defect in redesigned replacement blades, a subsequent consultant's report suggested that the failure of the integrity of the stiffeners and end box diffuser, and not a blade defect, caused the generator failure. Because of the "new evidence," which made the previous decision clearly erroneous under existing case law with regard to the economic loss doctrine and the "other property" exception to that doctrine, the court reconsidered its previous ruling to what would otherwise have resulted in manifest injustice. The court held that since the parties continued to dispute whether the re-designed blades were a part of the object of the bargain and therefore covered by the various warranties, disclaimers of damages and disclaimers of liability provisions that had been raised by defendant as defenses, this question of fact was properly within the province of a jury. However, regardless of the resolution of that question, summary judgment had to be granted for defendant on the negligence, negligent misrepresentation, and malfunction claims. The court granted summary judgment to the manufacturer as to negligence, negligent misrepresentation and based upon the court's re-examination of the economic loss doctrine and as to the validity of the waiver of consequential damages clauses between the prime contract and a subcontract. The court denied summary judgment on all remaining counts. - **Capricorn Power Co., et. al, v. Siemens Westinghouse Power Corp., 324 F.Supp.2d 731 (2004).**

Plaintiffs, an injured motorist and his wife, brought a negligence action against the

defendant driver for personal injuries and loss of consortium resulting from an accident in which the defendant driver rear-ended the plaintiff motorist's car. The verdict form and the court's jury instructions on damages permitted the jury to consider a number of categorized misfortunes, such as "loss of the pleasures and enjoyments of life" and the "loss of feeling of well-being," as separate, compensable items of damages apart from the damages available for pain and suffering. The jury awarded the plaintiffs a large sum for personal injuries and loss of consortium. Defendant driver requested a new trial based upon the jury instruction regarding damages. The Court denied the defendant's motion for a new trial and judgment was entered on the jury verdict. Defendant driver appealed from the judgment on the jury's verdict. On appeal, the Superior Court held that an award for pain and suffering is a single award, although many things can contribute to it. The Court noted that here the jury instructions permitted jurors to award such damages in a piecemeal fashion, based on separate components such as loss of life's pleasures. Accordingly, the Superior Court vacated the award of damages and remanded the matter for a new trial on that issue only. - **Carpinet v. Mitchell, 853 A.2d 366 (Pa.Super. 2004)**.

Passenger appealed from judgment entered on a jury verdict finding the driver to be negligent but that the driver's negligence was not a substantial factor in bringing about passenger's injuries. Both parties' medical experts agreed passenger sustained injuries in the accident. Passenger requested a new trial as to damages only, but driver requested a new trial for both the issues of liability and damages. The Supreme Court held that a new trial as to damages alone will only be granted where (1) the issue of damages is not intertwined with the issue of liability; and (2) the issue of liability has been "fairly determined" or is "free from doubt". In this case, the driver admitted in his deposition that the passenger complained of pain immediately after the accident, and both parties' medical experts agreed that the accident caused the passenger to sustain at least some injury. Finding it to be unfair to allow the driver to relitigate the issue of liability under these circumstances where the issue of damages was not intertwined with liability, the Superior Court granted a new trial to damages only. - **Kraner v. Kraner, 841 A.2d 141 (Pa. Super 2004)**.

Appellant injured party sued appellee motorist for damages she claimed to have sustained as a result of an auto accident. A jury rendered a verdict in favor of the injured party, and the Wayne County Court of Common Pleas denied her post-trial motions arguing that the verdict was inadequate. The injured party sought review. The motorist conceded liability, and a trial was held on the issue of damages only. The appellate court found the jury had awarded the injured party an amount equal to her lost wages, which meant it gave her nothing for pain and suffering. Both parties' experts conceded that the injured party suffered soft tissue injuries in the accident. She was taken by ambulance to an emergency room and was released wearing a soft collar, suffering from neck and shoulder pain, and

later developed low back pain. She was in physical therapy for several months; her neck pain resolved after four months, but she claimed she continued to suffer from lower back pain on occasion. The motorist's expert opined that the injured party suffered from degenerative changes that were normal for her age, and that the soft tissue injuries related to the accident should have resolved within three to six months of the accident. The appellate court held that on these facts, the injured party suffered a compensable injury; the jury's failure to award her damages for pain and suffering entitled her to a new trial. The trial court's order denying the injured party's post-trial motions was reversed, and the matter was remanded for a new trial on damages only. - **March v. Hanley, 2004 Pa Super 299, 856 A.2d 138 (2004).**

Appellees, accident victims, sued appellant, driver, for injuries they allegedly sustained when the driver's vehicle rear-ended the vehicles they were in. The jury awarded damages to one victim but not the other. The driver appealed, challenging the trial court's exclusion of certain evidence and its failure to give a requested jury instruction. The driver's attorney had one victim videotaped while shoveling snow and cleaning snow off his car with a broom. The attorney did not notify the victim's attorney of the existence of this tape until Friday afternoon; the driver's medical expert was deposed and questioned about this tape on the following Monday and changed his earlier testimony about the extent of the victim's injuries based upon the surveillance tape. As the driver's attorney's office was 60 miles from the victim's attorney's office, the latter could not review the tape until just prior to the deposition. The Superior Court of Pennsylvania held that, due to prejudice to the victim from the driver's attorney's failure to timely disclose the tape's existence, the trial court properly excluded both the tape and the expert's testimony. The driver conceded that the victim had sustained some injuries in the collision, but contested the causal relationship between the accident and many of the alleged injuries. Therefore, the Superior Court held that the trial court reversibly erred by not charging the jury that it had to find that the driver's negligence was a substantial factor in bringing about all injuries for which any damages were awarded. Therefore, the Superior Court held that the trial court's exclusion of a surveillance tape and an expert's testimony that was based on the tape was affirmed, but the judgment was vacated and the case was remanded for a new trial. - **Mietelski v. Banks, 854 A.2d 579 (2004).**

Former employer brought action against former employee for breach of non-disclosure and non-compete agreement. Former employer alleged that former employee copied paragraphs from proposals, which were trade secrets. The trial court awarded the employer liquidated damages and attorney's fees. Former employee appealed to the Superior Court of Pennsylvania. The Superior Court held that the employee violated his contract when he left the employer and took a position at a competitor. The Court further held that the agreement's liquidated damages clause was enforceable and that the employee's gross salary, which served as the basis for liquidated damages, was proven by

competent evidence. The Court reasoned that the employee's gross income, rather than net income, was a proper basis because the employee had agreed to an equitable accounting of all earnings. The Court further ruled that the award of attorney's fees was improper because the employer did not raise such a claim in its complaint. The judgment of the trial court was reversed only as to the award of attorney's fees. - **Omicron v. Weiner, 860 A.2d 554 (Pa.Super. 2004).**

Plaintiff was injured in a motor vehicle accident caused by defendant running through a stop sign. After a long procedural history, a second trial was held and the jury awarded plaintiff \$5 million in damages and his wife \$1 million. The issue on appeal, among others, was whether the trial court abused its discretion in failing to award remittitur of damages. The appeals court rejected defendant's assertion of abuse of discretion. After reviewing the standard for remittitur, where the verdict must shock the conscience of the court and not be supported by the evidence, and the standard for abuse of discretion, the court found that the jury was within its prerogative in its valuation of the various expert opinions. The verdict amounts did not shock the conscience. Here, plaintiff had major life-altering injuries, including seizure disorder, cognitive dysfunction, depression, vision impairment, a resting tremor and an unstable gait, among others. The court would not substitute its judgment for that of the fact-finder. - **Potochnick v. Perry, 861 A.2d 277 (Pa.Super. 2004).**

The trial court found that the plaintiff sustained asbestos related injuries and awarded him \$2,000,000. It awarded the plaintiff wife \$500,000 for loss of consortium. On appeal, the Superior Court vacated the judgment and remanded for a new trial to determine damages. On appeal, the defendants argued that the trial court erroneously admitted evidence of subsequent remedial measures. The defendant introduced evidence that its asbestos containing products did not release significant amounts of asbestos dust. The Superior Court concluded that the trial court properly allowed evidence of a warning to impeach and rebut the claim that the product was not prone to create dust. Finally, the Superior Court concluded that because the awards to the plaintiffs were so patently excessive, the trial court erred in failing to grant remittitur of the judgment. There was scant evidence that the injured party suffered from a severe asbestos related condition. At best, the undisputed evidence demonstrated only that a sedentary, 74 year old man with cirrhosis and a 20 year smoking habit became winded after moderate exercise and no longer was as active around the house as he once was. The Superior Court remanded for a new trial to determine damages. - **Smalls v. Pittsburgh-Corning Corp., 843 A.2d 410 (Pa. Super. 2004).**

Appellant injured party appealed the order of the Court of Common Pleas of Allegheny County (Pennsylvania), which denied his motion for a new trial. It was conceded that there was some injury for which appellee driver was legally liable, but the jury found that the injury, neck and back strain and sprain, was not severe enough to warrant compensation, and awarded zero damages. The injured party was a passenger in a van stopped at a red

light that was hit from the rear by a pick-up. The parties agreed that the driver was at fault and some injury was caused. The appellate court concluded that, based on the evidence, it was not unreasonable for the jury to find that while the injured party suffered some pain, it was not severe enough to warrant an award of damages. The injured party was treated only twice for the neck pain. The first treatment was almost two weeks after the accident. He missed no time from work. From the limited treatment, the timing of the treatment, and the fact that the injured party continued working, the jury was free to conclude that the injured party suffered a mild neck strain that produced no more than a minor inconvenience. Given the six month delay between the accident and the treatment for the lower back, it was not unreasonable for the jury to conclude that only the neck pain was related to the accident. In turn, the jury could reasonably conclude that the injured party's injury was no more than a transient rub of life for which no compensation for pain and suffering was due. - **VanDirk v. O'Toole, 857 A.2d 183 (Pa.Super.2004).**

X. DEFAMATION

Plaintiff brought defamation and false imprisonment claims against defendants, a hotel and others. Defendants moved for summary judgment. Plaintiff was accused of stealing items at a convention that took place at the hotel. The criminal charges against him were later dropped. A reasonable jury could have found that plaintiff suffered from some continuous fear, embarrassment, or humiliation. With the exception of defendants' statements to the police alleging plaintiff's criminal activity, plaintiff had a viable defamation claim. However, the allegedly defamatory statements to police were absolutely privileged, and plaintiff could not claim defamation for those communications. Plaintiff alleged that his confinement, while waiting for police arrival, constituted false imprisonment. Hotel security kept plaintiff from leaving before the police arrived. Plaintiff could reasonably have believed that the hotel was claiming lawful authority to confine him until the police arrived. Plaintiff's testimony raised a genuine issue of material fact for the fact-finder to decide if the security personnel's words and actions confined plaintiff within the boundaries of the hall. Plaintiff established a viable false imprisonment claim that could be brought to trial. The motion for summary judgment was denied in full. - **Douglas Pennoyer, Jr. v. Marriott Hotel Services, Inc., et al., 324 F. Supp. 2d 614 (D.Ct. 2004).**

XI. ENVIRONMENTAL LAW

Borough sued a company who purchased and operated a battery recycling plant for attorney's fees and administrative costs related to said plant under various environmental statutes. The defendant moved for summary judgment. First, summary judgment was requested by the defendant and the plaintiff conceded that it was inappropriate to file under CERCLA and the state law equivalent HSCA. Second, the court addressed that the

Borough can recover as an innocent landowner under § 107(b)(3) of CERCLA. As an innocent landowner, one can proceed if they can prove: 1. that the release or threat of release of hazardous substance and damage were the result of the act or omission of a third party; 2. the third party's act did not occur as part of a contractual relationship, either directly or indirectly, with the Borough; 3. the Borough exercised due care with respect to the hazardous substance; and 4. the Borough took precautions against foreseeable acts or omissions of any such third party. The court was unable to determine, as a matter of law, the answers to these questions, and summary judgment was denied. - **Borough of Throop v. Gould Electronics, Inc., 302 F.Supp. 2d 366 (2001).**

Plaintiff brought an action against defendant steel manufacturer, alleging that discharges from the manufacturer's plant's violated the Clean-Water Act. ("CWA"). The manufacturer appealed the judgment of liability upon jury verdict and the penalty imposed by the district court. The manufacturer contended that it was improperly precluded from showing that laboratory error caused the manufacturer to over-report certain of its discharges. The manufacturer also argued that the penalty imposed by the court resulted from an improper calculation of the economic benefit to the manufacturer from the unlawful discharges and an improper consideration of violations of monthly averages as violations for each day of the month. The appellate court first held that, although strict liability was imposed under the CWA for discharge violations, the manufacturer was not precluded from sharing the putative violations indicated in its own laboratory reports resulted from laboratory error rather than an actual unlawful discharge. Further, in assessing the penalty, the calculation of the manufacturer's weighted average cost of capital lacked an evidentiary basis and may have overstated the economic benefit to the manufacturer, but the least costly methods of compliance and the periods of non-compliance were properly determined. Also, counting a violation of a monthly average as a month of daily violations failed to consider the egregiousness of the manufacturer's conduct. As a result, the judgment of liability was affirmed except for alleged violations which were affected by the laboratory error defense, and the assessment of penalty was vacated and remanded for further consideration. - **United States of America v. Allegheny Ludlum Corporation, 366 F.3d 164 (3d. Cir. 2004).**

XII. ERISA

In a suit by plaintiff employee against defendant insurer requesting punitive damages under 42 Pa. Cons. Stat. § 8371 for the insurer's bad faith in denying disability benefits, the insurer appealed from a decision of the United States District Court for the Eastern District of Pennsylvania which denied its motion to dismiss based on preemption under ERISA, 29 U.S.C.S. §§ 1001-1461. The employee was granted long-term disability benefits under a benefit plan governed by ERISA. After the insurer terminated his benefits, the employee filed suit for bad faith, requesting punitive damages under 42 Pa. Cons. Stat. § 8371. The

insurer filed a motion to dismiss on the ground of ERISA preemption. The district court denied the motion, and the insurer appealed. The court held that the district court erred in denying the insurer's motion because § 8371 was a state remedy that allowed an ERISA-plan participant to recover punitive damages for bad faith conducted by insurers, supplementing the scope of relief granted by ERISA. Thus, § 8371 was subject to conflict preemption. Moreover, even if § 8371 was found to "regulate insurance" under ERISA's saving clause, 29 U.S.C.S. § 1144(b)(2)(A), it would still be preempted because the punitive damages remedy supplemented ERISA's exclusive remedial scheme. The court further held that 42 Pa. Cons. Stat. § 8371 did not "regulate insurance" under the saving clause because it did not substantially affect the risk pooling arrangement between the insurer and the insured. Thus, express preemption under 29 U.S.C.S. § 1144(a) applied. Accordingly, the United States Court of Appeals for the Third Circuit reversed the district court's decision and remanded with instructions to dismiss the employee's bad faith claim. - **Barber v. Unum Life Insurance Company of America, 383 F.3d 134 (3rd Cir. Pa. 2004).**

In this case, plaintiff-insured brought a claim alleging that defendant-insurer's denial of a claim for long-term disability insurance benefits violated ERISA, 29 U.S.C.S. §1001. The insurer moved for summary judgment. In its motion for summary judgment on the claim, the insurer contended that the insured's claim of an ERISA violation failed as a matter of law. The insured visited her attending physician and reported fainting, pain in her right side, and increased lower extremity swelling. The insured went on disability leave. According to the insurer, the insured did not sufficiently demonstrate an inability to perform her occupation, and, therefore, did not meet the definition of total disability as defined in the policy. The employer's disability plan granted insurer the discretion to determine the insured's benefits eligibility. The insurer's decision to deny disability benefits was not arbitrary or capricious. With the exception of the insured's treating doctor, the other physicians who examined the insured did not cite any evidence to support the insured's inability to perform a sedentary occupation. Finally, although the treating physician did not agree with his peers about insured's symptoms and disability status, the insurer was not required to give any special deference to him. Therefore, the court granted the insurer's motion. - **Dinote v. United of Omaha Life Ins. Co., 331 F. Supp.2d 341 (E.D. Pa. 2004).**

The employee had been receiving medical care for various ailments for two years, but she was neither diagnosed with nor treated specifically for multiple sclerosis (MS) until after her benefits plan became effective. Based on the company's interpretation of the benefits policy language, the company concluded that the employee had received medical care for symptoms related to MS during the 90-day period prior to her insured effective date. The company thus concluded that her MS was a pre-existing condition for which long-term disability (LTD) benefits were not payable under the plan. Because the company both

funded and administered the plan, the court applied a heightened standard of review to the company's decision and concluded that the district court erred as a matter of law when it held that the company's determination was not arbitrary and capricious. After interpreting the words "for" and "symptom," the court held that the phrase "symptoms for which you received medical care" in the policy necessarily connoted an intent to treat or uncover the particular ailment which caused that symptom. Thus, the medical care that the employee received during the 90-day period was not for a symptom of her MS. - **McLeod v. Hartford Life, 2004 U.S. App. LEXIS 12253, 372 F.3d 318 (2004).**

Plaintiff filed a complaint alleging she was wrongfully denied LTD benefits under her employer sponsored long term disability policy. The action was stayed while she pursued her remaining administrative remedies. With her third and final appeal, she was granted benefits rendering her suit moot. Plaintiff then moved for attorney's fees and costs pursuant 29 U.S.C. § 1132(g). First and foremost, the court dismissed plaintiff's action based on lack of subject matter jurisdiction. "To bring an ERISA claim, a plaintiff must exhaust all of her administrative remedies." *McCarthy v. Pelino & Lentz* 1994 U.S. LEXIS 16535. Second, the court could not award attorney's fees even if it construed plaintiff's claim as a new cause of action. There was no Third Circuit case law on point on this issue, however other circuits have had similar cases. Therefore, the court ruled that attorney's fees were not recoverable when the ERISA dispute is resolved at the administrative level. - **Schaffer v. Prudential, 301 F.Supp.2d 383 (2003).**

Plaintiff insured asserted a claim for benefits under ERISA and a state law bad faith claim under 42 Pa.C.S.A. § 8371 arising from the denial of long term disability insurance benefits by defendant insurer (CNA). CNA filed a motion to dismiss the state law bad faith claim as preempted by ERISA and concomitantly to strike the plaintiff's demand for punitive damages and a jury trial. In this case, CNA provided long term disability insurance to the plaintiff under an ERISA plan maintained by the plaintiff's employer. After the plaintiff's Parkinson's Disease progressed to a point that the plaintiff could no longer perform the duties of his job, the plaintiff made a claim for long term disability benefits. CNA denied the claim and plaintiff sued. CNA argued that ERISA preempted the plaintiff's state law bad faith claim. The district court agreed. The court found that even though § 8371 regulated insurance, when checked against the McCarran-Ferguson factors, it appeared doubtful that the bad faith statute fell within the ERISA saving clause. (29 U.S.C. § 1144(b)(2)(A)). Consequently, the state statute conflicted with the clear intent of Congress that the ERISA civil enforcement provisions be exclusive. Finally, without the state law claim, the plaintiff was not entitled to a jury trial since an ERISA claim was equitable in nature. - **Smith v. Continental Cas. Co., 303 F.Supp.2d 560 (E.D.Pa 2002).**

XIII. EXPERTS

Appellant, in her own right, and as administratrix of the decedent's estate, appealed the order of the trial court, which denied her motion for post-trial relief seeking a new trial against defendants, the Pennsylvania Department of Transportation, a township, a contractor, a property owner, and a subcontractor, named in a negligence action. At trial, a jury found that no defendant committed any act of negligence. The decedent was killed when he lost control of his car on a patch of ice and collided with another vehicle. The administratrix alleged that defendants' negligent actions caused ice to form on the road. On appeal, the administratrix raised numerous issues. The appellate court concluded that the trial court did not err in excluding evidence concerning a township ordinance because the question of whether a party had violated an ordinance was a question of law and legal opinion testimony was not admissible. It was also determined that the trial court did not err in precluding the testimony of the township's engineer because the issue of whether defendants complied with the township ordinance was not relevant to the question of whether defendants acted negligently in constructing berms on property adjacent to the road. Finally, the court held that the trial court did not err in precluding the testimony of the administratrix's expert regarding industry standards for silt fence construction because the expert was only precluded from reading the standards to the jury, but was not prevented from testifying as to how specific standards applied to his opinion. Accordingly, the order of the trial court was affirmed. - **Browne v. Commonwealth of Pennsylvania, Department of Transportation, 843 A.2d 429 (Pa. Cmwlth. 2004).**

Plaintiffs, a patient's husband and patient's estate, filed an action against defendant-hospital, alleging that the hospital's negligence during post-operative care caused patient's brain injury and ultimate death. At trial, plaintiffs presented evidence that the patient experienced pain, anguish and fear while she lay in a persistent vegetative state for nineteen days until she died. The jury awarded damages for pain and suffering. On appeal, defendant-hospital argued that the jury's award for pain and suffering was based on inadmissible evidence - the lay opinion testimony of the patient's adult children that patient suffered pain while she was in a vegetative state. The Superior Court noted that a lay witness may testify as to certain matters involving health, the apparent physical condition of a person, and as to obvious symptoms, but such testimony must be confined to facts within the witness's knowledge and may not be extended to matters involving the existence or non-existence of a disease, which is only discoverable through the training and experience of a medical expert. Accordingly, the court held that the lay opinion testimony of the adult children was incompetent and should not have been admitted in a medical malpractice action, because the children were not qualified medical experts. The trial court's error in admitting this incompetent testimony was not harmless because such emotional testimony could have, in addition to confusing the jury, prejudiced its decision. - **Cominsky v. Donovan, 846 A.2d 1256 (Pa.Super. 2004).**

Patient brought medical malpractice action against neurologist, radiologists, and hospital alleging failure to diagnose and test for brain tumor. The trial court granted summary judgment to the defendants, holding that plaintiff's proffered expert witness, a neurologist, could not comment on the standard of care for radiologists. Patient appealed to the Superior Court. The Superior Court reversed and remanded, holding that the neurologist was qualified to give an expert opinion about the radiologists' standard of care. The Court noted that the Medical Care Availability and Reduction of Error Act (MCare) may be applicable to this case rather than the prior case law relied upon by the trial court. However, the Court did not decide which law properly applied, reasoning that even under MCare's heightened standard, the neurologist was qualified to offer an opinion, at least at the summary judgment stage. Under Mcare, a physician testifying as an expert on the standard of care in a medical malpractice case must essentially either practice in the same sub-specialty or a sub-specialty that has a substantially similar standard of care. The expert must also be substantially familiar with the standard of care for the specific care at issue. The Superior Court noted that the neurologist's curriculum vitae, offered in response to the summary judgment motion, established prima facie his qualifications to read the X-rays in this case and to offer an opinion on what should have been done under the circumstances. The Court further reasoned that while it would not find him qualified to render such an opinion if the radiologists were reading X-rays of a leg, his opinion on X-rays relating to neurological problems and the standard of care for radiologists reading such X-rays should have been allowed. - **Gartland v. Rosenthal, 850 A.2d 671 (Pa.Super. 2004).**

Estate of patient brought medical malpractice action against her doctors. Patient had died of multiple organ failure caused by excessive blood loss which occurred after she had undergone surgery to alleviate chronic pelvic pain. At trial, patient's treating physician was permitted to offer expert testimony relative to anatomical structure and the standard performance of the surgery. He also testified relative to an instrument used in the surgery, the way one looks through it and the fact that it has a light attached. Said treating physician also testified that he was informed by a defendant surgeon of the steps which had already been made to identify and stop the bleeding and that he was told by the surgeon that the surgeon believed that he had addressed it correctly. The jury returned a verdict in favor of defendant doctors. Plaintiff estate appealed. On appeal, the estate argued that it was error for the trial court to admit the above-described testimony of the treating physician. The Superior Court affirmed the verdict, concluding that the trial court's admission of said testimony was proper. The Court noted that the treating physician was identified as both a fact and expert witness on defendants' pre-trial statements. With respect to the use of the instrument, the Court reasoned that such testimony was not expert opinion testimony, but merely a description of the type of instrument. The treating physician's testimony regarding the defendant surgeon's statements was also admissible under the Pennsylvania Rules of Evidence as a statement made for the purpose of the patient's later diagnosis or treatment by the treating physician. - **King v. Stefenelli, 862 A.2d 666 (Pa.Super. 2004).**

Plaintiff-motorist who was assaulted in a parking lot brought action against automobile manufacturer GMC, alleging negligence and strict liability with respect to the vehicle's automatic unlock feature. The case proceeded to trial and the jury returned a verdict in favor of GMC, responding in the negative to an interrogatory asking whether plaintiffs proved the vehicle was defective in design because of the inclusion of the automatic unlock feature. Following post-trial motions, plaintiff appealed to the Superior Court, alleging error in the trial court's admission of GMC's expert's testimony and the court's ruling that plaintiff could not pursue recovery under a negligence theory where the jury found no defect on the strict liability claim. With respect to the expert issue, plaintiff argued that GMC's electrical engineer expert's report was not probative to the subject matter of security. The Superior Court held that the trial court did not err in concluding that the expert's experience and education were relevant to the issue of how automatic door lock/unlock systems are designed and function, including how these designs may impact security issues. The Court therefore concluded that the expert testimony was relevant (tended to prove or disprove a material fact at issue), a basic requisite for the admission of any evidence. With regard to the negligence issue, the Superior Court held that trial court erred when it refused to permit the jury to consider plaintiff's negligence claim. The Court reasoned that, while the jury concluded that the locking mechanism was not defective in design or function, it should have been able to consider whether GMC was negligent by unreasonably creating a system which operated to automatically unlock the vehicle when it was turned off. The absence of success of the strict liability claim should not have foreclosed this question from being presented to the jury. The Court based its decision on recent Pennsylvania Supreme Court case law that recognized that negligence and strict liability are distinct legal theories with distinct elements. - **Moroney v. GMC, 850 A.2d 629 (Pa.Super. 2004).**

Plaintiff-patient brought medical malpractice action against defendant orthopedic surgeon, who performed bunion-removal surgery. Plaintiff complained that defendant's surgery caused her foot condition to worsen. Plaintiff presented an expert report from a podiatrist who was certified by the American Board of Podiatric Surgery. The report did not identify the standard of care of orthopedic surgeons and/or the manner in which defendant orthopedic surgeon deviated therefrom. Defendant filed a motion in limine to exclude the podiatrist expert's report, arguing that the podiatrist was unqualified to provide an expert opinion under both the common law and the newly enacted Medical Care Availability and Reduction of Error Act (MCARE Act). The trial court granted the motion in limine and defendant's subsequent motion for summary judgment. On appeal, the Superior Court affirmed the trial court's order granting defendant's motion in limine and motion for summary judgment. The court held that a podiatrist who was an expert in the general field of foot surgery lacked the training and experience necessary to opine about the standard of care relevant to an orthopedic surgeon. The Superior Court reasoned that training for orthopedic surgery involved consideration of entire skeletal system, rather than just the

foot, and the podiatrist's report never made reference to orthopedic surgeon's standard of care. The court further noted that medical experts may be unqualified to testify about the standards of care applicable in certain other medical fields, and that the relevant standard of care pertains not only to the procedure being performed but also to the qualifications of the person performing the procedure. Accordingly, the Court concluded that the podiatrist's expert testimony was properly excluded under both prior case law and the MCARE Act. - **Wexler v. Hecht, 847 A.2d 95 (Pa. Super. 2004).**

XIV. FELA

Plaintiff employee sought review from the judgment of the trial court, entered after refusing to remove the non-suit entered against the employee at trial in the employee's action under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq. The employee worked for the employer, a railroad, as a water service mechanic. The job required the employee to kneel for long periods of time and perform heavy lifting. Despite the employee's complaints of pain in his back and knees, the employer failed to grant the employee's request for knee pads. The employee eventually had surgery on his knee. The employee presented the testimony of his orthopedic surgeon in support of his causation argument that the repetitive nature of his work had caused his back and knee problems. The Superior Court concluded that the trial court erred in granting the employer's motion for compulsory non-suit on the ground that the employee merely showed that his injuries were possibly a result of the employer's negligence. Under the Federal Employers' Liability Act, 45 U.S.C.S. § 51 et seq., this showing was sufficient to defeat a non-suit. A non-suit was justified only where there was a zero probability that employer negligence contributed to the employee's injury. A jury could have reasonably found that the employer's failure to mitigate the employee's work place conditions was a breach of the employer's duty to provide its employees with a relatively safe work place. The Superior Court reversed the trial court's decision and remanded the case for a new trial. - **LaBes v. New Jersey Transit Rail Operations, Inc. 2004 Pa. Super. 467, 863 A.2d 1195 (2004).**

XV. HEALTH CARE LAW

Appellant parents initiated a class-action suit against appellee pharmaceutical companies to secure damages for personal injuries allegedly incurred by their children as a result of an injection of a vaccine, preservative, and blood produce manufactured by the companies. The Court of Common Pleas of Philadelphia County, Pennsylvania, sustained the companies' preliminary objections and dismissed the parents' complaints. The trial court concluded that it lacked jurisdiction because the cause of action was cognizable under the exclusive jurisdiction of the federal National Childhood Vaccine Injury Act ("NCVIA"), 42 U.S.C.S. § §300aa-1 to -34. On appeal, the parents argued that the trial court erred in concluding that it lacked jurisdiction. The appellate court found that the language of the NCVIA relative to the jurisdiction was clear: a claimant's exhaustion of the NCVIA's

statutory remedy was a condition precedent to subject matter jurisdiction of the state or federal court to resolve the merits of a claim filed by an individual seeking damages for a vaccine-related injury. The children were claimants and were subject to the mandate of NCVIA requiring that an initial filing for benefits be made in the Vaccine Court. While a request for medical monitoring was a viable cause of action in Pennsylvania, the parent had to comply with the NCVIA and petition in the Vaccine Court if and when their children manifested injuries related to the ingestion of the vaccine. Thus, the parents were precluded from seeking relief in state court until they exhausted the remedies in the Vaccine Court. As such, the Superior Court of Pennsylvania affirmed the order of the trial court which stated the court lacked jurisdiction. - **Ashton, et al. v. Aventis Pasteur, Inc., et al.**, 851 A.2d 908 (Pa.Super. 2004).

XVI. INDEMNIFICATION

Defendant appealed the entry of summary judgment, where the trial court found that a successor corporation implicitly assumed the predecessor's lease as a matter of law under the principles of corporate successor liability. As part of an agreement between the successor and the predecessor, the predecessor agreed to obtain the lessor's consent to assign a lease, with the terms subject to the successor's negotiations and approval. Although the successor and the lessor were not able to negotiate acceptable lease terms, the successor paid the monthly rent and utility obligations for 11 months and then abandoned the premises. The Superior Court held, in affirming summary judgment, that the successor impliedly assumed the predecessor's obligations under the lease where its conduct toward the lessor and the leased premises indicated an intent to assume the lease and the lessor relied on the successor's actions and suffered damages. In addition, the predecessor was also entitled to summary judgment because the record demonstrated that the lessor acquiesced to the assignment and implicitly released the predecessor from its contractual obligations, that the indemnity provision in the purchase agreement was not triggered even if the predecessor remained liable for rent, and that the successor had no common law right to indemnity or contribution from the predecessor. - **Bird Hill Farms, Inc. v. U.S. Cargo & Courier Serv. Inc.**, 845 A.2d 900 (Pa. Super. 2004).

In this case the Pennsylvania Supreme Court decided an issue of first impression: whether a "pass through indemnification clause" without more, violates public policy. In this case, a food mart hired a general contractor to perform some work. Within the contract, there was a clause that required the general contractor to indemnify the store for any injuries providing that the store was not solely negligent. The general contractor then entered into a contract with a subcontractor to perform some of the work. The contract with the subcontractor which had an incorporation clause whereby the contract between the store and the general was incorporated into the subcontract. There was a fall-down accident. The case settled for \$200,000. In an indemnification action, the trial court decided that the store,

the general and the sub were each responsible for 1/3. The Superior court held on appeal that the indemnity clause passed through the 2 contracts and therefore, the subcontractor was responsible for the entire amount. The Pennsylvania Supreme Court reversed. They held that contracts for indemnity should be held to the strict standard of the Perry-Ruzzi rule. This rule holds "a contract for indemnity... should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation." - **Bernotas v. Super Fresh Food Marts, Inc., 863 A.2d 478 (Pa. 2004).**

XVII. INSURANCE

A. Auto

A truck owned by the insured collided with an automobile driven by the injured party. The insured had \$1,000,000 in primary insurance coverage through the defendant insurer and \$10,000,000 in excess insurance coverage. Plaintiff insurance commissioner was appointed liquidator of the insurer. The current opinion examines the proof of claim process. The injured party submitted a proof of claim to the liquidator, but then sought to withdraw it when he became aware that the insured was seeking to invoke the third party claims provision of 40 Pa.C.S.A. § 221.40(a). The issue was whether permitting the injured party to withdraw his proof of claim operated as an unjust disadvantage to the insured. The court concluded that it did not. At the time the injured party filed his lawsuit against the insured, the insured disclosed the insurer as its primary insurance company but did not disclose the existence of excess insurance. Without knowledge of excess insurance coverage, the injured party filed a proof of claim. Subsequently, two nearly contemporaneous events occurred: the injured party learned of the excess insurance coverage and the insured invoked the third party claims provision in the proof of claim. The court concluded that the injured party was entitled to withdraw the proof of claim because to deny withdrawal was to deny the injured party the opportunity to seek recovery from the excess insurance carrier for the injuries he sustained. That denial worked a disadvantage to the injured party, but did not disadvantage the insured. Therefore, the petition to enforce the proof of claim was denied, and the court ordered the liquidator to allow the withdrawal of the proof of claim filed by the injured party. - **Koken v. Reliance Ins. Co., 841 A.2d 588 (Pa. Cmwlth. 2003).**

1. Arbitration

Intervenors, an insurer and its subsidiary, sought injunctive relief and sought relief from a stay in order to compel arbitration of a dispute with defendant insurers, arising from

reinsurance agreements executed between the parties. Defendants were under the control of plaintiff liquidator, who opposed the arbitration. Intervenor and the insolvent insurer had entered into two reinsurance agreements, both of which contained arbitration clauses. The liquidator, on behalf of the insolvent insurer, sought to draw down on the letter of credit. Intervenor sought to have the matter resolved through arbitration and further contended that it was entitled to offset any sums due to the insolvent insurer from the first agreement with sums due under the second agreement. The court found that compelling arbitration was inappropriate, as the liquidator did not commence the action, nor did she consent to arbitration. Moreover, a prior court order prohibited arbitration unless the liquidator agreed to that venue, which she did not. Further, the court noted that the insurer and its subsidiary were independent business entities with separate corporate identities which had entered separate contractual relationships. Accordingly, they could not seek to be treated as one entity for purposes of pursuing a set-off of a mutual debt under § 532 of the Insurance Act, 40 Pa.C.S.A. § 221.32(a). The Commonwealth Court denied the relief requested but directed that intervenor insurer was to be made whole in the event that there was an erroneous or excess drawing down on the letter of credit. - **Koken v. Reliance Ins. Co.**, 846 A.2d 778 (Pa. Commw. 2004).

2. Lapse

Appellant Commonwealth of Pennsylvania, Department of Transportation, Bureau of Motor Vehicles, sought review of two orders from the trial court which granted the appeals of appellee drivers contesting the suspension of their vehicle registrations due to their lapse in insurance coverage for more than thirty days. On April 8, 2003, the drivers' insurance company terminated a policy of motor vehicle liability insurance issued to the drivers and reported the termination of that liability insurance policy to the Department of Transportation. The Department of Transportation then mailed notices to the drivers that the registrations for their vehicles were being suspended pursuant to 75 Pa. Cons. Stat. §1786(d). The drivers then filed successful appeals with the trial court pursuant to 75 Pa. Cons. Stat. §1377(a). Upon further appeal, the Commonwealth Court reversed, finding that the documents introduced into evidence by the Department of Transportation established that the insurance coverage on the vehicles had lapsed. The court found that the notices sent to the drivers by the insurance company served to notify them of the cancellation of their policy due to their failure to pay the amount owed. Furthermore, the court found that the drivers failed to meet their burden of establishing that they were entitled to a statutory exception under 75 Pa. Cons. Stat. §1786(d)(2)(I), for they did not establish that the lapse in insurance coverage was for a period of less than thirty-one days, or that they did not operate or permit the operation of the vehicle during the period of lapse in coverage. Accordingly, the Commonwealth Court reversed the trial court's decision. - **Choff v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Motor Vehicles**, 861 A.2d 442 (Pa. Cmwlt. 2004).

3. UM/UIM

a. Coverage

Plaintiff insurer sought a declaratory judgment against the defendant seeking to determine that it was not obligated to pay underinsured motorist benefits to the defendant's father, administratrix of the decedent's estate, who had an insurance policy. The insurer moved for judgment on the pleadings. The insurer argued that the estate was not entitled to UIM benefits under the father's policy because the car occupied by the decedent at the time of the accident did not meet the definition of an underinsured auto. The district court agreed. The administratrix argued that the estate was entitled to UIM benefits for the three cars that were not involved in the one car accident, and alternatively, that even if the terms of the policy precluded a finding that the estate was entitled to UIM benefits for those cars, the policy exclusions were contrary to public policy and should be invalidated. The court held that the dual recovery exclusion, which excluded motor vehicles insured for bodily injury liability under the policy from the definition of underinsured cars, operated to prevent the administratrix from recovering UIM benefits. Further, where the administratrix was trying to recover UIM and liability coverage under the same policy for a single car accident involving a single tortfeasor, the court held that the dual recovery exclusion within the policy did not violate the public policy of Pennsylvania Motor Vehicles Financial Responsibility Law. - **Allstate Ins. Co. v. Letter**, 306 F.Supp.2d 488 (M.D.Pa 2004).

The decedent, who lived with his parents, was killed when another driver hit his father's car head on. The estate recovered from the driver's policy and the father's UIM policy, and then made a claim under the policy that the decedent held on his car. The insurer denied coverage citing the household exclusion in the decedent's policy. The trial court found that the plain language of the policy excluded the claim. The estate responded that the exclusion clause was a violation of public policy. The appellate court disagreed and affirmed. The Superior Court held that the purpose of the household exclusion was the stated public policy of reducing premiums. It further stated that the insurer was not obligated to provide coverage for the higher risk of multiples in a single household of which it was unaware and uncompensated. The Court determined that there was a logical reason to exclude coverage, because it was expanded risk and the exclusion would reduce the cost of the insured's premium. The exclusion barring the decedent, who was a passenger in a household vehicle, from receiving UIM benefits under his own policy due to the household exclusion was not void as against public policy when the decedent received UIM benefits from the policy covering the household vehicle. Therefore, the Superior Court affirmed the decision that the estate could not recover UIM coverage from the policy the decedent held with the insurer. - **Estate of Dmutis v. Erie Insurance Exchange**, 2004 P.A. Super 173, 851 A.2d 172 (2004).

Insurer brought an action against insured seeking to vacate an arbitration award in favor of the insured awarding uninsured motorist coverage equal to her bodily injury liability coverage. The parties cross-moved for summary judgment. The insurer claimed that the arbitration award should be vacated because the insured's challenge to a provision of her insurance policy was contrary to public policy or legislative mandate. The court initially held that collateral estoppel did not bar the court from considering the insurer's complaint as the issue of its power to review the arbitrators' decision and whether the insurer violated Pennsylvania's Motor Vehicle Financial Responsibility Act ("MVFRA") was not essential to the prior judgment, and that it had the power to review the arbitrators' decision as the central issue involved a challenge to the MVFRA. The court then held that the insurer was not required by the MVFRA to notify the insured that she could elect uninsured motorist limits equal to her bodily injury liability limits, or to obtain a written authorization from the insured requesting lower uninsured motorist limits; rather, once the insured was substituted as the named insured on the policy, if she desired higher uninsured motorist limits, she was required to notify the insurer that she did not want to be bound by her former husband's election of lower uninsured motorist coverage limits. As such, the district court granted summary judgment for the insurer, and the insured's motion for summary judgment was denied. - **The Hartford Insurance Company of the Midwest v. Green**, 309 F.Supp.2d 681 (E.D. Pa. 2004).

Insurer appealed from decision awarding insured driver damages for bad faith. Driver sought UIM coverage in the amount of \$100,000 for bodily injury. Insurer offered \$10,000 based on its opinion that insured had requested coverage be lowered to the amount of \$35,000 with stacking. The trial court found insurer lacked a reasonable basis to resist reformation of the UIM coverage, thereby breaching its duty of good faith and fair dealing. The Superior Court noted that the insured himself never provided any type of writing requesting UIM coverage limits lower than his bodily limits. It was the insured's agent who signed the form instructing underwriting to do so. As driver did not provide the insurer with the written request, there is no presumption that he had knowledge of the lower UIM limits. Further, because the driver did not make the request himself, the policy must be reformed ab initio. - **Hayes v. Harleysville Mutual Ins. Co.**, 841 A.2d 121 (Pa. Super. 2003).

Appellant insureds, a husband and wife, commenced a declaratory judgment action against appellee insurer as a result of the insurer's rejection of their claim for underinsured motorist (UIM) benefits following a motor vehicle accident involving the wife and an underinsured motorist. The Court of Common Pleas of Northampton County entered judgment in favor of the insurer. The insureds appealed and raised several issues. The appellate court concluded that the trial court did not err when it charged the insureds with constructive knowledge of the insurer's erroneous listing of the husband as "first named

insured” and concluded that the insureds were estopped from raising the insurer’s mistake because the wife did not read the policies and mailings at any point. There was no indication that the wife ever told or communicated to the insurer’s agent that she was to administer the insurance policy on behalf of herself and the husband. The wife’s status as an applicant did not render her the “first named insured.” In addition, because the insureds stipulated to the entry of the November 12, 1994, mailing the insurer had no need to lay a proper foundation to utilize the document at trial. Also, 75 Pa. Cons. Stat. § 1731 was not violated because the husband, who was estopped from denying his status as “first named insured,” signed the appropriate waiver forms. Finally, the trial court’s application of 75 Pa. Cons. Stat. § 1791 was not erroneous where the wife, as the applicant for insurance coverage, signed the forms with the 75 Pa. Cons. Stat. § 1791 notice. - **Jones v. Prudential Property and Casualty Insurance Co, 2004 PA Super 284, 856 A.2d 838 (2004).**

Defendant, an insured’s employee, was injured when the forklift he was operating fell out of the back of a truck. The employee made an uninsured motorist claim against plaintiff insurer under the insured’s business automobile policy. The insurer filed a declaratory judgment action, alleging that the employee was not an “insured” because the forklift he was operating was not a covered “auto.” The insurer moved for summary judgment. The question was whether a forklift was a covered “auto” as defined in the business insurance policy. Under the policy, an “auto” was defined as a land motor vehicle, trailer, or semitrailer designed for travel on public roads but did not include “mobile equipment.” “Mobile equipment” included any of the following types of land vehicles: bulldozers, farm machinery, forklifts, and other vehicles designed for use principally off public roads. Reading the clear and unequivocal definitions of “auto” and “mobile equipment” together, the court concluded that a forklift was not a covered “auto” under the policy. At the time of the accident, the employee was not operating a covered auto and was not an insured under the policy of insurance issued by the insurer to the insured. The employee was not covered by the insurance policy. - **Northern Insurance Company of New York v. Reilly, 323 F. Supp. 2d 648, 2004 U.S. Dist. LEXIS 16295 (2004).**

Plaintiffs, injured party and his wife, appeal from an order of the trial court which entered a verdict in favor of the defendant-insurance company in a declaratory judgment action to recover underinsured motorist (“UIM”) benefits. The injured plaintiff and another driver were part of a maintenance crew. They were driving a water truck and a flatbed air truck upon which sand bags had been stacked when a pothole caused a number of sandbags to spill. While the injured party was trying to direct traffic around the spill, he was struck by a car. On appeal, plaintiffs argued that the trial court erred in rendering a verdict in a favor of defendant-insurance company. Specifically, plaintiffs challenged the trial court’s interpretation and application of the “orientation” element of the “occupancy test” as promulgated in Utica. The Superior Court held that the injured party was not “vehicle oriented” when the accident occurred. He became “highway oriented” when he left his

vehicle for the purpose of trying to slow and manage oncoming traffic. Although he might have intended to return to his vehicle at some later time, his purpose for being outside of his vehicle when the accident occurred was what controlled when accessing whether he was whether he was “vehicle oriented” under Utica. Thus, he did not meet the third prong of the Utica test, and he was not an “insured” for purposes of recovering UIM benefits from the insurer. Therefore, the trial court properly entered a declaratory judgment in favor of defendant-insurance company. - **Petika v. Transcontinental Ins. Co., 855 A.2d 85 (Pa. Super. 2004).**

Appellant claimant challenged the order of the Court of Common Pleas of Lehigh County Civil Division, which denied the claimant’s petition to vacate an arbitration award in favor of appellee insurer. The case had been remanded to the trial court for reconsideration. The claimant had brought suit under the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. Cons. Stat. Ann. §§ 1701 through 1799.7. The claimant had suffered injuries while riding as a passenger on a motorcycle operated by a third party, the tortfeasor. The claimant recovered the available policy limits under the tortfeasor’s liability insurance policy; however, this recovery did not fully compensate the claimant for her injuries. The claimant, who did not own a motor vehicle and who was residing with her father at the time of the accident, therefore made a claim for underinsured motorist coverage under the policy the father purchased from the insurer to cover his automobiles. The insurer denied coverage because the claimant was occupying a motorcycle, not a car, when she was injured. The court held that the policy provision contained in the insurer’s policy that limited underinsured motorists (UIM) benefits to insureds who were using cars or who were pedestrians conflicted with the MVFRL’s requirement that insurers offer UIM benefits to protect those persons who suffered injury arising out of the maintenance or use of a motor vehicle and who were legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles, as required by 75 Pa. Cons. Stat. Ann. §§ 1731©). The court vacated the judgement, reversed the trial court’s denial of the claimant’s petition to vacate the arbitration award, and remanded the case to the trial court for entry of a judgment in favor of the claimant. - **Richmond v. Prudential Prop. & Cas. Ins., 856 A.2d 1260 (Pa.Super.2004).**

Plaintiff’s husband purchased automobile insurance for the defendant in 1990. The original policy included \$300,000.00 in UM/UIM coverage. Five months later, plaintiff’s husband executed a waive of the UM/UIM coverage. This waiver was on a separate piece of paper, signed and dated. No other waiver was ever executed during the life of the policy. Four years later, plaintiff’s husband increased the policy limits and secured an umbrella policy. In 1999 the plaintiff was a guest passenger with her husband in a vehicle they did not own and were involved in an accident. Plaintiff claimed injuries in excess of the tortfeasors policy limits. She applied to the defendant for UIM coverage. The claim was rejected based

on the waiver. Plaintiff filed the instant court action to force the defendant to provide benefits based on the arguments that the waiver form did not comply with the requirements of the MVFRL and that the waiver was not knowing and intelligent. The trial court, on cross Motions For Summary Judgment, found for plaintiff and against defendant. The Superior Court reversed. First, the knowing and intelligent waiver argument was waived. The trial court found the waiver complied with the requirements of the statute, however, sua sponte, found that the increase in the policy limits constituted a new policy, therefore requiring a new rejection form. The appellate court found this action by the trial court unsupported by any statute or case law. The Superior Court found the decision of the trial court well meaning, from the plaintiff's point of view, however it reversed and entered judgment for the defendant. - **Smith v. The Hartford Insurance Co., 849 A.2d 277, 2004 Pa.Super. LEXIS 720 (2004).**

Following their involvement in a motor vehicle accident, the defendant insureds sought \$100,000 in underinsured motorist (UIM) coverage benefits under their policy with State Farm. It was undisputed that the policy provided bodily injury liability coverage of \$100,000 per person/\$300,000 per occurrence and \$15,000 per person/\$30,000 per accident in UIM coverage. The defendant insureds argue that they are entitled to receive UIM benefits under the subject policy at the same level as their bodily injury liability coverage—\$100,000 per person/\$300,000 per occurrence—in accordance with the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). State Farm commenced an action in federal district court seeking declaratory judgment that the maximum UIM benefits available to defendant insureds under their policy is \$15,000 per person/\$30,000 per accident. The parties filed cross-motions for summary judgment. The Court noted that the MVFRL requires that automobile insurance companies make available for purchase uninsured, UIM and bodily injury liability coverage up to at least \$100,000 per person/\$300,000 per occurrence and provide certain notice of such availability. Further, a named insured may request in writing the issuance of coverages in amounts equal to or less than the limits of liability for bodily injury. The court found that the defendant insureds had effectively “waived down” their UIM coverage by virtue of their payment of a lower premium applicable to the UIM coverage that they had prior to the enactment of the MFVRL in 1984—\$15,000 per person/\$30,000 per accident. In so holding, the court relied on case law that held that a “waive down” request may take any form and that the insured is deemed to have requested lower UIM limits when he or she has remitted checks to the insurer in the lower premium amount. Accordingly, the court granted State Farm’s motion for summary judgment. - **State Farm v. Gillespie, 342 F.Supp. 2d 317 (E.D. Pa. 2004).**

b. Stacking

Insurer commenced a declaratory judgment action against insureds, who maintained an automobile insurance policy covering three vehicles with the insurer pursuant to Motor Vehicle Financial Responsibility Law (MVFRL). The named insured had executed a form

entitled “Rejection of Stacked Uninsured Coverage Limits,” pursuant to section 1738 of the MVFRL, which provides that a named insured may reject stacked uninsured (UM) coverage for vehicles insured under a policy by signing a form expressly prescribed by the MVFRL. In 1997, the insureds were involved in a motor vehicle accident and sustained physical injuries. The insureds made a claim for UM benefits, and the insured paid the policy limits. The insurer refused to pay stacked UM motorist benefits based on the two other vehicles insured under the policy. The insureds contended that the rejection of stacked coverage was invalid because of the inclusion of the words “Rejection of Stacked” before the words “Uninsured Motorist Coverage,” the exact words prescribed by the MVFRL. The parties filed cross-motions for summary judgment. The trial court agreed with the insureds that the form was invalid under the MVFRL because it contained the three additional words and granted summary judgment in their favor. Insurer appealed to the Superior Court of Pennsylvania. The Superior Court reversed the trial court’s decision, holding that the form for rejecting stacked coverage was valid. The court reasoned that the form used by the insurer is identical in all respects to the wording of the statute with the exception of the inclusion of three words that actually make it clearer that the named insured is rejecting stacked benefits by executing the form. - **Allstate Ins. Co. v. Seelye, 846 A.2d 1286 (Pa.Super. 2004).**

B. Bad Faith

Appellant insureds sued appellee insurer for breach of contract. The insurer moved for summary judgment. The insureds moved for leave to amend the complaint by adding a bad faith claim under 42 Pa. Cons. Stat. Ann. §8371. The insureds appealed the order of the trial court which granted summary judgment in favor of the insurer and denied their motion for leave to amend the complaint. On appeal, the insured did not dispute that their original claim for breach of contract was time-barred under the one-year statute of limitations set forth in the insurance contract. However, the insureds did argue that the applicable statute of limitations for the bad faith claim was six years under 42 Pa. Cons. Stat. Ann. §5527. Therefore, the trial court erred in granting summary judgment and in denying their motion to amend their complaint since they raised their bad faith claim within this time period. However, the appellate court held that a bad faith action under 42 Pa. Conn. Stat. Ann. §8371 was subject to a two-year statute of limitations. Thus, the trial court did not err in granting summary judgment in favor of the insurer. Accordingly, the Superior Court affirmed the decision of the trial court. - **Ash v. Continental Insurance Company, 861 A.2d 979 (Pa.Super. 2004).**

Delivery driver filed claim with his personal automobile insurer to recover income-loss benefits for an injury caused by lifting a box in the back of his employer’s van. Nationwide denied the claim based upon a “use for hire exclusion”. Claimant then brought an action

against Nationwide for breach of contract and bad faith. Nationwide filed preliminary objections asserting claimant was not entitled to benefits based on the exclusion and requested the court dismiss the complaint. The court sustained the objections and dismissed the case, to which the claimant appealed. On appeal, the Superior Court affirmed the decision and held that: (1) the use for hire exclusion barred coverage, even though the driver did not directly receive a fee; and (2) insurer's alleged practice of paying benefits in identical situations was inadmissible extrinsic evidence. - **Brosovic v. Nationwide Mutual Insurance, 841 A.2d 1071 (Pa. Super. 2004).**

Appellant insurance companies sought review of the judgment from the Court of Common Pleas of Beaver County, which ruled in favor of the appellee administrator for the estate of a deceased in his bad faith claim against the insurance companies. The companies sought judgment notwithstanding the verdict. The deceased was injured in a car accident. He filed claims against both his insurer (the first insurer) and the tortfeasor's carrier, which had a bodily injury limit of \$50,000.00. The deceased later died of causes unrelated to the accident. His attorney indicated that he planned to pursue an underinsured motorist claim against the first insurer, which valued the claim at \$35,000.00 to \$40,000.00. After arbitration was scheduled and lost wages were disputed, the first insurer settled the claim for \$25,000.00. The administrator then filed a successful bad faith claim against the first insurer under 42 Pa. Cons. Stat. Ann. §8371 which the trial court molded to indicate that the second insurer, a company that was also named on decedent's policy, was liable as well. On appeal, the court entered judgment notwithstanding the verdict in favor of the companies, first finding that because the first insurer's name figured more prominently on the policy, it was the insurer for purposes of the bad faith statute. It then found that the record did not support a finding of bad faith. Instead, it showed that the first insurer never deceived the administrator or forced him to settle the case for less than it was worth. As a result, the Superior Court of Pennsylvania vacated the judgment and remanded the case to the trial court for entry of judgment notwithstanding the verdict in favor of the insurance companies. - **Brown v. Progressive Insurance Company and Mountain Laurel Assurance Company, 860 A.2d 493 (Pa. Super. 2004).**

Insurer sought review of a decision of the trial court which entered judgment in favor of the Appellee insured on her claim of insurance bad faith. Both compensatory and punitive damages were awarded by the court. The case was brought pursuant to 42 Pa. Cons. Stat. Ann. § 8371. The insured was injured in an accident and remained partially disabled after surgery. The insured sought recovery under the underinsured motorist (UIM) portion of her policy. The insurer denied her UIM, citing a lack of causation. The insurer had previously found causation and had paid the insured's claims for first-party medical benefits. The UIM issue went to arbitration, and the insured was awarded an amount well in excess of the UIM coverage. Although the parties settled the UIM issue, the insured filed

her bad faith action. The trial court found bad faith and made 169 findings of fact in support of its ruling. The appellate court affirmed, holding that the insurer's conduct during the course of the bad faith litigation was properly considered by the trial court in finding bad faith, that there was no point of law raised in the case upon which the insurer could rely to preclude a bad faith showing, that the evidence supported the finding of bad faith and that the size of the punitive damage award was appropriate under Pennsylvania law and did not violate due process. - **Hollock v. Erie Insurance Exchange, 842 A.2d 409 (Pa. Super.2004).**

Plaintiffs, the beneficiaries under a life insurance policy of the insured, who was their mother, sued defendant insurer for denying a portion of death benefit proceeds. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the insurer, and the beneficiaries appealed. The district court found that an amendment to the life insurance policy, which increased the benefit, was void due to the insured's failure to fully disclose her medical history. The insured listed her son, one of the beneficiaries, as her doctor in the original application. On the application for the amendment, she did not list her son, and did not mention a medication he had prescribed for her. However, she did list the arthritis for which he had prescribed it, and detailed several other symptoms, doctors, and treatments for the same condition. The appellate court found that the policy was not void as a matter of law, as it was for a jury to decide whether the omissions were made knowingly or in bad faith, and whether they were material. The insurer did not waive its right to contest the amended policy's validity by failing to investigate the statements about the insured's arthritis. The district court should not have granted summary judgment on the beneficiaries' bad faith claim against the insurer, without detailing its reasons for doing so. The district court did not abuse its discretion in granting the insurer's motion to amend its pleadings to add a counterclaim. The decision granting summary judgment was vacated. The case was remanded for further proceedings. - **Jeffery Justofin, et. al. v. Metropolitan Life Insurance Co., 372 F.3d 517, 2004 U.S. App. LEXIS 12853.**

Insureds brought a class action against their homeowner's insurers to recover for breach of contract and bad faith failure to pay replacement costs for partial losses to dwellings before the property was repaired or replaced. At the trial level, the court sustained insurer's objections in the nature of a demurrer, to which the insureds appealed. The insureds assert that they have not received full indemnification under their insurance policies for their partial losses because the insurers have deducted depreciation from the actual cost to repair or replace the damaged portion of their buildings. They further contend that, under Pennsylvania law, unless the phrase "actual cash value" is specifically defined in an insurance policy to include depreciation, depreciation is not to be included, and the policy holder is entitled to repair/replacement cost. Insurers, on the other hand, assert that the

policies specify that the insureds must first undertake to repair/replace the damaged property before being fully compensated and until such time, insureds are entitled only to repair/replacement cost minus depreciation. On appeal, the Superior Court held that: (1) the term "actual cash value" in some policies could not mean replacement value without a deduction for depreciation; and (2) a policy with a dwelling replacement cost guarantee endorsement entitled insured to replacement cost without deduction for depreciation before repairing or replacing the property. - **Kane v. State Farm Fire & Casualty Company**, 841 A.2d 1038 (Pa. Super. 2003).

Plaintiff-insured sued defendant-insurers alleging the termination of his long-term disability benefits was unreasonable and in bad faith, a breach of contract and the covenant of utmost fair dealing, and a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa.Cons.Stat. Ann. §201-1, and the bad-faith statute, 42 Pa.Cons.Stat. Ann. §8371. The initial insurer granted benefits under the insured's "own-occupied" policy. After seventeen months, acquiring insurers terminated the benefits, allegedly because the insured's doctor said the insured could perform all of the duties of the occupation. The insurers based the denial on an investigation that the insured claim contained factual inaccuracies and material misrepresentations the insurers knew about or recklessly disregarded, which was conducted by the insurers' wholly owned subsidiary. The insured alleged the insurers went from a "claim-payment" orientation to a "claim-management" orientation, meaning, they set a budget for claim payments and focused on terminating claims to keep payments within the budget. Among other things, the court held the insured's request for more information about the insurers' policies and practices regarding own-occupation insurance policies were reasonably likely to produce relevant information that could contradict the insurers' proffered reasons for denying the claim. However, to address concerns about trade secrets, confidentiality and over broad requests, the court limited the use and extent of some of the discovery. As such, the court grant in part and denied in part defendants' motion for a protective order. - **Saldi v. Paul Revere Life Ins. Co.**, 224 F.R.D. 189 (E.D. Pa. 2004).

Plaintiff insured brought action alleging claims pursuant to 42 Pa. Cons. Stat. Ann. §8371, based on defendant insurer's delay in payment of auto insurance medical benefits and first party wage loss benefits. The insurer removed the case to federal court, based on diversity, and filed a motion to dismiss. The insured was involved in an automobile accident and suffered personal injuries as a result of the accident. The complaint alleged that the insurer failed to pay the insured's claims for auto insurance medical benefits and first party wage loss benefits. The court observed that the 42 Pa. Cons. Stat. Ann. §8371 conflicted with the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. §1701 et seq., in that 75 Pa. Cons. Stat. Ann. §1797(b) set out the process that an insured party had to undertake to challenge denial of a claim for medical benefits. Accordingly, the court concluded that 75 Pa. Cons. Stat. Ann. §1797 provided the exclusive remedy in an auto

insurance medical benefits claim. As to the wage loss claim, the court found no conflict between 75 Pa. Cons. Stat. Ann. §1716 and 42 Pa. Cons. Stat. Ann. §8371. The court held that the insured could maintain a bad faith action with regard to denial of first party wage loss benefits pursuant to §8371 because 75 Pa. Cons. Stat. Ann. §1716 did not provide the exclusive remedy for such a claim. Accordingly, the United States District Court for the Western District of Pennsylvania dismissed the auto insurance medical benefits claim and denied dismissal of the first party wage loss benefits claim. - **Schleinkofer v. National Casualty Co., 339 F.Supp.2d 683 (W.D. Pa. 2004).**

The appellant insurer appealed the judgment of the Court of Common Pleas of Erie County, Pennsylvania, which entered a \$756,009.00 judgment in favor of appellee insureds for their insurance bad faith claims against the insurer pursuant to 42 Pa.Cons.Stat.Ann. §8371. The insureds filed a cross-appeal from the judgment entered by the trial court. On appeal, the insurer alleged that the trial court erred when it concluded that the insureds had established a bad faith claim against the insurer. The appellate court found that the insureds established that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim. The insurer's lack of diligence and its willful rendering of imperfect performance were further exemplified by its continued pursuit of its claim that the insureds knew or should have known about structural damage to the roof, despite the lack of any supporting evidence. In addition, the trial court's prior finding of bad faith was sufficient to permit it to award punitive damage, within its sound discretion. In their cross-appeal, the insureds argued that the trial court erred by giving the insurer credit for the interest it had already paid in the coverage dispute. The appellate court concluded that the insureds were not entitled to relief on this case. Therefore, the Superior Court of Pennsylvania affirmed the judgment of the trial court. - **Zimmerman v. Harleysville Mutual Insurance Co., et al, 2004 Pa. Super 383, 860 A.2d 167 (2004).**

Plaintiff insured sued defendant insurer seeking a declaration that defendant was contractually obligated to provide group dental insurance at a guaranteed rate for a two year period and damages for violation of Pennsylvania's Bad Faith Statute, 42 Pa. Cons. Stat. § 8371. Defendant counterclaimed for breach of contract. The U.S. District Court for the Western District of Pennsylvania granted summary judgment to defendant. Plaintiff appealed. The district court erred as a matter of law in refusing to apply Pennsylvania's doctrine of reasonable expectations under which the agreed upon two-year rate guarantee was enforceable, and erred in resolving ambiguities and/or disputed facts vis-a-vis the "composition of the group" in defendant's favor. Neither any lack of ambiguity in the policy language nor plaintiff's status as a sophisticated purchaser of insurance prevented application of the doctrine of reasonable expectations; indeed, the reasonable expectations of plaintiff were not even questioned at least insofar as the parties negotiated and agreed

upon the rate guarantee for the second year of coverage. The Court of Appeals also agreed with plaintiff, at least to the extent that "composition of the group" was ambiguous enough that it should have been left to the jury to determine what the parties meant by that phrase when they used it. As for the bad faith claim, it was properly dismissed because plaintiff could not rest a bad faith claim on § 8371 since any decision of defendant to conceal its underwriting miscalculation was intended, at most, to extract a higher premium, and not to deny benefits. The court reversed the grant of summary judgment on liability and accordingly vacated the award of damages and interest on all claims except the bad faith claim. The Court of Appeals affirmed the district court's decision to dismiss the bad faith claim. The case was remanded for further proceedings. - **UPMC Health System, v. Metropolitan Life Ins. Co., 391 F.3d 497 (3d Cir. 2004).**

C. Breach of Contract

Plaintiffs challenged the decision of the trial court when it granted the defendant's motion for partial summary judgment on the unconscionability and good faith and fair dealing claims, and, after trial, entered judgment for the defendant on the breach of contract claim. Plaintiffs, acting as class representatives, alleged that the defendant denied them the full benefit of property insurance coverage. In this case, the plaintiffs suffered a substantial loss to their home and personal property as a result of a fire, and the plaintiffs contended that they were entitled to amounts withheld by the defendant, notwithstanding the fact that the replacement home and personal property strayed from the specifications. In affirming the decision of the trial court dismissing the plaintiffs' claims, the Superior Court held that the policy clearly, explicitly, and unambiguously conditioned full replacement benefits upon the actual repair or replacement of the damaged property. Further, the settlement limitation did not conflict with the defendant's promise to pay, but merely conditioned full payment upon repair or replacement. Additionally, the Superior Court found that the defendant's practice of requiring a claimant to rebuild the structure as it was before the loss was reasonable and certainly could not be construed as a breach of the insurance contract and that the policy expressly limited replacement benefits to like construction and the personal property endorsement incorporated in that provision. - **Burton v. Republic Ins. Co., 845 A.2d 889 (Pa. Super. 2004).**

In a consolidated appeal, appellant assignee appealed the order of the Philadelphia County Court of Common Pleas, sustaining the preliminary objections in the nature of a demurrer of appellee insurer to the assignee's complaint in an insurance matter. After their property was damaged by fire, the insured parties hired the assignee, a public adjuster, to assist in handling the losses from the fire. In return, the insured parties agreed to pay the assignee a fee of 10 percent of the amount paid by the insurer. Subsequently, the insured parties terminated the services of the assignee. The insurer issued a settlement check solely to the insured parties for losses sustained due to the fire. The assignee filed a complaint alleging

breach of contract, conversion and breach of assignment. The trial court properly sustained the insurer's preliminary objections. The service agreement between the assignee and insured parties created a principal-agent relationship in which the principal/assignor, the insured parties, retained the power of revocation, despite any language in the assignee's agreement to the contrary. Thus, the assignee retained the right to sue the insured's parties for breach of contract, but it could not sue the insurer for breach of contract. The conversion claim could not be maintained, as Pennsylvania law did not allow conversion claims to be based on a refusal to pay insurance policy proceeds. Accordingly, the Superior Court of Pennsylvania affirmed the trial court's order. - **The Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company, 860 A.2d 1038 (Pa.Super. 2004).**

Plaintiff-managing agent sued defendant insurer alleging breach of contract. Defendant's insurer cross-claimed against managing agent for breach of contract and negligence. Defendant-insurer moved for summary judgment on its complaint. The insurer and the managing agent entered into a managing general agency agreement, under which the managing agent had authority to solicit, underwrite, bind and issue policies in accordance with the underwriting guidelines. Without obtaining financial information as required by the underwriting guidelines, the managing agent issued a policy providing comprehensive insurance coverage to a restaurant. A subsequent financial report showed that the restaurant was in serious financial trouble. A fire damaged the restaurant. The insurer alleged that the managing agent breached its contract with the insurer and was negligent in writing and issuing the insurance policy. The court determined that the insurer was entitled to summary judgment as to its breach-of-contract claim because the managing agent violated the terms of the contract when it bound the insurer to provide insurance coverage to the restaurant without proof of financial stability. In addition, the managing agent violated the contract by failing to discover that the restaurant's principals had violated civil and perhaps criminal law by failing to pay state and federal taxes. The insurer established causation and damages. As such, the trial court granted the insurer's summary judgment motion as to the insurer's breach-of-contract claim. The court dismissed the insurer's negligence claim. - **Specialty Ins. v. Royal Indemnity Co., 324 F.Supp.2d 674 (E.D. Pa. 2004).**

D. CAT Fund

Plaintiffs, an injured party and his legal guardians, sued a number of physicians and hospitals for injuries that left the plaintiff permanently brain damaged. Under a settlement agreement with three physicians, the Catastrophe Loss Fund was to pay plaintiffs \$600,000.00. The trial court entered judgment for plaintiffs in the amount of \$28,180,567.00. On appeal, plaintiffs argued that the trial court erred by denying their motion to mold the verdict and in concluding that the insurer was liable to plaintiffs for post-judgment interest only with respect to the amount of the judgment that remained unpaid by the Catastrophe

Fund. Specifically, the issue is whether the trial court properly applied the Healthcare Services Malpractice Act, 40 Pa.Stat.Ann. §1301.01, and its successor, the Medical Care Availability and Reduction of Error Act, 40 Pa. State. Ann. §1303.101. It concluded that the insurer was liable for delay damages and post-judgment interest only in proportion to its underlying settlement liability. The appellate court found that both Acts required the insurer to shoulder a proportionate share of the liability for delay damages and post-judgment interest in cases where the medical care provider sought relief from the Medical Professional Liability Catastrophe Loss Fund or the Medical Inter-Insurance Exchange Fund. Thus, the trial court did not err when it concluded that the insurer was liable for post-judgment interest only in proportion to its underlying liability in the case. Therefore, the Superior Court affirmed the trial court's decision. - **Caruso v. The Medical Professional Liability Catastrophe Loss Fund, 858 A.2d 620 (Pa.Super. 2004).**

The parents of a young girl who was left with permanent facial scarring as a result of plastic surgery filed a medical malpractice action against the doctor who performed the surgery and against his professional corporation. The complaint was based on alleged acts of negligence which took place more than four years prior to the filing of the complaint. The Medical Professional Liability Catastrophe Loss (CAT) Fund assumed the defense of both the doctor and his professional corporation. Judgment was entered against both the doctor and his professional corporation. The CAT Fund paid its statutory share of the verdict on behalf of the doctor, but refused, however, to pay any portion of the verdict on behalf of the professional corporation, based on its contention that the professional corporation had not obtained separate basic coverage and, as such, was not entitled to the CAT Fund's excess coverage under the Malpractice Act, Pa. Stat. Ann. Title 40 § 1301.701. The Commonwealth Court of Pennsylvania found that the professional corporation had the necessary coverage to comply with the Malpractice Act. While the professional corporation's shared limits policy was invalid, the CAT Fund was without justification to rely on the invalid language as a ruse to refuse to provide excess coverage on behalf of the professional corporation. - **Lewinsky v. Commonwealth, 2004 Pa. Cmwlt., LEXIS 488, 852 A.2d 1270 (2004).**

Appellant, the Commonwealth Medical Care Availability and Reduction of Error Fund (MCARE Fund), as successor in interest to the Medical Professional Liability Catastrophe Loss Fund (CAT Fund), sought review from orders of the Commonwealth Court which found the MCARE Fund obligated to defend and pay claims asserted against appellees, a primary health care insurer and a health care provider. The CAT Fund functioned generally similar to an excess insurance pursuant to the Health Care Services Malpractice Act, Pa. Stat. Ann. Tit. 40, §§ 1301.701 to 1006 (superseded). Appellees each received service of process involving claims of professional malpractice alleged to have occurred more than four years prior to such service. Further, the CAT Fund was not given notice of the claims

until more than four years prior to such service. Further, the CAT Fund was not given notice of the claims until more than 180 days after the date of the writ's service. Both appellees requested status under Pa. Stat. Ann. tit. 40, § 1301.605, which the CAT Fund refused on the ground that the requests were untimely. The Commonwealth Court, in appellees' declaratory judgment action, found that regardless of the 180-day prescription of § 1301.605 for initial indemnification and funding the defense of an underlying action, Pa. Stat. Ann. tit. 40, § 1301.702(c) prohibited the CAT Fund from denying the untimely requests unless the CAT Fund was prejudiced by the untimeliness. On appeal by the MCARE Fund, the Supreme Court found that the Commonwealth Court impermissibly engrafted the prejudice standard of § 1301.702(c) onto Pa. Stat. Ann. tit. 40, § 1301.605. - **Pennsylvania Medical Society Liability Ins. Co. v. Commonwealth of Pennsylvania, et. al., 842 A.2d 379 (Pa. 2004).**

In this case, a doctor was treating a young man who wanted to gain weight with steroids. After 11 years the man stopped, allegedly due to negative side effects. When the doctor was treating this man, he had a "claims" policy of insurance rather than an "occurrence" policy. This means the coverage is only for claims made during the policy period, not for an occurrence that happens during the policy period. This doctor let his policy lapse, did not purchase a "tail policy" and left for Korea. The man filed a medical malpractice suit against the doctor. The suit was served by publication and a default was entered. The man then sought payment of the judgment from the Medical Malpractice CAT Fund. The fund denied payment of the almost 1.44 million dollar judgment. The case was eventually transferred to the Commonwealth Court under its original jurisdiction. Both parties filed motions for summary judgment. The court granted that of the CAT Fund and denied that of the plaintiff. He appealed. The Pennsylvania Supreme Court upheld the decision of the Commonwealth Court. They held that general assembly, created the CAT Fund to serve as a contingency fund to pay award against a health care provider to the extent their share of an award exceeds its basic coverage. Further the Act requires the provider to maintain a minimum level of coverage in order to be eligible for CAT Fund coverage. - **Paternaster v. Lee, M.D. and Pa. MCAT Fund, 863 A.2d 487 (Pa. 2004).**

E. Exclusions

Commercial general liability (CGL) insurer sought a declaratory judgment that its policy provided no coverage for liability to insured's employee injured in the course of employment. Because the employer did not provide workers' compensation coverage as required by the Workers' Compensation Act (Act) on the date of the accident, the employee initiated legal proceedings against the insured employer pursuant to the Act. Following the entry of a default judgment and award of damages against the insured employer, the insurer denied coverage and brought the subject action under the Declaratory Judgment Act. The insurer filed a motion for summary judgment that was granted by the trial court

which found that the insurer did not have a duty under its policy to defend or indemnify the insured employer with regard to the employee's lawsuit. The insured employer filed this appeal with the Superior Court of Pennsylvania, arguing that the "employee" exclusion in the policy was void as against public policy. The Superior Court rejected this argument, holding that the "employee" exclusion was valid. The court reasoned that invalidating the exclusion would encourage employers to ignore their statutory obligation to obtain workers' compensation insurance and rely on their general liability policy, which in turn would require a higher premium schedule reflecting additional risk. - **Certain Underwriters at Lloyds v. Hogan, 852 A.2d 352 (Pa.Super. 2004).**

Plaintiff/Insurer commenced a declaratory judgment action against Defendants/Insureds seeking a declaration that it owed no duty to defend or indemnify insured babysitter after her convictions for first-degree murder, aggravated assault, and endangering welfare of child for the death of a child that was in the babysitter's care. The child's parents brought an underlying civil action against the babysitter that clearly sounded in negligence. The babysitter's insurance policy contained a provision excluding coverage for "expected or intended injuries by the insured." The trial court ordered the insurer to defend the insured babysitter in the underlying civil action. The insurer appealed the trial court's order, arguing that the babysitter's criminal convictions conclusively established that the child's death was the result of intentional acts. The Superior Court of Pennsylvania held that the insured babysitter's criminal convictions do not conclusively establish her intent regarding the specific negligent acts alleged in the parent's civil complaint. The Superior Court reasoned that although the criminal convictions provide independent evidence that at some point the babysitter intentionally caused the death of the child, the convictions do not establish the nature of the act that caused the child's death or whether the act was one of the specific acts/omissions raised in the parent's civil complaint. The court further noted that in light of the insurer's broad duty to defend claims potentially within the scope of the policy even if they may be groundless, the babysitter's criminal convictions do not preclude litigation of her intent regarding the specific acts alleged in the parents' complaint. - **Erie Ins. Exchange v. Muff, 851 A.2d 919 (Pa.Super. 2004).**

Before the court were four cross-motions for judgment on the pleadings filed by petitioner-insurer and respondent-insured. The insurer had brought a declaratory judgment action seeking a judgment as to whether the directors' and officers' liability insurance the insured purchased from the insurer protected the insureds from a liquidator in a cause of action asserting various breaches of the insureds' fiduciary duties. The insureds were the directors and officers of an insolvent medical benefits coordinator. The liquidator was the Insurance Commissioner of the Commonwealth of Pennsylvania. The liquidator sought to recover the lost value of the coordinator's assets, which allegedly resulted from the insured's breach of their fiduciary duties in their management of the coordinator. The liquidator

asserted that the insureds allowed health maintenance organization (“HMO”) to increase its management fee fifty (50%) percent without requiring any justification. Liquidator asserted that the insured’s knew or should have known that the management fees were grossly excessive and disproportionate to the fair market value of services the HMO provided. The court held that the insurer met its burden of establishing the policy exclusion regarding the excluding of receivers and bankruptcy successors to a corporation, precluding coverage. The court found that the liquidator, by law and court order, was vested with the coordinator’s property rights, including contract rights, and stood in the shoes of the company as the management successor to the insureds, the former directors and officers of the company. Therefore, the Commonwealth Court granted the insurer’s motion for judgment on the pleadings and denied all others. - **TIG Speciality Ins. Co. v. Koken, 855 A.2d 900 (Pa.Cmwlth.2004).**

F. Fraud

Plaintiff insurance companies filed an action against defendant medical providers for insurance fraud. Plaintiffs claimed that defendant medical providers systematically misrepresented their services to obtain higher reimbursement amounts from plaintiffs and for billing unnecessary diagnostic testing. The jury returned a verdict in favor of plaintiffs. Plaintiffs filed a motion to amend the judgment to add treble damages. Defendant medical providers filed a motion for a new trial. The district court found that the defendant medical providers were liable on the fraud claims by clear and convincing evidence. The district court also held that treble damages were appropriate under 18 Pa.Cons.Stat.Ann. §4117(g) for defendant medical providers’ repeated patterns of insurance fraud. Further, the court rejected the defendant medical providers’ argument that the two year statute of limitations applied because there was evidence that the defendant medical providers’ participated in fraudulent concealment of their conduct, and therefore, tolling of the statute was warranted. The court granted plaintiff’s motion to amend the judgment and award treble damages and denied defendant medical providers’ motion for a new trial. - **Allstate Insurance Company v. American Rehab and Physical Therapy, Inc., 330 F.Supp. 2d 506 (E.D. Pa. 2004).**

Defendant appealed the judgment of sentence imposed by the court after convicting defendant of insurance fraud in violation of 18 Pa.Cons.Stat.Ann. §4117(a)(3) and theft by deception in violation of 18 Pa.Cons.Stat.Ann §3922(a)(1). Defendant had purchased a vehicle for his friend, and the friend was required to make the car payments. While the friend still owed money on the vehicle, she hit a tree. The car was uninsured. Defendant and the friend purchased another vehicle and obtained insurance. The damaged vehicle was subsequently added to the policy and an insurance claim was then filed on the damaged car. The claim form falsified the date of the accident. Defendant signed a power of attorney form and an odometer statement in order to finalize the claim. There was

sufficient evidence to convict defendant of insurance fraud in violation of 18 Pa.Cons.Stat.Ann. §4117(a)(3). Defendant knew that the friend was uninsured and wanted to make an insurance claim on the damaged car. Also, defendant knew that a claim was made on the damaged car, as he prepared and signed the odometer statement and power of attorney form. There was also sufficient evidence to convict defendant of theft by deception in violation of 18 Pa.Cons.Stat.Ann. §3922(a). Defendant obtained \$7,731.00 by filing the false claim. He participated in the deception by preparing and signing the power of attorney form and odometer statement and the insurer relied upon the deception. As a result, the Superior Court affirmed the sentence. - **Commonwealth of Pennsylvania v. Sanchez, 848 A.2d 977 (Pa.Super. 2004).**

G. Health

Plaintiff worker was employed at an asbestos plant. Defendant insurer was the workers' compensation carrier for the plant. The worker suffered from asbestosis and sued the carrier under various tort liability for failing to warn the worker of asbestos in the workplace. The insurer moved for summary judgment. The insurer performed dust studies and made various recommendations to the plant. Plaintiffs argued that the insurer had a duty to warn the plant's employees directly about the levels of asbestos found in the dust studies rather than only report its findings to the plant's safety team. Plaintiffs also argued that the insurer's duties included making sure that its recommendations were adopted by the plant's safety team. Specifically, plaintiffs argued that the insurer was liability based upon: (1) Restatement (Second) of Torts §324A and 323; (2) the third-party beneficiary status of the worker; and (3) the breach of the insurer's fiduciary obligation to the worker. The court held that since there was no evidence that the insurer acted negligently in the performance of the dust studies or its recommendations to the employer, there is no liability under either §324A or 323. The overall responsibility for safety at the plant remained with the plant itself and its own safety team. Furthermore, even assuming that there was a contract between the insurer and the plant, the insurer did not breach the contract since the insurer did not negligently perform its duties under the contract. As such, district court granted the insurer's motion for summary judgment. - **Daraio v. Carey Canada, Inc., 309 F.Supp.2d 706 (E.D. Pa. 2004).**

H. Homeowners "insured location"

Homeowners' insurer sought a declaratory judgment that policy provided no liability coverage for the death of an all-terrain vehicle (ATV) driver on field adjacent to named insured's property. The trial court granted summary judgment to insured, finding that the subject policy provided coverage for a pending wrongful death case against the insured. Insurer filed an appeal with the Superior Court. The Superior Court affirmed the trial court. They recognized that the subject policy pertaining to "insured location" included "any premises used by you in connection with the [residence premises or the part of any

other premises, other structures and rounds used by you as a residence]”. The Court reasoned that the insured must have “used” the adjacent field “in connection with” his residence premises in order for the adjacent field to qualify as an insured location and therefore obligate the insurer to provide coverage. Because the word “use” or the phrase “in connection with” were not defined in the policy, the Court interpreted them according to their plain and ordinary meanings set forth in Webster’s dictionary. The Court then looked to deposition testimony of the insured that he repeatedly rode his ATV from his property onto the adjacent field and back. Thus, the Court reasoned that the insured used the adjacent field in connection with his residence premises under the plain meaning of the term insured location contained in his homeowner’s insurance policy. The court observed that the insurer failed to limit its coverage to only those locations that were used by necessity or which the insured had an underlying legal interest. - **State Farm Fire and Cas. Co. v. MacDonald**, 850 A.2d 707 (Pa.Super. 2004).

I. Homeowners “occurrence”

Appellants, a homeowner and the family of a deceased, individually and as administrators of her estate, sought review of the order from the Pennsylvania Superior Court, which reversed and remanded the judgment of the lower court. That judgment held that appellee insurer had a duty to defend and indemnify the homeowner for the wrongful death of his houseguest, which was caused by his selling heroin to her. The homeowner was charged criminally for the death of his houseguest, to whom he sold a bag of heroin labeled “suicide.” She injected it into herself, and the homeowner found her dead the next day. The decedent’s family filed wrongful death and survival actions against him. His insurer filed a declaratory judgment action, claiming that the family’s allegations did not trigger an obligation to either defend or indemnify because the sale of heroin did not constitute “an occurrence,” i.e., an accidental event under the homeowner’s policy. The trial court held that the insurer had the duty to defend because the facts supported that the death was caused by the homeowner’s negligence. The Superior Court reversed after expanding the doctrine of “inferred intent,” which had been applied previously in Pennsylvania only to cases involving child sexual abuse. It also held that it should not be the public policy to insure the sale of heroin. On appeal, the court held that although the superior court erred in expanding the inferred intent doctrine, it reached the correct result in holding that public policy precluded an insurer from any duty to defend or indemnify the homeowner. - **Minnesota Fire and Casualty Co. v. Greenfield**, 855 A.2d 854 (2004).

Plaintiffs alleged that they were assaulted in a hockey arena parking lot and sued the owner of the arena. The owner filed a third-party complaint against the assailant, Corry, who was the holder of a homeowner’s policy issued by the plaintiff-insurer. Plaintiff filed suit under the Declaratory Judgment Act seeking a declaration that it has no duty to defend or indemnify defendant in the underlying lawsuit. Plaintiff-insurer moved for summary

judgment. Plaintiff maintained that the claims asserted against the defendant fell outside the coverage of the policy because the injuries allegedly sustained were not caused by “an accident,” but were “expected or intended” by defendant and/or “the result of” defendant’s “willful and malicious acts.” The issue of plaintiff’s obligation to defend turned on whether the joinder complaint against defendant included a negligence claim. There was no suggestions with respect to certain allegations that defendant intended to cause the harm that resulted, or knew that such harm was substantially certain to result. The allegations in the joinder complaint thus sounded in intentional tort and negligence. Therefore, plaintiff had a duty to defend defendant in the state court proceeding. The declaratory judgment complaint was dismissed to the extent that it related to a duty to defend. To rule on the indemnification question would have required resolution of the merits of the underlying dispute and would have unduly prejudiced one or more the litigants in the state court proceeding. Thus, the action was stayed respecting the question of indemnification pending resolution of the state proceeding. - **State Farm Fire & Cas. Co. v. Corry, 324 F.Supp.2d 666 (E.D.Pa. 2004).**

J. Medical Malpractice “occurrence”

Plaintiff, excess insurer, filed a declaratory judgment action against defendants, insured hospital and the claimants in a state court medical malpractice action, claiming there was no obligation to provide coverage under an umbrella policy because the hospital failed to report the malpractice claim during the effective policy. Cross-motions for summary judgment were filed by all parties. The notice of the malpractice claim was given over a year after the policy had already expired. The policy was a follow form, claims-made policy and all claims had been reported during the policy. An automatic and optional extension provision of one endorsement were consistent with the reporting requirement that followed form with the underlying policy. A second endorsement made explicit that the insurer was liable for coverage even if the fund under Pa.Stat.Ann.tit. 40, §1301.605, supplanted the underlying insurer. Nothing in the second endorsement suggested the first endorsement was ineffective when the second was implicated. The court found the two endorsements were complimentary. The policy condition required the hospital to give notice as soon as possible of an occurrence which could result in a claim. The “occurrence” language was inconsistent with the form, claims-made language in the first endorsement and the underlying policy; the endorsement controlled. Pennsylvania’s Notice/Prejudice Rule did not apply to the insurer’s claims-made policy. The policy was a claims-made policy, not an occurrence policy, and notice was a condition precedent to coverage. Therefore, the Court held that no coverage existed and the insurer’s motion was granted. - **Lexington Insurance Company v. Western Pennsylvania Hospital, 318 F.Supp. 2d 270 (2003).**

XVIII. INTELLECTUAL PROPERTY

Plaintiff filed a lawsuit against professional basketball player Allen Iverson seeking damages for claims of idea misappropriation, breach of contract, and quantum meruit (unjust enrichment), all arising out of Iverson's use of the phrase "The Answer," both as a nickname and as a logo or slogan. According to the facts alleged by plaintiff, he had made the suggestion that Iverson use "The Answer" as a nickname on evening before Iverson first promised to pay him for the use of said name, although a promise to pay was made later that evening. Ultimately, Iverson used the nickname idea in connection with a shoe contract and sales of other goods. Defendant Iverson filed a motion to dismiss the lawsuit which was granted by the district court. The district court concluded that regardless of whether a contract had been formed, the disclosure of "The Answer" idea had already occurred and was, therefore, past consideration insufficient to create a binding contract. The court further held that in the absence of any concrete facts, the friend could not show that Iverson was unjustly enriched, reasoning that Iverson had only received an idea that he was already free to use. - **Blackmon v. Iverson, 324 F.Supp. 2d 602 (E.D. Pa. 2003).**

Sports programming licensee sued unauthorized user, seeking damages for an unauthorized broadcast of a sports event. Applying the two year statute of limitations of 42 Pa.C.S.A. §5524(7), the district court dismissed the licensee's claims as time barred. After denial of its motion for reconsideration, the licensee sought review. In front of the Third Circuit, the licensee sued the user under the "piracy statutes" of the Federal Communications Act (FCA), specifically, 47 U.S.C.S. §553, which prohibits the unauthorized reception of cable service, and 47 U.S.C.S. §605, which prohibited the unauthorized publication or use of communications. The FCA did not specify a limitation. The district court determined that the two year limitation period of the Pennsylvania cable piracy statute, 18 Pa.C.S.A. §910 applied, and that the suit was time-barred. The Third Circuit affirmed, finding both laws specifically prohibited the use of an unlawful telecommunications device to decode cable television signals. Further, the Court determined that when a federal statute fails to provide a limitation, the limitation from an analogous state law is employed. The two exceptions to this rule, consideration of the practicalities of litigation and preventing frustration of federal policy or law, did not apply. Therefore, the Court affirmed the district court's judgment dismissing the licensee's claim as time-barred. - **KingVision Pay-Per-View, Corp. v. 898 Belmont, Inc., 366 F.3d 217 (3rd Cir. 2004).**

Plaintiff bank filed an action against Defendant South Korean Company and South Korean citizen affiliated with company over the internet web address www.bizbank.com. The original registrant had previously assigned the trademark BIZBANK, a United States Patent and Trademark Office registered trademark, to plaintiff. Plaintiff claims that defendants' website infringes plaintiff's trademark. Plaintiff's lawsuit alleges infringement

of a federally registered trademark and unfair competition under the federal Lanham Act. The Lanham Act protects owners of registered trademarks. The defendants' website invited visitors to choose from a variety of categories of information such as accounting, business services, economics, and investing. The district court found that those categories fell within the classes covered by plaintiff's trademark registration. The court found that defendants infringed the trademark and engaged in unfair competition. The court reasoned that plaintiff met its burden of proof under the Lanham Act by demonstrating that it owns the mark in dispute, that the mark is valid and legally protectable, and that defendants' use of the mark to identify goods or services is likely to create confusion. Accordingly, the court enjoined defendants from further use of the mark BIZBANK and required defendants to immediately transfer or arrange to immediately transfer the domain name www.bizbank.com to plaintiff pursuant to the Lanham Act. - **Pennsylvania Business Bank v. Biz Bank Corp.**, 330 F.Supp. 2d 511 (E.D. Pa. 2004).

After a Third Circuit panel held that plaintiff manufacturer's serial numbers for parts lacked sufficient originality to be copyrighted, the district court granted defendant competitor summary judgment on a copyright infringement claim. A second appellate panel reversed and remanded. The Third Circuit vacated the panel opinion, voting to rehear the case en banc. The competitor listed the manufacturer's part numbers to show the competitor's comparable products. Each number was dictated by the manufacturer's system. Once the system was in place, all of the parts in a class were numbered without creativity, which would have defeated the system. The numbers resulted from mechanically applying the system, not creative thought. The Third Circuit reaffirmed the first panel's ruling. Nothing in the affidavit on the development of the system undermined the analysis. The affidavit pointed out that before the parts in a particular class could be numbered, a person had to identify the product characteristics to be reflected in the numbers and devise the code to be used to express those characteristics. The numbers were purely functional; they conveyed information about a few objective characteristics of mundane products. The question was not whether the numbers represented an idea, as opposed to the expression of the idea, but whether they had the requisite spark of creativity for copyright protection. The manufacturer did not claim its system was copyrightable. The numbers were also not protected because they were analogous to words or short phrases. A plurality of the court affirmed the order of the district court granting summary judgment in favor of the competitor on the manufacturer's copyright infringement claim. - **Southco, Inc. v. Kanebridge**, 390 F.3d 276 (3rd Cir. 2004).

Plaintiffs, the United States of America, the Internal Revenue Service (IRS), and a revenue officer sought to enforce subpoenas issued pursuant to 26 U.S.C.S. §7602 requiring defendant taxpayers, who had been under criminal investigation by the IRS, to answer questions and produce documents relative to a federal tax liability. The taxpayers refused to answer questions regarding their assets and sources of income, asserting their Fifth

Amendment privilege against self-incrimination. The IRS contended that the assertion of the privilege was improper for two reasons. First, it argued that the defendants' assertion of privilege was a prohibited blanket invocation. Second, the IRS claimed that the defendants have no basis for asserting the privilege because the information sought is for use in the collection of tax liabilities. The court refused to enforce the subpoenas and held that the defendant taxpayers' invocation of the Fifth Amendment privilege against self-incrimination was proper. The court concluded that the taxpayers asserted the privilege in response to specific questions in that their fear of a criminal prosecution and the potential use of the evidence in such a prosecution was substantial and genuine. In light of the fact that the taxpayers had been under criminal investigation and the statute of limitations for potential criminal charges had not expired, the questions they refused to answer implicating self-incriminating information because they required them to supply evidence of a necessary element of tax-related crimes. Further, although the IRS stated that it only wanted the information for collection purposes, it was unwilling to represent that no charges would be filed. - **United States of America v. Matthews, 327 F.Supp. 2d 527 (E.D. Pa. 2004).**

XIX. JURISDICTION

The Commonwealth of Pennsylvania, by the Attorney General, filed a complaint against defendant corporation, alleging that the corporation failed to deposit funds in an escrow account for the benefit of the Commonwealth in 2001 and 2002 as required by the Tobacco Settlement Agreement Act of 2000, 35 P.S. §§ 5671-5675. The defendant filed preliminary objections. The defendant argued that the court lacked personal jurisdiction because it was a Korean corporation with its principal place of business in Korea, it did not transact business in Pennsylvania, and it did not have sufficient minimum contacts in Pennsylvania to support Pennsylvania's exercise of jurisdiction without violating fundamental notions of fairness and due process. The Commonwealth Court concluded that while the contacts with the state involving the sale of cigarettes to its distributors might be insufficient to establish personal jurisdiction, the corporation's attempt to comply with the Tobacco Product Manufacturer Directory Act, so as to allow its cigarettes to be sold in Pennsylvania, created sufficient contacts for the court to exercise personal jurisdiction. By escrowing money, filing certifications, applying to place its cigarette brands on Pennsylvania's tobacco directory, and obtaining an agent to accept service, the corporation, in effect, admitted that it decided to purposefully engage in the privilege of conducting business in Pennsylvania so that it could purposefully direct its products to Pennsylvania residents. The defendant's preliminary objections were denied. -The Commonwealth of Pennsylvania, by the Attorney General, filed a complaint against defendant corporation, alleging that the corporation failed to deposit funds in an escrow account for the benefit of the Commonwealth in 2001 and 2002 as required by the Tobacco Settlement Agreement Act of 2000, 35 P.S. §§ 5671-5675. The defendant filed preliminary objections. The defendant argued that the court lacked personal jurisdiction because it was a Korean corporation with its principal place

of business in Korea, it did not transact business in Pennsylvania, and it did not have sufficient minimum contacts in Pennsylvania to support Pennsylvania's exercise of jurisdiction without violating fundamental notions of fairness and due process. The Commonwealth Court concluded that while the contacts with the state involving the sale of cigarettes to its distributors might be insufficient to establish personal jurisdiction, the corporation's attempt to comply with the Tobacco Product Manufacturer Directory Act, so as to allow its cigarettes to be sold in Pennsylvania, created sufficient contacts for the court to exercise personal jurisdiction. By escrowing money, filing certifications, applying to place its cigarette brands on Pennsylvania's tobacco directory, and obtaining an agent to accept service, the corporation, in effect, admitted that it decided to purposefully engage in the privilege of conducting business in Pennsylvania so that it could purposefully direct its products to Pennsylvania residents. The defendant's preliminary objections were denied. - **Commonwealth of Pennsylvania v. KT&G Corp., 863 A.2d 1254 (Pa. Cmwlth. 2004).**

XX. LABOR AND EMPLOYMENT

Plaintiffs, an injured employee and his wife, sued defendant school district alleging negligence. The defendant filed preliminary objections to the claim in the nature of a demurrer. The trial court sustained the preliminary objections. However, the Commonwealth Court reversed the trial court's decision and reinstated the complaint. In this case, the school district hired a company to work on the heating, ventilation, and air conditioning system, and the company assigned one of its employees to do that work. While the employee was working at the school, he fell through a ceiling above an auditorium and was injured. He sued the school alleging negligence. The school filed preliminary objections to the complaint claiming it was not liable for the injuries because the employee worked as an independent contractor and that it had no duty to warn him of a condition that was as obvious to him as it was to the school. The Superior Court held that nothing in the complaint stated that he worked for an independent contractor or showed that the condition that caused his injury was obvious to the employee as it was to the school. It was held that the trial court erred when it made those assumptions and considered them in ruling for the school. - **Beaver v. Coastville Area Sch. Dist., 845 A.2d 955 (Pa. Cmwlth. 2004).**

Appellee employees, while on strike, applied for unemployment compensation benefits under the Unemployment Compensation Law, 43 Pa. Cons. Stat. § 751 et seq. The Office of Employment Security denied the claims and a referee affirmed the denial, as did the Board of Review. The employees appealed, and the Commonwealth Court reversed. Thereafter, the Appellant employer sought review. After the parties' collective bargaining agreement (CBA) expired, the employees went on strike. The referee found that as the employer had not refused to extend the CBA in order to maintain the status quo, the work stoppage was a strike, not a lock-out, and the employees were thus disqualified from

unemployment compensation benefits. The Commonwealth Court held that (1) the “status quo” encompassed not only terms of the CBA, but also the parties’ “past practices”; and that (2) since it had been the employer’s past practices to allow light duty status employees to maintain their previous shift hour, the change in that policy represented a disruption of the status quo for purposes of determining eligibility for unemployment compensation, relying on *Miceli v. Unemployment Compensation Board of Review*, 519 Pa. 515, 549 A.2d 113 (Pa. 1988). The Supreme Court held that the Commonwealth Court had misinterpreted *Miceli*. Under *Miceli*, a court could not look beyond the terms and conditions of employment, as embodied in the CBA, in determining what conduct constituted a disruption of status quo. As the CBA gave the employer sole authority to make shift assignments, it was the employees, not the employer, who had disrupted the status quo. - **Behers, et. al. v. Unemployment Compensation Board of Review of Appeal of St. Paul’s Manor**, 842 A.2d 359 (Pa. 2004).

Plaintiff union sued, pursuant to Labor Management Relations Act (LMRA), 29 U.S.C.S. § 185, to compel the corporations’ performance of obligations set forth in a New York decision, the parties’ Collective Bargaining Agreement and additional agreements between the parties. The question before the Court was whether this dispute was subject to arbitration. The dispute was subject to the arbitration provisions of the parties’ Collective Bargaining Agreement (CBA). The union argued that the agreement to apply a New York decision to affected Pennsylvania employees in exchange for suspension of an arbitration and a dismissal of the federal action was an agreement made by the parties entirely independent of any prior written agreements, including the CBA. However, the underlying dispute was based on the parties’ CBA and was arbitrable. The union argued that because it had not identified a specific provision of the CBA that was violated, the arbitration provisions do not apply. The court could not fathom how the union could show that employees received no benefits to which they were entitled under the Settlement Agreement without referring to the CBA that dictated what it meant to be “made whole.” This dispute underlying the “Settlement Agreement” was arbitrable and because the arbitration clause was sufficiently brought, the dispute over the “Settlement Agreement” was subject to arbitration under the CBA. Therefore, the complaint was dismissed. - **Communications Workers of America, AFL-CIO v. Verizon Communications, Inc.**, 299 F.Supp. 2d 450 (2004).

Petitioner union sought review of an order of respondent Pennsylvania Labor Relations Board, which sustained the exceptions of respondent borough with regard to a hearing examiner’s proposed decision and order (PDO) and modified the portion of the PDO that directed the employer to reinstate a police chief to his position. An investigatory interview was held between the police chief and the borough’s mayor, solicitor, and council president. During the investigatory interview, it was established that disciplinary action

was possible. The interview ended after the appropriate union representative was not available to attend, and the solicitor informed the police chief that a disciplinary hearing was to be scheduled. The police chief was terminated for inefficiency in handling the budget and insubordination without a disciplinary hearing. The union filed an unfair labor practice charge, and the hearing examiner determined that an unfair labor practice had resulted and ordered reinstatement. Upon review, the Board vacated the hearing examiner's reinstatement award and found that the borough had independent, alternative reasons for the police chief's termination, which were unrelated to the interview. The court upheld the Board's decision, because the record indicated that the police chief physically threatened and accosted a borough councilman, failed to provide requested information, and submitted inaccurate information, which were all independent grounds for the termination. The court affirmed the order. - **Duryea Borough Police Department v. Pennsylvania Labor Relations Board, 862 A.2d 122 (Pa.Cmwlth. 2004).**

Defendant employer appealed from a judgment on jury verdict of the Court of Common Pleas of Dauphin County in favor of defendant former employee in an action for breach of contract. The employer argued that they were entitled to judgment as a matter of law because the employee had not overcome the presumption that he was an employee-at-will. The employee had worked for the employer in Pennsylvania for many years when he was approached about an assignment in Mexico. The assignment was described in a letter that set a probable length for the assignment and also enumerated the special pre-requisites, including a bonus plan, for the position. When the bonus was eliminated, the employee objected, but did not pursue the matter for fear of repercussions. When his position was eliminated a few years later, he sued for breach of contract. The appellate court reviewed the jury's findings that the employer had made an agreement with the employee and breached it with deference to the jury's role in weighing the credibility of the various witnesses and in light of business employment practices. The appellate court agreed that the employee had rebutted the presumption of employment-at-will with evidence of the special inducements normally offered to those willing to accept expatriate assignments. Pennsylvania case law supported the conclusion that when the initial contract term expired, the contract was automatically renewed for a similar period. - **Janis v. AMP, Incorporated, 2004 Pa. Super. 301, 856 A.2d 140 (2004).**

The appellants, employees, sought review of the judgment from the United States District Court for the Eastern District of Pennsylvania, which entered judgment in favor of the defendant employer and security corporation in the appellants' suit. In this suit, the appellants asserted violations under Pennsylvania law which the defendants removed to the District Court, contending that the claims were completely preempted by §301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C.S. §185. The appellants were represented by the United Steel Workers of America and were subject to a Collective Bargaining Agreement ("CBA"). They learned that their employer, a manufacturer of

automobile and truck assembly components, had installed surveillance cameras that monitored the work area and hallways and transmitted oral communications to a security company the employer had hired. The employees filed suit against defendants in Pennsylvania State Court alleging various Pennsylvania common law tort causes of action, including invasion of privacy. The defendants removed the case to the District Court, which entered judgment in their favor. On appeal, the Court vacated judgment and remanded the case to the state court, finding that removal was improper. The employees' tort claims were not completely preempted by §301 of the LMRA because whatever duties the employer was alleged to have had with respect to supervision of the employees, those duties were independent of the CBA and as such, the employees' claims arising from negligent or reckless breach of those duties were not completely preempted by §301. Therefore, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and remanded the case with instructions to return it to the Pennsylvania state court. - **Kline, et al v. Dana Corp., et al, 386 F.3d 246 (3rd Cir. 2004).**

Appellant, Port Authority of Allegheny County, appealed from an Order of the Court of Common Pleas of Allegheny County sustaining an arbitration award that reinstated an employee to his position as an incline operator after finding that he had inappropriately touched a female passenger. The Commonwealth Court of Pennsylvania found that ample evidence supported the arbitrators' finding that the employee twice reached under the shirt of a female passenger and touched her despite her demands that he stop. However, the arbitrators erred when they inquired into the intended meaning of the undefined Collective Bargaining Agreement ("CBA") term "sufficient cause" for discharge and found that, as a matter of contractual intent, the employees' misconduct did not qualify as sufficient grounds for automatic discharge. The employees' misconduct fell squarely within the kind of conduct bearing upon the Port Authority's ability to perform its function of providing safe public transport. The Court went on to find that the Port Authority, by agreeing to the "sufficient cause" provision of the CBA, did not and could not relinquish its ability to fire an employee who sexually assaulted a passenger. The Court held that insofar of the arbitrators' award reinstating the employee was based on an interpretation of the CBA that could not properly have been agreed to by the Port Authority that award was not rationally derived from the CBA and the Order of the Common Pleas Court was reversed. - **Port Authority of Allegheny County v. Amalgamated Transit Union Local, 853 A.2d 1090 (2004).**

XXI. LANDLORD/TENANT

Plaintiff tenant entered into a lease agreement which granted it the exclusive right to operate a pharmacy at defendant landlord's shopping center. The tenant sued the landlord for lost revenues it allegedly suffered when defendant supermarket opened a pharmacy

department. The tenant appealed the judgment of the Court of Common Pleas of Delaware County, which granted summary judgment in favor of the landlord. On appeal, the issue was whether the tenant could recover damages from the landlord for violation of an exclusivity provision contained in their lease agreement. The landlord promised the tenant that, during the term of the tenant's lease, the landlord would not permit the use or occupancy of any space not demised to the tenant which was located within the entire premises for the operation of a drug store, or a drug department. This unambiguous language clearly was violated by the landlord when it allowed the supermarket to open its pharmacy department. Thus, the appellate court held that, under the unambiguous terms of the lease agreement, the trial court erred when it granted summary judgment in favor of the landlord. Accordingly, the Superior Court of Pennsylvania reversed the order of the trial court which granted summary judgment in favor of the landlord. The matter was remanded for entry of summary judgment in favor of the tenant and for a trial on damages only. - **Eckerd Corporation v. Glen Eagle Retail, et. al, 853 A2d 385 (Pa.Super. 2004).**

In an ejectment action against appellee bank, appellant property owner appealed the order of the Court of Common Pleas of Monroe County, which found in favor on (1) the property owner with respect to his ejectment claim; (2) the bank with respect to the property owner's breach of contract claim; and (3) the property owner with respect to the bank's counterclaim for breach of the implied covenant of quiet enjoyment. On appeal, the main issue was where litigation which impaired a tenant's possessory interests in a leasehold, brought in bad faith by a landlord, constituted a breach of implied covenant quiet enjoyment in the lease. Specifically, the property owner argued that the trial court erred in concluding that the property owner breached the covenant of quiet enjoyment, and by doing so obviated the bank's obligations under the lease. The appellate court concluded that litigation by a landlord/lessor which substantially impaired a lessee's possessory interests could constitute a breach of the covenant of quiet enjoyment or such litigation was pursued in bad faith, maliciously or without probable cause. While the property owner's actions substantially interfered with the bank's possessory interest in the leasehold, the record failed to support the trial court's conclusions that the property owner's lawsuits were brought in bad faith where the litigation was resolved, in the case of the 1998 suite, in the property owner's favor. Thus, the property owner did not breach to covenant of quiet enjoyment. Accordingly, the Superior Court of Pennsylvania reversed the judgment and entered in favor of the bank on the property owner's breach of lease count, and remanded the case for the entry of judgment in favor of the property owner on this count, and for a determination and award of related damages. In all other respects, the judgment of the trial court was affirmed. - **Kohl v. PNC Bank National, et al., 863 A.2d 23 (Pa. Super. 2004).**

XXII. LEGAL MALPRACTICE

Appellant client corporation sued appellee lawyer for legal malpractice and breach of fiduciary duty. The jury found in favor of the corporation on both claims, but only awarded damages on the legal malpractice claim. The trial court granted the lawyer's motion for judgment notwithstanding the verdict and entered judgment in his favor. The corporation appealed, alleging the lawyer acted as counsel for both the corporation and a group of British investors with interests adverse to the corporation during a sale of the corporation's assets and that the lawyer made false statements prior to the sale that caused the corporation's assets to be sold for an inadequate price. On appeal, the court found that the trial court erred when it concluded that the lawyer did not provide legal services to the corporation at the time of a shareholders' meeting. As such, the trial court erred when it granted JNOV based on its conclusion that an attorney-client relationship did not exist between the lawyer and the corporation at the time of the shareholders' meeting. Furthermore, the appellate court found that the corporation proved the fact of actual damages with sufficient evidence, as the lawyer's conduct did, in fact, prevent the corporation from realizing a fair value for its assets. Consequently, the trial court's entry of JNOV on behalf of the lawyer was erroneous. Finally, the Court held the case would have to be remanded for the trial court to consider alternative post-judgment motions that were not decided by the trial court. Therefore, the entry of judgment notwithstanding the verdict on the lawyer's behalf was reversed, the trial court's denial of the lawyer's post-trial motion for a new trial and remittitur was vacated, the denial of the corporation's post-trial motions was vacated. The case was remanded to the trial court for the sole purpose of adjudicating the corporation's post-trial motions and the lawyer's motion for a new trial and motion for remittitur. - *Capital Care Corp. v. Hunt*, 2004 PA Super 64, 847 A.2d 75 (2004).

Plaintiff sued defendants, former attorney and law firm, alleging claims for legal malpractice. Defendants moved to dismiss asserting that the client did not file a certificate of merit pursuant to Pa. R. Civ. P. 1042.3. The court had diversity jurisdiction. It is undisputed that plaintiff did not file a certificate of merit within 60 days of filing the complaint. The certificate was not filed until he responded to the motion to dismiss. The court had to decide whether: (1) the Pennsylvania certificate of merit rule was applicable in a federal court sitting in diversity; and (2) the application of the rule required dismissal with prejudice of the complaint. Looking to the United States Court of Appeals for the Third Circuit's application of a similar statute in New Jersey, the present court determined that Rule 1042.3 was controlling, substantive law. Turning to the second issue, defendants argued that plaintiff's failure to file a certificate of merit in a timely fashion compelled dismissal of the complaint with prejudice. Although the 60-day time limit was binding, defendant did not show prejudice from the delay. Unlike the New Jersey statute, R. 1042.3 did not require dismissal with prejudice. The rule allowed for the entry a judgment similar to a default, which would not bar plaintiff from commencing another suit upon the same

cause of action. Plaintiff was entitled to the relief offered by Pa. R. Civ. P. 3051. Defendants' motion to dismiss was denied. - **Pasquale Scaramuzza v. Anthony J. Sciolla, Jr., et. al., 345 F. Supp. 2d 508 (E. D. Pa. 2004).**

XXIII. LIBEL/SLANDER

The appellant, injured parties, sought review from an order of the Pennsylvania Superior Court affirming the trial court's order granting summary judgment in favor of appellees, a malpractice attorney and a malpractice law firm, with regard to the injured parties' complaint. The complaint alleged defamation, commercial disparagement and interference with a contract. The malpractice attorney and law firm filed a malpractice complaint against the injured parties. The complaint alleged breach of fiduciary duty. After filing the malpractice complaint, the malpractice attorney faxed a copy of the complaint to a freelance reporter who regularly wrote stories for a daily local legal publication. An article detailing the allegations in the complaint was published. As a result, the injured parties filed the instant action. The malpractice attorney and law firm filed a motion for summary judgment asserting judicial privilege. However, the trial court erred in granting the motion for summary judgment. Judicial privilege did not protect the malpractice attorney and law firm with regard to the copy of the complaint that was faxed to the reporter. The act of sending the complaint to the reporter was an extrajudicial act that occurred outside the regular course of the judicial proceedings and was not relevant in any way to those proceedings. Therefore, the Supreme Court of Pennsylvania reversed the order insofar as it affirmed the trial court's order granting summary judgment in favor of the malpractice attorney and the malpractice law firm. - **Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004).**

Husband and wife sued defendant newspapers for defamation. The court sustained the newspapers' preliminary objections and dismissed the complaint. The husband and wife appealed. The Superior Court reversed the trial court's decision and remanded the matter for further proceedings. Thereafter, the newspapers appealed. Appellees, husband and wife, were public figures and the wife led a crusade against "gangsta rap" music. She sued a gangsta rap artist (Tupac) and the recording companies that marketed his music after the artist made recordings with lyrics about the wife. The husband and wife listed loss of consortium as one of their damages. The husband and wife alleged that the newspapers printed defamatory articles about the lawsuit and held them up to public ridicule, as they reported that the husband and wife sought damages because the lyrics diminished their sex life. The husband and wife claimed their attorney told the newspapers that the loss of consortium claim did not include a claim for loss of sexual relations. On appeal, the Court found the complaint, albeit barely, alleged that the statements were capable of a defamatory meaning. However, because the pleading was impermissibly vague, the Supreme Court dismissed it with leave to re-plead if the husband and wife were able to

allege, in good faith, that their attorney unequivocally told the newspapers before the articles were printed that the husband and wife were not seeking damages for loss of sexual relations. - **Tucker v. Philadelphia Daily News, et al, 848 A.2d 113 (2004).**

XXIV. MEDICAL MALPRACTICE

Plaintiff estate brought medical malpractice action for death of an end-stage renal failure patient who had been in defendant nephrologist's care for some period of time. Patient had developed breathing difficulties for which he was taken to a hospital's intensive care unit. Defendant nephrologist was called in to see patient in order to prepare for in-patient dialysis treatment but did not examine the patient's mouth and throat because he understood that he was there solely to consult about dialysis. On the following day, the patient underwent an emergency intubation where upon a piece of steak was found in his throat and following its removal, the patient developed an infection and ultimately died. Before trial, plaintiff estate entered into a joint tortfeasor release agreement with all defendants except the nephrologist. Following a verdict in favor of plaintiff estate, the nephrologist filed a post-trial motion wherein he argued that the trial court erred in permitting plaintiff's expert witness, an internist, to testify under the MCARE Act ("Act") regarding the applicable standard of care where the treatment performed by the defendant nephrologist solely involved nephrology. The trial court denied said post-trial motion. On appeal to the Superior Court of Pennsylvania, defendant doctor argued that the trial court erred in denying the doctor's post-trial motion. The doctor argued that the Act required expert testimony of a nephrologist in order to demonstrate that the doctor, who treated the patient in the context of a nephrology consultation, committed malpractice by failing to address and respond to the patient's airway blockage. The Superior Court disagreed with defendant doctor, concluding that the "same sub-specialty" ideal contained in the Act includes an expressed caveat, which reflected the legislature's decision to afford the trial court discretion to admit testimony from a doctor with expertise in another speciality that has a similar standard of care for the specific care at issue. The Superior Court reasoned that the plaintiff's expert testimony as an expert in internal medicine was appropriate because any physician with specialized training and certification in internal medicine, such as the defendant nephrologist in this case, should have noted anomalies pertaining to the patient's behavior. The Superior Court found that there could be no question as to the adequacy of defendant nephrologist's background to the task of diagnosing and treating respiratory problems, because the defendant doctor was Board Certified in internal medicine which he testified entails the diagnosis of airway obstruction. Accordingly, the Superior Court affirmed the trial court's denial of defendant nephrologist's post-trial motion. - **Herbert v. Parkview Hospital, 854 A.2d 1285 (Pa.Super. 2004).**

Plaintiff-patient brought pro se medical malpractice action against four doctors. Patient

alleged that they failed to diagnose him with an active draining sinus in the posterior aspect of his left thigh that caused osteomyelitis in his left femur. The complaint was reinstated twice. At no time, either at the filing of the original complaint or within 60 days thereafter, did appellant file the certificate of merit required by the Pennsylvania Rules of Civil Procedure or file a motion seeking an extension of time to file the certificate. Because there were no certificates of merit filed and no motion to extend time for filing the certificates pending, defendant doctors filed a praecipe for entry of judgment of non pros pursuant to Pa.R.Civ.P. 1042.6. Plaintiff-patient subsequently retained counsel who filed a petition to open or strike judgment of non pros. The trial court denied the petition. Plaintiff-patient appealed to the Superior Court. The Superior Court noted that the Supreme Court of Pennsylvania had recently adopted rules governing liability actions against licensed professionals. Those rules provide that in an action based on an allegation that a licensed professional deviated from an acceptable professional standard, the plaintiff's attorney shall file a certificate of merit with the complaint or within 60 days after the filing of the complaint. The Superior Court held that the 60-day period for filing a certificate of merit began to run on the date on which the original complaint was filed, not on the date of reinstatement of the complaint. The Court further held that patient's explanation that he was unaware of requirement to file certificate did not justify late filing. The Court reasoned that the certificate of merit rule applied to both attorneys and pro se litigants; pro se litigants are not absolved from complying with procedural rules. Accordingly, the Superior Court affirmed the trial court's denial of the petition to open or strike the judgment of non pros. - **Hoover v. Davila, 862 A.2d 591 (Pa.Super. 2004).**

A minor, by her parents, commenced a malpractice action, alleging that the doctors' failure to properly diagnose and treat their daughter resulted in irreversible disease. The Court granted the parents an extension of time in order to identify their expert witness, but they were still unable to timely comply. Appellee doctors each filed for summary judgment which the Court granted. New counsel for the Plaintiffs sought an additional extension, which was denied. An expert report was filed within 30 days of the motions and as part of the parents' response to the summary judgment motions, but the report was not considered by the Court due to its lateness. On appeal, the Court found that expert testimony was needed as to whether the doctors met the necessary standard of care and that the treating doctor's expert opinion was acquired in anticipation of litigation with respect to his evaluation of their care. The Court found that the doctors were prejudiced by the late filing of the expert report and that preclusion by the trial court was proper. - **Kurian v. Anisman, et al, 2004 P.A. Super 165, 851 A.2d 152 (2004).**

Plaintiff patient sued defendants, a hospital, two doctors, and a medical practice group, for malpractice. Following a surgical procedure provided by the defendants, one of the doctors fitted the patient with a splint on her left calf and ankle. As the surgical anesthesia wore off, the patient began to complain of a burning pain in her calf under her splint, for which

she ultimately required a skin graft. As a result of this injury, the patient's leg became severely disfigured. A jury verdict was rendered in favor of the patient and against one doctor. The verdict was molded to include the medical malpractice group for joint liability with the doctor. The doctor and the medical malpractice group appealed to the Superior Court of Pennsylvania. On appeal, the defendants argued that the patient's expert's testimony exceeded the fair scope of his report. The Court noted that the Pennsylvania Rules of Civil Procedure require that an expert's testimony at trial be limited to the fair scope of his deposition testimony or pretrial report. The Court recognized that in determining whether the expert's testimony is within the fair scope of his report, any discrepancy between the expert's report and his trial testimony must not be of such nature that would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response. In concluding that the expert's testimony did not exceed the fair scope of his report, the Court reasoned that the defendants did not assert that they were unable to prepare a meaningful response to the doctor's report or that the report misled them. Accordingly, the judgement of the trial court was affirmed. - **Sutherland v. Monongahela Valley Hospital, 856 A.2d. 55 (Pa.Super. 2004).**

Appellants, a minor and his parents, sued appellees, a doctor and a hospital, for medical malpractice. The Court of Common Pleas of Blair County, Civil Division (Pennsylvania), granted summary judgment in favor of appellees and dismissed the case with prejudice due to appellants' failure to produce an expert report after being granted two 30-day extensions of time to produce the expert report. Appellants sought review. On appeal, the issue was whether the trial court abused its discretion in granting summary judgment in appellees' favor where there was an outstanding petition for voluntary discontinuance. The appellate court found that appellants' first expert witness died in 1999, and from that time until February 17, 2004, appellants did not procure another expert witness to support their theory of causation, and appellants admitted at the February 11, 2004, conference that they could not produce a living expert witness to substantiate their claims. As such, the trial court did not err in granting summary judgment in favor of appellees because appellants could not maintain a cause of action for medical malpractice where they failed to procure an expert witness. In addition, the granting of a discontinuance would have been improper because appellees had already experienced unreasonable inconvenience and expense in having to retain counsel and undertake discovery to defend themselves in a cause of action for which appellants could not provide evidentiary support during the previous five years. The judgment of the trial court was affirmed. - **Cash R. Gray, et. al., v. Richard Samuel MaGee, M. D., et. al., 864 A. 2d 560 (Pa. Super. 2004).**

Defendants, a university health system and three physicians (collectively "TUHS"), appealed from an order of the Court of Common Pleas of Philadelphia County, which

directed defendant hospital to answer certain of plaintiff patient's interrogatories in a medical malpractice action. The interrogatories asked about inquiries made or not made by the hospital to the National Practitioner Data Bank about the physicians. The interrogatories also requested documents obtained from any such inquiries. The lower court overruled objections to the interrogatories asking whether or not queries were made but allowed TUHS's objections to those interrogatories seeking documents. TUHS claims the information sought by the interrogatories was privileged and was protected from discovery by the Health Care Quality Act, 42 U.S.C.S §11101 et seq., and the Peer Review Protection Act, Pa. Stat. Ann. Tit. 63 §425.1 et. seq. The court quashed the appeal. The order appealed from was not a final order and it did not satisfy the collateral order rule, Pa. R. App. P. 313. The matter up for review in the appeal could resolve an issue in the underlying medical malpractice action. The information the hospital was told to reveal was not privileged. There was no public policy protecting the hospital from revealing whether it made the statutorily required inquiries, and disclosure of whether inquiries had been made was contemplated by 45 C.S.R. §60.11(a)(5). Accordingly, the Superior Court of Pennsylvania quashed the appeal of discovery order. - **Jacksonian v. Temple University Health System Foundation, et al., 862 A.2d 1275 (Pa. Super. 2004).**

XXV. MUNICIPAL LAW

Defendant City of Philadelphia appealed from an order of the trial court which denied the City's motion for summary judgment based upon an assertion of immunity under the Political Subdivisions Tort Claims Act in plaintiff pedestrian's personal injury action. The pedestrian slipped and fell on ice that had accumulated on a sidewalk. The trial court denied the City's motion for summary judgment based on a finding that a genuine issue of material fact existed as to whether the City had actual knowledge of the sidewalk's condition. The trial court also found that the accumulation of snow and ice constituted a dangerous condition of the sidewalk and was a defect in its maintenance. On appeal, the Commonwealth Court of Pennsylvania examined the issue of whether the trial court erred by failing to determine as a matter of law that the accumulation of snow and ice on the sidewalk did not fall within the sidewalk exception to governmental immunity. The court ruled that the trial court did err. In order to recover under the exception, the pedestrian had to allege that her injuries arose from a dangerous condition derived, originated, or having its source in the sidewalk itself. The pedestrian's complaint had no such allegations and her deposition testimony was that the snow and ice, and not a condition derived from the sidewalk, caused the fall. Thus, the pedestrian's claim did not come within the sidewalk exception to governmental immunity. Accordingly, the Commonwealth Court reversed the order of the trial court. - **Cohen v. City of Philadelphia, 847 A.2d 778 (Pa. Cmwlth. 2004).**

Appellant parents, individually and as co-administrators of their son's estate, appealed from the entry of summary judgment by the trial court in favor of Appellee municipal

authority, finding that the authority enjoyed governmental immunity under the Pennsylvania Political Subdivision Torts Claims Act, 42 Pa. Cons. Stat. §§8541-8542. The parents argued that the contractor's negligence should be imputed to the Authority, bringing the authority's negligence into the real estate and utility service facilities exceptions to governmental immunity. The appellate court held that the cave-in of the sewer trench, which resulted in the son's death, was not an unusual or unexpected risk. The parents' claim that digging in the shale soil made the project unusually dangerous was also rejected. The fact that a harm could be prevented by more than one type of precaution did not transform the everyday risk into an inherently dangerous one. The independent contractor was required to use standard precautions to protect a cave-in of the trench under its contract with the Authority and OSHA regulations. The parents failed to establish that the particular trenching presented a peculiar risk or danger, and the trial court correctly applied the common law rule that an employer would not be held vicariously liable for the tortious conduct of its contractor. The parents could not establish a common law cause of action in tort against the authority, which was the first step in defeating a claim of governmental immunity. - **Dunkle v. Middleburg Municipal Authority, et.al., 842 A.2d 477 (Pa. Cmwlth. 2004).**

Plaintiff parents sued defendant fire department for injuries their child sustained when she was hit in the head by a softball while the family was at an event on the defendant's property. The Court of Common Pleas of Tioga County, Pennsylvania, found in the fire department's favor and denied the parents' motion for post-trial relief. The parents appealed. On review, the parents challenged the trial court's jury instructions regarding the real estate exception to governmental immunity. The Commonwealth Court of Pennsylvania found that whether a dangerous condition existed on the department's property, and whether the department created or contributed to that condition, were the ultimate issues at trial for the jury to decide. The Court found that the trial court did not err because it did not formulate the jury charge based solely on the parents' theory of liability. The Court stated that it would have an error to foreclose the department's theory of the case and, in effect, create a standard of strict liability. Thus, the Court concluded that the trial court's jury instructions with respect to notice to the landowner as it pertained to premises liability was appropriate and accurately described by law. Furthermore, the department's property, if defective in some way, did not cause the child's injuries but merely facilitated the act of a softball player. The Commonwealth Court concluded that the jury charge clearly and accurately explained the issues and the applicable law regarding premises liability and governmental immunity and, therefore, the judgment was affirmed. - **Gaylord v. Morris Township Fire Department, 853 A.2d 1112 (2004).**

Philadelphia Housing Authority (PHA), challenged the decision of the trial court which held PHA liable for injuries sustained by plaintiff as a result of a dog attack on PHA's premises. On appeal, the appellant contended that the trial court erred in denying its

motion for summary judgment on the issue of sovereign immunity under 42 Pa.C.S. §8522(b)(6). On appeal, appellee alleged that PHA was negligent in permitting the dog to remain on the premises in violation of its pet policy and that it was negligent per se under the Dog Law, Pa.S.A.tit. 3, §§459-101 to 1205. At trial, there was testimony that the president of the residence council who had received complaints about the dog notified the property manager, who agreed to take action, but that no action had been taken before the dog bit the appellee. Reversing the trial court's decision, the Commonwealth Court held that the care, custody, and control of animals exception to sovereign immunity did not apply because the PHA did not have "control" over the dog when it bit the appellee. Constructive control was inadequate to defeat the defense of sovereign immunity, and the record did not support the premise that the PHA had knowledge of the dog's vicious tendencies. The president of the residence council's speculation that the dog could or might harm someone did not inform PHA that the dog, in fact, was dangerous. Moreover, PHA did not own the dog, and it was not in physical possession of the dog at the time of the incident. Therefore, the Court reversed the trial court's decision denying the motion for summary judgment on the issue of sovereign immunity. - **Govan v. Philadelphia Housing Authority, 848 A.2d 193 (2004).**

Appellant, an injured passenger, sued Appellee Southeastern Pennsylvania Transportation Authority (SEPTA), alleging that SEPTA was negligent in operating its bus off the designated bus route and that she sustained permanent injuries as a result. SEPTA asserted sovereign immunity and filed a motion for summary judgment, which was granted by the Court of Common Pleas of Philadelphia County. The passenger then appealed. On appeal, the passenger argued that the trial court erred in granting SEPTA's motion for summary judgment. Specifically, the passenger argued that her cause of action fell within the motor vehicle exception to sovereign immunity, that off-route movement of the bus constituted operation for purposes of the motor vehicle exception, and that the bus driver's decision to deviate from the authorized route in violation of SEPTA's rules constituted negligent movement of the vehicle. The appellate court concluded that the movement of the bus off its designated route did not constitute operation for purposes of the motor vehicle exception. In addition, the court held the decision of the bus driver to deviate from the designated route and drop the passenger off at an authorized location did not implicate the motor vehicle exception. Also, the bus driver's alleged violation of SEPTA's rules did not, by itself, bring the passenger's cause of action within the motor vehicle exception. Thus, the court concluded that the trial court did not err in granting summary judgment because the passenger failed to establish that her cause of action fell within the motor vehicle exception to sovereign immunity. - **Mosley v. Southeastern Pennsylvania Transportation Authority, 842 A.2d 473 (Pa.Cmwlt. 2003).**

Plaintiff decedent's estate sued defendant city and officer for negligence under 42 Pa. Cons. Stat. §8542(b)(1). Defendants sought summary judgment on grounds that the estate failed

to give timely notice of the claim and that a prior settlement exhausted the statutory cap on damages. The trial court denied the motion, and defendants then appealed. An officer had abandoned his attempt to stop a motorist from reckless driving and the motorist's vehicle hit the decedent's car, killing him and injuring his passenger. The estate failed to file a notice of claim within six months and by the time it did, the city had settled the claim of the passenger for \$500,000.00. The trial court held that the estate's failure to timely file a notice of claim was excused under §5522(a)(2), as the city had actual notice of the accident, and under §5522(a)(3) there was a reasonable basis for the delay (the administratrix was a New Jersey resident and was unaware of the notice requirement). The appellate court agreed. The city's claim of prejudice from its statutory-cap settlement, which it would not have done had it known another action would be filed, was not the type of prejudice that would vitiate either exception to the six month notice rule. The trial court properly found that the \$500,000.00 statutory cap was not exhausted by the prior settlement. The passenger asserted viable claims under 42 U.S.C.S. §1983 and the Fourteenth Amendment as well as state claims, and the settlement released the city from both the state and federal claims. Accordingly, the Commonwealth Court of Pennsylvania affirmed the judgment. - **Thomas v. City of Philadelphia, et. al, 861 A.2d 1023 (Pa. Cmwlth. 2004).**

XXVI. NEGLIGENCE

Plaintiffs, husband and wife, sued defendant airline for negligence in the operation of the airline's aircraft and for loss of consortium. The husband was injured when someone opened an overhead luggage compartment and a laptop computer fell on his head. The airline moved for summary judgment asserting that the plaintiff had not articulated a standard of care owed to the plaintiff under federal law and that plaintiff had not identified any negligent conduct that constituted a breach of duty owed to the plaintiff which had legally caused his injury. The court determined that the applicable standard of care for this negligence claim was established under the Federal Aviation Act, specifically 14 C.F.R. § 91.13(a). This provision provides that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. The district court found however that the husband could not identify an act or omission by the airline that violated the regulation. The court ruled that Section 91.13(a) was reserved only for egregious misconduct where the potential for harm was incontestably high. The flight had landed and stopped at the terminal when the accident occurred; there was no threat of imminent, dire physical injury to the husband while the plane sat stationary. Accordingly, the court held that the airline did not breach its duty not to operate an aircraft recklessly or carelessly and granted the motion for summary judgment. The wife's consortium claim was derivative of the husband's claim and likewise failed. - **Allen v. American Airlines, Inc., 301 F. Supp. 2d 370 (E.D. Pa. 2004).**

Plaintiff employee of defendant filed a two count lawsuit alleging negligence and negligent entrustment, stemming from an act of domestic violence against the employee that occurred in one of the defendant's stores. The defendant moved for summary judgment. Prior to the plaintiff's shift starting, the plaintiff stood in the break room. Her husband entered the room with a gun, shot her and himself. The plaintiff survived. The plaintiff sued the defendant, claiming that it breached its duty to protect her by failing to call the police when they knew that her husband was there; having inadequate security; failing to provide her a safe environment to work; failing to have in place a policy to address spousal abuse; and by selling the bullets that injured her. The trial court granted the defendant's motion for summary judgment because the defendant owed no duty of care to protect her from her husband's criminal behavior. Furthermore, the retailer had no control over the husband and could not have prevented the shooting. - *Midgette v. Wal-Mart Stores, Inc.*, 317 F.Supp.2d 550 (E.D.Pa 2004).

XXVII. PRODUCTS LIABILITY

Plaintiff filed a complaint against Medtronic alleging claims of negligence, breach of implied and express warranties, and strict liability based on plaintiff's experience with a prescription medical device that was bilaterally implanted in plaintiff to help relieve him of symptoms associated with Parkinson's disease. Plaintiff alleges that the systems implanted in him failed to function properly and as a result caused him substantial damage. Medtronic filed a motion for summary judgment claiming that all of patient's claims are preempted by federal law and further argued that the patient's claims failed as a matter of law pursuant to applicable Pennsylvania law. The district court determined that only the patient's implied warranty of merchantability claim was preempted, pursuant to the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.S. §§ 321-394. However, the court found that the patient's remaining claims should be dismissed because plaintiff had failed to produce sufficient evidence on these claims to proceed to a jury. Additionally, plaintiff's strict products liability and implied warranty of merchantability claims also failed under Pennsylvania law, finding that comment k of Section 402A of the Restatement of Torts precluded the application of Section 402A to prescription medical devices. The comment provides that these products, although dangerous in that they are not without medical risks, are not deemed defective and unreasonably dangerous when marketed with proper warnings. Accordingly, the court granted Medtronic's motion for summary judgment. - ***Davenport v. Medtronic, Inc.*, 302 F. Supp. 2d 419 (E.D. Pa. 2004).**

Plaintiff was severely injured when his legs became trapped under the rear wheels of a machine manufactured by Blaw-Knox. Plaintiff and his wife sued Blaw-Knox alleging that the machine was defective because (1) its rear wheels were not enclosed, (2) it lacked a

back-up alarm on the rear of the machine, and (3) it lacked proper warning signs. Plaintiffs sought to introduce evidence that, shortly after the accident, the owner of the machine partially enclosed the rear wheels, installed a back-up alarm on the rear of the machine, and placed warning signs on the rear of the machine. Blaw-Knox filed a motion in limine to prohibit plaintiffs from introducing evidence of the owner's redesign. Similarly, the plaintiff's filed their own motion seeking an order allowing them to introduce evidence of the redesign at trial. The district court granted Blaw-Knox's motion and denied plaintiffs', ruling that evidence of the redesign was inadmissible under Federal Rule of Evidence 407, as it was a subsequent remedial measure. At trial, a jury returned a verdict for Blaw-Knox to which the plaintiffs appealed. On appeal, plaintiffs argued that Rule 407 does not apply to subsequent remedial measures taken by a non-party. The Third Circuit agreed and held that Rule 407 does not bar evidence of remedial measures taken by a non-party, on the basis that the admission of remedial measures by a non-party will not expose that non-party to liability and therefore will not discourage the non-party from taking remedial measures in the first place; a party-manufacturer would be discouraged from improving safety of their products if such changes can be introduced as evidence that their previous designs were defective. - **Diehl v. Blaw-Knox, 360 F.3d 426 (3d. Cir. 2004).**

Plaintiffs brought a strict liability action against the defendant manufacturers following an accident involving a mechanical press manufactured by the defendant and use by the plaintiff. The parties stipulated that one manufacturer assumed all liability for design, manufacture, and sale of the press. During a bench trial, the court held initially that the mechanical design of the press was safe with the inclusion of an anti-repeat device. The court then held that the press was substantially altered subsequent to leaving the manufacturer, in that the latch bracket assembly on the press was no longer safely fastened to the press, that the modifications to the press were not reasonably foreseeable to the manufacturer, and that the modifications to the press were a superceding cause of the injured party's injuries. The court further held that the manufacturer did not have an obligation to provide guards. The court finally held that the manufacturer was not liable for a failure to warn because the warnings attached to the press were sufficient to warn the injured party of any dangers that were reasonably foreseeable by the manufacturer and that the alleged insufficiency of the warnings was not the cause in fact or the proximate cause of the injuries. Therefore, the court entered judgment for the manufacturer and against the plaintiffs. - **Fisher v. Walsh Parts & Serv. Co., Inc., 296 F.Supp.2d 551 (E.D.Pa. 2003).**

Appellant injured party brought a products liability action against multiple companies including appellee companies. The injured party alleged that certain of appellees' products contained asbestos and that his use of these products caused him to develop mesothelioma. The trial court granted appellees' motions for summary judgment. The injured party then appealed. The trial court held that, as a matter of law, the evidence presented by the

injured party did not meet the frequency and regularity requirements of the Eckenrod test which requires a plaintiff to prove frequent, regular, and proximate exposure to a defendant's product. In asbestos litigation, the injured party has to present evidence that he inhaled asbestos fibers shed by appellees' products. Ideally, the injured party would be able to directly testify that he breathed in asbestos fibers and that those fibers came from appellees' products. The appellate court found that the trial court erred as a matter of law. The injured party was able to testify and stated that he worked with appellee's products and inhaled fibers from these products. The question as to whether there was sufficient regularity and frequency so as to cause the injured party's injury was a question for the jury. Because the injured party provided direct testimony, the Eckenrod test was not applicable. Therefore, the trial court erred in applying the Eckenrod test. Accordingly, the Superior Court of Pennsylvania vacated the judgments of the trial court and the case was remanded. - **Gilbert v. Monsey Products Company and A.P. Green Refractories Company, 861 A.2d 275 (Pa.Super. 2004).**

Plaintiffs, a cigarette smoker and his wife, brought a products liability action against defendant cigarette manufacturer. Therein, plaintiffs brought failure to warn claims against defendant manufacturer. The plaintiff smoker was diagnosed with lung cancer after 30 years of smoking. The trial court granted defendant cigarette manufacturer's motion for summary judgment, resulting in the dismissal of the lawsuit in its entirety. Plaintiffs appealed to the Superior Court of Pennsylvania. The Superior Court concluded that the trial court did not err in dismissing the failure to warn claims because the record contained evidence that the smoker continued smoking long after federally-mandated warnings of the dangers of cigarette smoking appeared on packages in 1969. The Court noted that plaintiff smoker did not quit smoking until 1992. The Court reasoned that this evidence adequately rebutted any presumption that the smoker would have quit smoking if the manufacturer had earlier warned of the dangers of its product. - **Goldstein v. Phillip Morris, Inc., 854 A.2d 585 (Pa.Super. 2004).**

Plaintiffs, husband and wife, sued for a workplace injury which happened to the husband. Plaintiffs alleged products liability against defendant manufacturer. Plaintiffs claimed the manufacturer made and installed a complicated and expensive box folding machine which contained unguarded chains and sprockets within arm's reach of operators. The manufacturer moved for summary judgment, arguing assumption of the risk. The husband testified that in reaching for the control box, he made special effort not to grab the chain because he knew that if he was not careful with his fingers, they could get in the chain and get pinched. The court found that the husband was aware of the "known danger" before he proceeded to grab the box and thus assumed the risk of his injury. His deposition testimony demonstrated his objective awareness of the risk of the box getting caught in the chain, as well as the risk of his fingers getting pinched if he put them too close to the chain. Yet, he proceeded in the face of this danger and grabbed the box. Just as he feared, the box

got caught in his hand and was pulled into the chain and sprocket. The court concluded that, in light of his awareness of this risk, the husband's decision to grab the box was unreasonable. As no genuine issue of fact remained, the manufacturer had to prevail as a matter of law. The court found the husband's self-serving statement that he did not think he was in harm's way was inadequate to overcome his admissions regarding the risk of the box and fingers getting caught. Accordingly, the U.S. District Court for the Eastern District of Pennsylvania, granted summary judgment to the manufacturer. - **Karim v. Tanabe Machinery, Ltd., 322 F.Supp.2d 578 (E.D. Pa. 2004).**

Plaintiff brought products liability action against Guidant Corporation and Advanced Cardiovascular Systems (ACS) seeking recovery for injuries he sustained when a guidewire manufactured by ACS fractured during the course of an angioplasty procedure. ACS is a wholly owned subsidiary of Guidant. ACS designed, manufactured, distributed, and sold medical devices, including the guidewire at issue in this case. Guidant moved for summary judgment, arguing that, as merely ACS's parent corporation, Guidant is not liable for ACS's acts. The federal district court granted summary judgment in favor of Guidant and dismissed all claims against it. The court relied upon the general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. The court further noted that mere ownership of a subsidiary does not justify the imposition of liability on the parent for acts of the subsidiary. It is only where the parent corporation dominates a subsidiary to such a degree that the subsidiary is a mere instrumentality of the parent or amounts to a sham corporation that the corporate existence of the subsidiary may be disregarded. - **Parkinson v. Guidant Corp., 315 F.Supp. 2d 741 (W.D. Pa. 2004).**

The administratrix of estates of decedents who died in a house fire started by a child playing with a butane lighter that did not have child-resistant features brought a products liability action against the manufacturers and distributors of the butane lighters. The trial court granted summary judgment for the defendants on all claims, including design defect sounding in both strict liability and negligence, negligent infliction of emotional distress, breach of the implied warranty of merchantability, and punitive damages. As to the design defect claim sounding in strict liability, the trial court noted that plaintiff was required to establish that the lighter was unsafe for its intended use, but founded upon the fact that a two-year old was not an "intended user," the court dismissed the strict liability claim. Additionally, the court found that where a product is found not to be defective for strict liability purposes, then a design defect claim sounding in negligence must also fail. The court similarly dismissed the emotional distress claim on the basis that plaintiff had failed to state a cause of action for negligence. As to the breach of warranty claim, the trial court found the lighter was fit for its ordinary purposes. Finally, the court held there was no evidence of wanton or willful misconduct sufficient to warrant a punitive damage claim. On appeal, the Superior Court reversed the trial court's entry of summary judgment on all five of these claims. As to the strict liability claim, the court posited that the product must

be safe for its intended use, when it was used by any user, either intended or unintended. On the claims for negligent design and negligent infliction of emotional distress, these claims were reversed in conjunction with the determination that a strict liability claim was viable. The Superior Court also reversed the breach of warranty and punitive damage claims, but provided no analysis for those conclusions, other than presuming the punitive damage claim was only dismissed because no other viable causes of action existed. Defendants then filed a petition for allowance of appeal, which was granted. Upon further appeal, the Supreme Court of Pennsylvania affirmed in part and reversed in part, and held that the administratrix failed to establish a claim for strict liability and that fact questions precluded summary judgment on the negligence claims. In reference to the strict liability claim, the Court agreed with the trial court and concluded that in a strict liability design defect claim, the plaintiff must establish that the product was unsafe for its intended user, and that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user, as such a standard would improperly import negligence concepts into strict liability law. As to the negligent design, negligent infliction of emotional distress, and punitive damage claims, the Court determined factual questions precluded entry of summary judgment on those claims. The breach of warranty claim was remanded to the Superior Court with instructions to provide reasoning for the disposition of the claim. - **Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003).**

XXVIII. RES JUDICATA

The plaintiff wife challenged the decision of the trial court, in the wife's divorce and equitable distribution action against the defendant husband. The plaintiff also challenged the court's decision granting the son's petition to intervene and declared the son to be the owner of a brokerage account under the Pennsylvania Uniform Transfers to Minors Act (PUTMA), 20 Pa. C.S.A. § 5301, et seq. The trial court concluded, in a prior order, that a portion of the account was the son's property and that the remainder of the account was marital property subject to equitable distribution. After the husband filed a motion for reconsideration and the son intervened, the trial court granted the motion to intervene and awarded the account to the son. In affirming, the Superior Court held that the order was appealable as a collateral order under Pa.R.A.P. 323. Next, the court concluded that the son's action was not barred by res judicata or collateral estoppel because the son was not a party to the matter when the trial court issued its prior order, and it was not barred by the doctrine of laches because the wife failed to show that she was prejudiced by the son's delay in filing his petition to intervene. The court then concluded that the wife waived her contention that the trial court was prohibited from reversing its prior order because she cited no authority as required by Pa.R.A.P. 2119. Finally, the trial court properly applied PUTMA in determining whether the brokerage account was the property of the son, because by the wife's own admission, the account was specifically set up under PUTMA

and she knew the account was being established on behalf of the son. - **Radakovich v. Radakovich, 846 A.2d 709 (Pa. Super. 2004).**

XXIX. STATUTE OF LIMITATIONS

Appellants, the injured party and another, appealed the trial court order which denied appellants' motion to amend their personal injury complaint and granted summary judgment in favor of appellee corporation. The injured party was touring a two-story home with a real estate agent as a prospective buyer. While descending a set of steps in the house, the steps gave way, causing the injured party to fall to the ground and suffer injuries. The complaint named the corporation as the owner of the house. There were ongoing negotiations between appellants and the corporation's insurer. Appellants filed suit before the statute of limitations had run. Several months later the corporation denied ownership of the house. On appeal, appellants argued that the corporation's agents actively misled them as to the identity of the proper owner of the house. The Superior Court concluded that the trial court abused its discretion in denying appellants' motion to amend because they established by clear and convincing evidence that the corporation's agents actively misrepresented the identity of the proper owner of the house. The corporation admitted that the insurer's employees acting on its behalf knew that the corporation was not the owner of the house when they engaged in negotiations with appellants. Accordingly, the Superior Court found that the lower court abused its discretion in denying the motion to amend and reversed the Order. - **Blaine v. York Financial Corporation, 847 A.2d 727 (Pa. Super. 2004).**

Plaintiff injured party appealed the judgment of the trial court granting summary judgment in favor of the defendant. A car owned by the defendant, while unoccupied, rolled forward and struck the plaintiff. The plaintiff was unloading his employer's truck. Just after the statute of limitations expired, the owner filed an answer, which was not filed within 20 days pursuant to Pa.R.C.P. 1026, stating that his son was the operator of the vehicle on the day of the accident. The injured party filed a motion to amend the complaint in order to substitute the son as defendant. The motion was denied. The Superior Court reversed and concluded that the trial court erred in granting summary judgment. The Superior Court concluded that the plaintiff could amend the complaint to substitute the son as defendant, because the owner, through his insurer and counsel, actively misled the plaintiff as to the identity of the driver. Despite having this information, the insurer failed to respond to the injured party's request for information regarding the driver. The Superior Court remanded with instructions to permit the amended caption and vacated the trial court's order. - **Diaz v. Schultz, 841 A.2d 546 (Pa. Super. 2004).**

Defendant bank officer filed a motion to dismiss counterclaim plaintiff partnership's action, which alleged breach of a loan agreement, breach of an oral contract, fraud, negligent misrepresentation, breach of fiduciary duty, and negligence. Plaintiff business owner filed a motion for leave to file a third amended complaint against the officer to add claims of breach of a loan agreement and breach of an oral contract to her existing claims. The owner had obtained a loan for her business, signing the loan agreement as an individual surety. The partnership, whose sole purpose was to own and operate property used as the business' headquarters, also signed as a surety. The owner later spoke with the bank officer about an additional loan. Although the bank officer sought another lender to participate in the loan, he assured the owner that in the meantime the bank would honor checks of the business even if it did not have enough money in the account. The business wrote a large check to cover mailing costs for its catalogs, which the bank did not honor. Ultimately, the business went bankrupt and the partnership defaulted on its mortgage because the business was unable to pay rent. After filing her complaint, the owner sought to add claims for breach of the loan agreement and an oral contract. The court held that, because it was possible that the bank officer could be personally liable, it would allow the amendment. The court dismissed the tort claims brought by the partnership because they were filed more than two years after the claims accrued, which the court determined to be the date the bank refused to honor the check. Accordingly, the court granted the officer's motion to dismiss with respect to fraud, negligent misrepresentation, breach of fiduciary duty, and negligence claims, but denied the motion as to the breach of loan agreement and oral contract claims. It also granted the owner's motion to file a third amended complaint. - **Dicicco v. Willow Grove Bank, et al, 308 F. Supp. 2d 528 (E.D. Pa. 2004).**

Appellants, an architectural group and nine other entities involved in a site investigation and/or construction of a mall, sought review of an order of the Supreme Court which reversed in part a finding of the trial court regarding the proper statute of limitations to be applied in appellee mall owner's action for breach of various real estate construction contracts. A subsurface investigation of the property where the owner's mall was built showed that it contained layers of shale that could make the construction of the mall subject to damage from heaving and buckling. The owner went ahead with the mall, and within two years of its completion, the mall began to suffer damage. The owner incurred substantial expense in correcting the damage and then sued Appellants. At issue was whether the six-year statute of limitations in 42 Pa. Cons. Stat. §5527 or the four-year statute of limitations in 42 Pa. Cons. Stat. §5525(a)(8) applied. The trial court ruled that the latter statute applied, while the Superior Court ruled that the former applied. The Supreme Court agreed with the trial court. In reaching its decision, the Superior Court had improperly assessed public policy and what seemed "fair." As the language of §5525(a)(8) was not ambiguous, that form of statutory interpretation was improper. The language of §5525(a)(8) was clear, and the Court held that, except in circumstances where another limitations period explicitly applied, all contract actions are governed by the four-year

limitations period in §5525(a)(8). - **Gustine Uniontown Associates, LTD, et. al. v. Anthony Crane Rental Inc., et. al., 842 A.2d 334 (Pa. 2004).**

The issue was whether the statute of limitations was tolled by the filing of the writ of summons. Pursuant to Pa. R. Civ. P. 1007, the action was commenced when a praecipe for a writ of summons was filed. Service was made by a constable. Thereafter, the injured party was required to make a good faith effort at service instead of stalling the judicial process. The injured party did so by promptly filing a complaint following the praecipe and had service of that complaint timely made by a sheriff pursuant to Pa. R. Civ. P. 400. While the trial court was correct in striking the service made by the constable as improper under Pa. R. Civ. P. 400 and 401, it erred in dismissing the action as barred by the statute of limitations. - **Johnson v. Allgeier, 2004 Pa. Super. 229, 852 A.2d 1235 (2004).**

On July 8, 2002, the injured parties filed a praecipe for writ of summons against a driver they alleged was negligent on September 25, 2000, and they attempted to effectuate service. The sheriff's return indicated the driver had moved. On January 7, 2003, the injured parties filed a complaint against the driver. However, the complaint was never served on the driver. The driver alleged that the two-year statute of limitations pursuant to 42 Pa.C.S.A. §5524 had expired and that the injured parties' writ of summons did not halt the statute of limitations since it had not been properly served upon the driver or continually reissued. The Superior Court held that the trial court erred in finding that service was not properly effectuated. The case relied upon by the trial court stated that the writ had to be reinstated immediately and continually in order to achieve good service. This case, however, was a plurality opinion and was not binding law. The standard remained that the injured parties had to make a good faith effort to serve the driver. The Superior Court held that the trial court erred in relying on a case that was not binding precedent and in failing to conduct a good faith effort analysis. Therefore, the order was reversed, and the case was remanded for the trial court to hold a hearing and more fully explore whether the injured parties made a good faith effort to serve the driver in the instant case. - **Sardo v. Smith, 2004 P.A. Super 172, 851 A.2d 168 (2004).**

Plaintiffs brought medical malpractice action against Defendant doctor alleging that Plaintiff-patient suffered permanent heart damage on September 4, 1997 as the result of the doctor's installation of a cardiac stent. Plaintiffs filed their Complaint before the expiration of the applicable two-year statute of limitations for negligence claims, but did not complete the Sheriff's "service" form or pay the "service fee" to effect service on Defendant. After the untimely service of the complaint upon counsel for Defendant, Defendant filed an Answer to Plaintiffs' Complaint, with New Matter endorsed with a notice to plead. In his New Matter, Defendant pleaded the affirmative defense of the statute of limitations. Plaintiffs did not file a reply to Defendant's New Matter. Defendant then filed a Motion for

Summary Judgment predicated on the expiration of the applicable statute of limitations prior to service of Plaintiffs' Complaint on Defendant's counsel. The trial court granted summary judgment, and Plaintiffs' appealed to the Superior Court of Pennsylvania. The Superior Court held that the filing of a complaint to commence an action is sufficient to toll running of the statute of limitations only if the plaintiff makes a good faith effort to serve the complaint in compliance with the other applicable rules of court. On appeal, Plaintiffs argued that they had defenses of estoppel, agreement, agency, and/or apparent authority to the Defendant's New Matter affirmative defense of statute of limitations. The Superior Court held that, because Plaintiffs did not file a reply to Defendant's New Matter, Plaintiffs waived those defenses. Said defenses were unreviewable on appeal because they were not presented to the trial court in Plaintiffs' opposition to Defendant's Motion for Summary Judgment. Accordingly, the Superior Court affirmed the grant of summary judgment in favor of the Defendant doctor. - **Devine v. Hutt, 863 A.2d 1160 (Pa.Super. 2004).**

Appellant Consumer appealed an order of the court of common pleas of Allegheny County which denied her motion for partial summary judgment in an action against appellees, an insurer and its sales agent. The order also granted appellees' motion for summary judgment and dismissed the consumer's complaint, which included claims of fraud and violation of the Uniform Trade Practices and Consumer Protection Law ("UTPCPL"). The agent sold the consumer a life insurance policy rather than the requirement she requested. Although she received a copy of the policy, the consumer argued that she did not discover the ruse until she received notification of a class action against the insurance company. The consumer's action was filed more than three years after she received her copy of the policy. The trial court properly dismissed the consumer's fraud, negligent misrepresentation and negligence supervision claims based on the two-year statute of limitations for those claims. The discovery rule did not extend those periods because the consumer failed to use due diligence in making inquiries as to why she never received information on the retirement plan. The consumer's bad faith claim was also properly dismissed as no right of action against appellees existed under the Unfair Insurance Practices Act. However, the trial court improperly ruled as a matter of law that the consumer could not establish justifiable reliance on the representations made by the agent about the retirement plan. Thus, the grant of summary judgment on the UTPCPL claim was improper. Accordingly, the Superior Court of Pennsylvania affirmed the trial court's order as to the denial of the consumer's motion for partial summary judgment and with respect to the dismissal of the fraud, negligent misrepresentation, negligent supervision and bad faith claim. The order was reversed with respect to the consumer's UTPCPL claims and the case was remanded for further proceedings. - **Toy v. Metropolitan Life Insurance Company and Bob Martini, 863 A.2d 1 (Pa. Super. 2004).**

XXX. UNEMPLOYMENT COMPENSATION

Board of Review affirmed a referee's decision to deny employee unemployment compensation benefits under Pa.Stat. Ann. Title 43, §802(e). The employee sought judicial review. The employee was fired for violating the employer's written policy prohibiting using the employer's computers to display or distribute graphic, obscene material. The appellate court held the evidence supported the conclusion that the employee used the employer's computer to download pornographic material in violation of the policy and in disregard of standard behavior the employer had a right to expect of the employee. As the employee downloaded the material to the employer's computer and left the compact disc containing obscene material in the computer, there is a necessary inference that the employee displayed the material. The policy prohibited use of the employer's property in connection with obscene material, and a violation did not depend on whether the conduct occurred at work. The policy was violated when the employer's property was used in an unauthorized manner. When the employee used the employer's property to download the material, it was contrary to the reasonable standards of behavior the employer had a right to expect. Any evidence that the policy was not uniformly enforced would not change the result. As a result, the decision of Board was affirmed. - **Burchell v. Unemployment Compensation Board of Review, 848 A.2d 1082 (Pa.Cmwlt. 2004).**

Claimant worker sought unemployment compensation benefits following his discharge by employer. The hearing referee awarded benefits and the Board affirmed the award. Because an employer witness testified that the claimant was not discharged for cause, the Board determined that claimant was not guilty of willful misconduct. Employer petitioned for review of the Board's Order. The Commonwealth Court affirmed, holding that the employer's failure to challenge on appeal the determination that claimant was not ineligible for benefits under statute governing willful misconduct precluded appellate review of Board's decision affirming award of benefits. - **Dept. of Economic Dev. v. Unemployment Comp. Board of Review, 847 A.2d 229 (Pa.Super. 2004).**

Respondent Pennsylvania Unemployment Compensation Board of Review, pursuant to § 402(e) Pa. Stat. Ann. tit. 43, § 802(e) of the Pennsylvania Unemployment Compensation Law, reversed the decision of an unemployment compensation referee granting petitioner claimant benefits. The claimant appealed. The claimant was fired for violating his employer's code of ethics by lying to management to cover up the theft of its property by a co-worker. He was granted unemployment benefits; the employer appealed, but the referee affirmed. In reversing the referee, the Board found that the claimant's lying to his supervisor about the stolen property was willful misconduct under § 802(e). The claimant argued that his failure to report the inappropriate conduct of a co-worker was not willful misconduct. The appellate court held that the claimant did not simply withhold information about the co-worker's theft; he took affirmative action when, on his own

initiative, he called his supervisor and misled him about the circumstances regarding the theft. Therefore, the Board properly ruled that he was ineligible for benefits. - **DeRiggi v. Unemployment Compensation Board of Review, 856 A.2d 253 (2004 Pa. Cmwlth), LEXIS 572 (2004).**

Petitioner claimant appealed the order of respondent Pennsylvania Unemployment Compensation Board of Review (UCBR), which affirmed as modified the decision of a referee and denied the claimant unemployment compensation benefits pursuant to Pa. Stat. Ann. tit. 43, § 802(e). On appeal, the claimant argued that the UCBR erred in denying her benefits based on willful misconduct. Specifically, the claimant argued that she reasonably believed the employer's absenteeism policy did not apply to her because her absence was protected under the Family and Medical Leave Act (FMLA), 29 U.S.C.S. §§ 2601-2654. The appellate court found that the claimant provided the employer with information sufficient to trigger the employer's obligation to provide the claimant with information concerning her rights and responsibilities under the FMLA, including the claimant's obligations regarding ending that leave. The employer had the burden to ensure an adequate understanding between the employer and the employee regarding the FMLA, and the employer admitted that it made no attempt to provide such information to the claimant. Where the employer discharged the claimant for failing to report absences that, under the circumstances, the claimant reasonably believed were protected under the FMLA, the employer had not demonstrated a conscious wrongdoing on the part of the claimant, and the UCBR erred in concluding that the claimant's action rose to the level of willful misconduct. The appellate court reversed the order of the UCBR denying unemployment compensation benefits to the claimant. - **Mary M. Eshbach, Petitioner v. Unemployment Compensation Board of Review, Respondent, 855 A.2d 943 (Pa. Cmwlth. 2004).**

Petitioner claimant petitioned for review of a decision of respondent Pennsylvania Unemployment Compensation Board of Review which affirmed the decision of a referee denying the claimant benefits pursuant to Pa. Stat. Ann. Tit. 43 §802(e). The claimant testified that he developed a software program during his free time at home. He believed that the program was his intellectual property because it was not developed for or at the request of the employer. Nonetheless, the claimant handed the program over when asked to do so by the employer. The software was not impeded by a password protection or any other device. The claimant merely requested that the employer not use it until the dispute over the ownership of the software was adjudicated in a court of law. Because this was merely a request, the employer was free to disregard it. The claimant's actions did not constitute a wanton and willful disregard of the employer's interests, a deliberate violation of the employment agreement, a disregard for standards of behavior or negligence indicating an intentional disregard of the employer's interests or his duties and obligations. The appellate court concluded that the claimant did not commit willful misconduct, because he turned over the software program to the employer when asked to do so and his

request did not impede the employer 's use of the software. Accordingly, the Commonwealth Court of Pennsylvania reversed the Board's order. - **Ross v. Unemployment Compensation Board of Review, 861 A.2d 1019 (Pa.Cmwlt. 2004).**

Petitioner claimant petitioned for review of an order issued by the Board of Review, which reversed a referee's determination that the claimant was eligible for benefits under 43 Pa.C.S.A. § 802(e), relating to willful misconduct. The claimant was called into a meeting with her employer. She hid a tape recorder in her shirt pocket and recorded the meeting without the employer's knowledge or consent. The employer found out and terminated the claimant. On appeal, the claimant argued that the employer did not have a clear work rule which she violated. The Commonwealth Court found that the claimant acknowledged receipt of the employer's handbook, which put her on notice of the employer's policies, and that she signed a confidentiality statement during the tenure of her employment. Also, the claimant understood that the meeting that she recorded would be confidential. The claimant admitted that she recorded the meeting without permission, but argued that she did so because she did not trust the employer. It was evident that the employer had an expectation of privacy during the meeting, which the claimant was aware of and breached. Therefore, the Board of Review did not err in determining that the claimant's action was a disregard of the standards of behavior which the employer had a right to expect of an employee. - **Schroeder v. Unemployment Comp. Bd. of Review, 846 A.2d 790 (Pa. Commw. 2004).**

Claimant petition for review of the order of the Unemployment Compensation Board of Review (Board), which affirmed the referee's decision that claimant voluntarily quit his employment making him ineligible for unemployment compensation benefits. The referee found that claimant told his supervisor that he quit. Upon review, the Commonwealth Court affirmed, concluding that the record revealed that the Board's findings were supported by substantial evidence. Claimant argued that he had a "necessitous and compelling" reason for voluntarily terminating his employment in that his supervisor allegedly made claimant's working conditions intolerable. The Court noted that, under Pennsylvania law, a claimant must establish that he acted with ordinary common sense in quitting his job and that he had made a reasonable effort to preserve his employment. The Court observed that the record contained no evidence to support claimant's allegations and that mere dissatisfaction with one's working conditions is not a "necessitous and compelling" reason for terminating one's employment. - **Spadaro v. Unemployment Comp. Bd. of Rev., 850 A.2d 855 (Pa.Cmwlt. 2004).**

Petitioner employer sought review of the decision from the Board of Review, which affirmed a referee's decision granting unemployment benefits to an employee who was discharged for violating the employer's drug use policy. The employer subjected

employees to random drug tests conducted in accordance with the U.S. Department of Transportation standards. The employee tested positive for cocaine twice, and subsequently was terminated. The employee sought unemployment benefits and the Board of Review found that the employer failed to sustain its burden of proving willful misconduct required by 43 Pa. Cons. Ann. § 402(e). On appeal, the Commonwealth Court reversed the Board of Review's decision, finding that the Board erred because it applied § 402(e) rather than the newly enacted § 402(e.1) of the Unemployment Compensation Law. Section 402(e.1) governs the eligibility for unemployment compensation benefits after an employee failed to pass a drug test. The Court found that in accordance with § 402(e.1), the employer showed that it had adopted a substance abuse policy that the employee violated. The Court then noted that § 402(e.1) did not relieve an employer from laying a foundation for a lab report and concluded that although irregular, once admitted, the employer's lab report of the employee's positive drug test were entitled to be given probative value. - **UGI Utilities, Inc. v. Unemployment Compensation Bd of Review, 851 A.2d 240 (Pa. Commw. 2004).**

Petitioner employer petitioned for review of an adjudication of the Board of Review, which awarded benefits to the claimant. In doing so, the Board of Review affirmed the decision of a referee that the employer's appeal was untimely under 43 Pa. Cons. Stat. § 821(e), and thus properly dismissed. The employer dismissed the employee on April 14, 2003. Her application for unemployment benefits was granted on May 12, 2003. However, the determination was mailed to the employer on June 18, 2003, long after the appeal deadline of May 27, 2003, had passed. Although the determination was not sent to the correct address, the employer received it on June 19, 2003, and filed an appeal on July 1, 2003. On appeal, the employer argued that it was entitled to appeal nunc pro tunc. The Commonwealth Court concluded that the delay was caused by a breakdown in the applicable administrative process of the Pennsylvania Department of Labor and Industry. The employer could not be punished for these breakdowns in the system. By statute, the employer is entitled to 15 calendar days to evaluate the decision and decide whether to appeal. Therefore, the court permitted the employer to file an appeal with the time beginning to run from the date the employer received the notice. - **UPMC Health System v. Unemployment Compensation Bd. of Review, 852 A.2d 467 (Pa. Commw. 2004).**

Employer contributes to and maintains a pension plan for retired employees. Employees were to receive a cost of living adjustment (COLA) in their pay early in 1980 as a part of the current contract. The employer and the union agreed that the union would relinquish the COLA in exchange for a lump-sum contribution to the pension fund. Claimant, and others similarly situated, filed for unemployment sometime after this lump-sum payment. These claimants were receiving payments from the plan. The issue in the consolidated appeals turns on the law which says that if the pension is 100% contributed to by the employer, then there is a 100% deduction of the amount received from the unemployment

benefits. If the individual contributes to the plan, then the pro-rata amount is credited at 50%. It was stipulated that, except for the bargained for lump-sum payment discussed earlier, the plan was otherwise funded by 100% employer contributions. The unemployment referee agreed with the claimant that the lump-sum payment constituted an employee contribution, therefore the offset of UC benefits was at 50%. The Board upheld the referee's ruling, based on *Elman v. Unemployment Comp. Bd. of Review*, 776 A.2d 1031 (Pa.Cmwlt. 2001) The Commonwealth Court reversed, overruling its decision in *Elman*. After a lengthy discussion of statutory interpretation and the goals behind the laws of unemployment compensation, the Pennsylvania Supreme Court affirmed. - **USX v. Unempl. Comp. Bd. of Rev., 858 A.2d 91 (2004 Pa. LEXIS 2181).**

Petitioner claimant appealed the order of respondent Pennsylvania Unemployment Compensation Board of Review, which denied the claimant benefits under 43 P.S. §802(e). On appeal, the claimant questioned whether she was discharged from her employer for disqualifying willful misconduct with her work within the purview of 43 P.S. §802(e). Specifically, the claimant argued that the Board erred in determining that the employer had a clear policy in place against internet usage. The appellate court concluded that the claimant's conduct constituted willful misconduct because it was contrary to reasonable standards of behavior for an employee to use company property for personal activities without authorization, even absent a rule prohibiting with conduct. The claimant accessed the internet during working hours rather than during her personal breaks or lunch. Moreover, the claimant was aware of the policy prohibiting the use of the internet for personal purposes except for designated times and requiring her to seek out more work from her supervisor if she was short on work. Thus, the Board properly determined that the claimant violated a clearly established policy and that her behavior constituted willful misconduct. Accordingly, benefits were properly denied. As such, the Commonwealth Court of Pennsylvania affirmed the Board's order. - **Pettyjohn v. Unemployment Compensation Board of Review, 863 A.2d 162 (Pa. Cmwlt. 2004).**

Claimant worked as a meter reader for Equitable Gas Company ("Equitable Gas"). The terms and conditions of Claimant's employment were governed by a Collective Bargaining Agreement which provided in part that meter readers who finished a route in fewer than eight hours were required to complete an eight hour shift by performing other duties and were prohibited from conducting personal business on company time. In the course of his employment, Claimant was observed concluding his assigned route at approximately 1:00 p.m. on a day in which he was scheduled to work until 4:00 p.m. Following the completion of his assigned route, Claimant was also observed going home, picking up his children at school, stopping at a pharmacy, and returning home at approximately 3:30 p.m. Claimant did not contact his employer to request time off or to request additional assignments. Over two months later, Equitable Gas terminated Claimant for conducting personal business on

company time and collecting pay for hours he did not actually work. Claimant was initially determined to be ineligible for compensation for willful misconduct. However, the Unemployment Compensation Bureau Referee reversed the denial of benefits, concluding that Claimant's conduct was too remote in time from his discharge to warrant a denial of benefits. Equitable Gas appealed to the Unemployment Compensation Board of Review ("UCBR") which reversed the referee's decision, finding that the "Remoteness Doctrine" was not applicable. Claimant petitioned the Commonwealth Court of Pennsylvania for review of the Order of UCBR. The Commonwealth Court held that, although there was a 74 day delay between Claimant's alleged misconduct and his discharge, the Remoteness Doctrine was not applicable so as to preclude a denial of benefits for willful misconduct. The Court noted that, where there is an explanation for the delay and there is no action on the part of the employer indicating that it condoned the Claimant's conduct, the "Remoteness Doctrine" does not apply. The Court reasoned that Equitable Gas' investigation and administrative review process concerning employee misconduct was a proper explanation for the delay. Accordingly, the Court affirmed the UCBR's denial of benefits. - **Raimondi v. Unemployment Compensation Board of Review, 863 A.2d 1242 (Pa.Cmwlt. 2004).**

XXXI. VENUE

Villanova University's campus is located in Delaware County. At the time of the accident, both the injured woman and the driver were students at the university. The driver was dismissed from the suit. The injured woman contended on appeal that the trial court erred in changing the venue of the action because the university held classes and conducted business in Philadelphia County. The injured woman relied upon five classes held by the university in Philadelphia County and its nursing program that used hospitals located outside of Delaware County. The injured woman primarily relied upon the university's website, which listed the five classes. The court held that it was undisputed that the university's principal place of business was in Delaware County and that the accident occurred in Delaware County. Moreover, there was no allegation that any transaction or occurrence out of which the cause of action occurred took place in Philadelphia County. As a result, the court found that venue was proper in Delaware County because the university did not conduct enough regular business in Philadelphia County to have been subjected to the jurisdiction of a court in that county. - **Singley v. Flier and Villanova University, 2004 Pa. Super 187, 851 A.2d 200 (2004).**

In a personal injury action, appellants alleged professional malpractice by appellees, a hospital and a doctor, in connection with the birth of the appellants' child. They filed the action in Philadelphia County, but appellees objected to venue. The Court of Common Pleas of Philadelphia County sustained the objection and transferred venue to Montgomery County, to which the appellants appealed. All of the events giving rise to the litigation transpired in Montgomery County. The hospital's principal place of business was

there, the injured parties resided there, and the doctor's office was located there. On appeal, the appellants argued that the trial court abused its discretion in finding that the quality and quantity of the hospital's contacts with Philadelphia County were insufficient to satisfy Pa. R.C.P. 2179(A)(2). The appellate court concluded that the hospital's practice of advertising in telephone books, in newspapers, on television, and on the Internet as a "health care center serving people in Philadelphia County" were insufficient to establish venue in Philadelphia County. Additionally, the hospital's relationship with two small Philadelphia County physician practice groups was incidental to its main goal of providing hospital care in Montgomery County. Thus, the court determined the trial court correctly transferred venue to Montgomery County and affirmed the order. - **Goodman v. Fonslick, et. al., 844 A.2d 1252 (Pa. Super. 2004).**

XXXII. WRONGFUL EMPLOYMENT PRACTICES

A. Age-Related Cases

Retired state police troopers brought an action against the Pennsylvania State Police (PSP), alleging age discrimination under the Pennsylvania Human Relations Act (PHRA). The PSP had issued a directive that expressly limited overtime for state troopers who had certain specified years of service. In issuing the directive, PSP had safety concerns for the troopers and the public based upon the substantial overtime that the troopers were working in a construction area. PSP also believed that troopers who were about to retire were using overtime assignments to "pad" their pensions, which were based upon the actual pay employees receive in the year preceding retirement. The directive stated that troopers eligible for retirement shall not be favored for overtime assignments and that overtime was to be assigned on an equitable basis. Following a non-jury trial, the trial court ruled in favor of the PSP, concluding that it did not commit age discrimination against the troopers under the PHRA. On appeal, the Commonwealth Court of Pennsylvania held that it was permissible for PSP to expressly limit overtime for state troopers who had certain specified years of service, without violating the PHRA. The Court reasoned that an employment decision based on years of service is not necessarily related to calendar age. - **Mallick v. Pennsylvania State Police, 862 A.2d 739 (Pa.Cmwlth. 2004).**

Employee sought review of the order of PHRC, which awarded the employee back pay and out-of-pocket expenses as compensation for employer's improper refusal to promote the employee by reason of his age. However, it declined to award damages resulting from the employee's discharge. On appeal, the employee argued that the PHRC erred by applying the doctrine of judicial estoppel to preclude the award of damages on his termination

claim, and that the PHRC failed to award him sufficient damages on his failure to promote claim. A terminated employee is entitled to be made whole for losses sustained as a result of wrongful termination. Therefore, the Superior Court upheld the PHRC's decision to deny the employee's request for damages on his termination claim because the employee's improper termination did not cause a loss that the PHRC needed to address in order to make the employee whole. In fact, the employee was physically unable, according to his own sworn statements, to perform any work after July 13, 2001, due to a disability, and based on that representation, he collected substantial social security benefits. In addition, the PHRC's determination that the employee sustained an injury triggering his failure to promote claim on July 9, 2001, was supported by the employee's complaint. To the extent that the employer challenged this finding, it was too late; it failed to file an answer to the employee's complaint. Thus, the PHRC's award of damages would not be disturbed where it acted in its authority. - **Parks v. Pennsylvania Human Relations Commission, 848 A.2d 204 (2004).**

The manager of an apartment complex sued the ownership company alleging she was discharged because of her age. However, she had a history of various misconduct. These acts included the one which was the impetus of this litigation. She was caught stealing a dishwasher and having apartment employees install it in rental property that she owned personally. She made her claim relying on statements made some 10 months prior to her discharge. One was that the vice president of the company asked if she made the comment that she was 63 years old. The other, and more damaging, was that he told 2 co-workers that he wanted to replace her with a young girl that was well endowed. The court held that the statement regarding the hiring of the younger girl was direct evidence of age discrimination. This triggers the Price Waterhouse test. Under that test, the burden of going forward shifts to the employer to prove that it would have fired the employee even if it had not considered his/her age. The court held this is a very high burden on summary judgment because the employer must leave no doubt. Here in the instant matter, the Court found that the employee did present the necessary quantum of evidence to trigger the Price Waterhouse test. That being the comments about hiring the younger well endowed girl. However, the court also found that the employer also, had met the very high burden of showing beyond doubt that the employee would have been fired anyway, as she was caught stealing. - **Glanzman v. Metropolitan Management Corp., 391 F.3d 506 (3d Cir. 2004).**

B. Disability-Related Cases

Plaintiff employee sued defendant employer alleging violations of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and the Pennsylvania Human Relations Act (PHRA) for the employer's failure to reinstate her to her previous position or a substantially equivalent position upon her return from her medical leave. The employer moved for summary judgment. The employer claimed that it was entitled to

reduce the employee's bookkeeping hours while she was on medical leave due to a bookkeeping modernization process. The court held that the employee failed to show any FMLA violation by the employer because the employer presented evidence that it was undertaking a bookkeeping modernization process during the employee's medical leave which would have resulted in the elimination of the employee's full-time bookkeeper position irrespective of whether she took medical leave, and the employee failed to demonstrate pretext as she did not challenge any part of the employer's assertion that it was undergoing an automation process before, during, and after she was on medical leave. The court further held that the employee failed to show any ADA or PHRA violation because, although the employee was disabled due to her toe amputation and Charcot joint disease, the employer offered reasonable accommodation for her impairment which she refused without engaging in the interactive process, and the employee failed to demonstrate that the employer's bookkeeping modernization process reason for not returning her to her bookkeeping position was pretextual. - **Bearley v. Friendly Ice Cream Corp.**, 322 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 11688 (2004).

Pro se plaintiff, a former employee, alleged that defendant, her former employer, discriminated and retaliated against her in violation of the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act. The employer asserted that the employee provided no evidence supporting her claim and moved for summary judgment. The employee averred that her asthma substantially limited her ability to breathe and that her asthma, migraine headaches, and back injury substantially limited her ability to work. Her claimed impairment and breathing was subsumed by the claim of impairment in working because the only cause of any substantial impairment of her ability to breathe was the employer's smoke-filled workplace. However, the employee provided no evidence supporting her claim that she was substantially limited in the major life activity of working, she did not prove that she had a record of disability, and she was not regarded by the employer as disabled. Thus, her ADA discrimination claim failed as a matter of law because she did not show that she was within the protected class of individuals with a disability. Her retaliation claim also failed because she was unable to establish a prima facie case of retaliation. While the employee was able to demonstrate that she engaged in a protected activity and suffered adverse employment actions when she was transferred and later terminated, she was unable to establish a causal connection between her protected activities and the employer's adverse actions. Accordingly, the United States District Court for the Eastern District of Pennsylvania granted the employer's motion for summary judgment. - **Merit v. Southeastern Pennsylvania Transit Authority**, 315 F.Supp.2d 689 (E.D. 2004).

After being terminated from his position with defendants, a university and a center, plaintiff-employee brought suit alleging violations of the Pennsylvania Whistle Blower

Law; The Americans with Disabilities Act of 1990 (“ADA”); the Age Discrimination and Employment Act (“ADEA”); illegal retaliation in violation of the ADA; and the Pennsylvania Human Relations Act (“PHRA”). The action was removed to the United States District Court for the Eastern District of Pennsylvania and the defendants moved to dismiss. The university sought dismissal because: (i) the employee failed to exhaust his administrative remedies as to his ADA, 42 U.S.C.S. §12101 et seq.; ADEA, 29 U.S.C.S. §621 et seq.; and PHRA claims; and (ii) the employee’s demand for a jury trial under the PHRA was impertinent and should have been stricken. The center moved to dismiss because: (i) the ADA and PHRA claims were improper in that administrative remedies were not exhausted; and (ii) his demand for a jury trial under the PHRA should have been stricken. Although the employee filed suit before receiving a right-to-sue letter, he received such a letter not only prior to going to trial, but also prior to filing his complaint in the court of common pleas, thus, his ADA claim survived dismissal. The employee filed a timely complaint with the Equal Employment Opportunity Commission, and thus adequately exhausted his administrative remedies in regards to his ADEA claim. However, he filed suit months before the one-year period of exclusive PHRC jurisdiction ended. Therefore, he failed to exhaust administrative remedies as to the PHRA claim. As the PHRA claim was dismissed, defendants’ motions to strike were moot. As a result, the university’s motion to dismiss was granted by the Court with regard to the employee’s claims under PHRA, and was denied with regard to the ADA, the ADEA, and the retaliation claim. The center’s motion to dismiss was granted with regard to the PHRA claim, and was denied with regard to the ADA, and retaliation claim. Additionally, the center’s motion to strike the employee’s demand for a jury trial was denied as moot and its motion for more definite statement was denied. - **Plush v. Manufacturers Resource Center and Lehigh University, 315 F.Supp.2d 650 (E.D. 2004).**

Plaintiff employee brought an action alleging discrimination and retaliation claims under the ADA. The employee was unable to carry a firearm as the result of a mental condition and was additionally perceived by his employer to be unable to have access to fire arms, or be around others carrying firearms. The federal district court granted the employer’s motion for summary judgment, finding that the employee did not proffer sufficient evidence to support a retaliation claim because the record did not support a finding that the employer’s explanation for terminating the employee was pretextual. The district court also granted summary judgment to employer relative to this discrimination claim. Employee filed an appeal to the United States Court of Appeals for the Third Circuit. The Court of Appeals held that the district court properly granted summary judgment relative to the retaliation claim. However, with regard to the discrimination claim, the Court of Appeals held that the district court erred when it failed to consider whether the employer’s limitation would prevent the employee from performing work in a class of jobs and that a reasonable jury could have concluded that the employee was actually precluded from working in a class of jobs. The court reasoned that there was a material dispute of fact as

to whether the employee was disabled and whether he was regarded by the employer as being disabled. Accordingly, the court reversed the district court's grant of summary judgment as to the discrimination claim and remanded the claim for further proceedings. - **Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751 (3d.Cir. 2004).**

C. Race/Origin-Related Cases

The instant action was brought by plaintiff employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann. tit. 43, § 951 et seq., and alleged retaliation under both the federal and state statutes. Defendant employer moved for summary judgment. The employee was an African-American female, who worked as a part-time, "extra" mailer in the employer's mailroom facility. The employee wrote a grievance letter to a manager, alleging that, on the basis of her race and gender, she had been denied a full-time position in the mailroom and a full union card. Later, the employee filed a complaint of discrimination with the PHRC and the Equal Employment Opportunity Commission (EEOC). The court held that there was evidence of a close temporal proximity between some of the employee's protected activity and subsequent adverse employment actions, there was evidence of retaliatory animus and a pattern of antagonism directed towards plaintiff following her filing of the PHRA and EEOC complaints. Additionally, the employee proffered evidence of disparate treatment. Genuine issues of material fact existed as to whether or not the employee was insubordinate to a manager, and whether the employee prematurely left her work area one day. The existence of such ambiguity precluded the court from scrutinizing the employer's proffered reason for the employee's placement on the "do not hire" list and eventual termination. - **Parker v. Philadelphia Newspapers, Inc., 322 F. Supp. 2d 624, 2004 U.S. Dist. LEXIS 12072 (2004).**

In an action by plaintiff, an African American male, alleging race-based employment discrimination under 42 U.S.C.S. § 2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964, 43 Pa. Cons. Stat. Ann. § 955(a) of the Pennsylvania Human Relations Act, promissory estoppel, and fraudulent misrepresentation, defendant employer moved for summary judgment. After being contacted by defendant recruiter, which was acting on behalf of the employer, plaintiff quit his job and relocated to another Pennsylvania city. On his first day of work, he wore jeans and a flannel shirt over a white T-shirt. That night he slept in his car in the employer's parking lot and washed up in the employer's bathroom. When his supervisor saw him wearing the same clothes as the day before, he told him that it would be more appropriate if he wore a button-down shirt and Dockers, as the company's dress code suggested. Five days later the supervisor told him that he was not going to fit into the company culture and his job was being terminated. On the motion, the court ruled that plaintiff's evidence failed to raise a genuine issue of material fact as to whether the reason

given for his termination was a pretext for race discrimination and granted summary judgment for the employer on the employment discrimination claim. Pursuant to a written employment agreement, plaintiff was an at-will employee, and Pennsylvania law recognized no action based on promissory estoppel for such employees. Plaintiff voluntarily withdrew the fraudulent misrepresentation claim. - **Walden v. Saint Gobain Corporation**, 323 F. Supp. 2d 637, 2004 U.S. Dist. LEXIS 12335 (2004).

In a suit brought by plaintiff former employee against defendant former employer pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., alleging claims for national origin and religious discrimination, the employee appealed from a decision of the United States District Court for the Western District of Pennsylvania, which dismissed his complaint pursuant to Fed. R. Civ. P. 12(b)(6). The employee was discharged after he refused to cover or remove Confederate flag stickers from his lunch box and pickup truck. The employee subsequently filed a discrimination suit, alleging that he was terminated based on his national origin, "Confederate Southern-American," and religion, Christian. The district court dismissed the employee's complaint pursuant to Rule 12(b)(6). On appeal, the court held that the district court properly dismissed the employee's complaint because the employee failed to allege that he suffered an adverse employment action within the meaning of Title VII. The court found that the employee conceded that he was fired because he refused to cover or remove his Confederate flag symbols when his employer told him to. Moreover, the employee did not claim that anything fundamental to his national origin or religion required a display of Confederate symbols. Instead, the display was based on the employee's personal need to share his heritage. Thus, even if the employee was a member of a protected class and the Confederate flag could be viewed as a religious symbol, the employee failed to establish a prima face of national origin or religious discrimination. - **Storey v. Burns Int.'l Security Serv.**, 390 F.3d 760 (3d. Cir. 2004).

D. Gender-Related Cases

Plaintiff sued defendant school district for gender and racial discrimination. The trial court granted summary judgment in favor of the school district. She was hired as a network specialist. After about 3 months, the director of technology resigned. The director's duties were temporarily reassigned to other employees, including plaintiff. She claims that she was not compensated for these extra duties because she is an African-American female. The school district downgraded the position of director to that of supervisor and posted the qualifications. Plaintiff applied for the position, although she did not meet the requirements. The position was given to someone who had the qualifications. Plaintiff also did not apply for another position because she felt she would not be hired because she is a black female. She eventually resigned because she claimed the discrimination and hostile work environment made her physically sick. She sued the school district. The school

district filed for summary judgment, which was granted. First, her claim for failure to hire as the supervisor was properly dismissed as it was filed after the applicable 300 day statutory limitations period. As for her hostile work environment claim, the Commonwealth Court found the school district did not meet both elements of the affirmative defense that the employer exercised reasonable care to prevent and correct any harassing behavior. Finally, the Commonwealth Court found that she raised a genuine issue of material fact as to the equal pay claim as to preclude summary judgment. The case was remanded to the trial court. - **Barra v. Rose Tree Media School District, 858 A.2d 206 (Pa. Super. 2004).**

Plaintiff-educator brought sexual discrimination action against defendant university, alleging that the university discriminated against him on the basis of his gender in violation of the Pennsylvania Human Relations Act. Plaintiff alleged that he was discriminated against when it offered him a one-year position as assistant professor, as opposed to a tenure track position. He further alleged that he was not offered the latter position as student teacher supervisor because the university was under threat of a sex discrimination lawsuit from female job applicants. The trial court credited the dean's testimony that it was the plaintiff's lack of scholarly growth, not his gender, that motivated the university. The trial court entered judgment in favor of the university. Following the trial court's denial of his post-trial motions, plaintiff appealed to the Commonwealth Court of Pennsylvania. The Commonwealth Court held that the trial court's findings were supported by the evidence, as the university offered legitimate, non-discriminatory reasons for not offering the male professor a tenure track position. The Court further held that, under the U.S. Supreme Court landmark case of *McDonnell Douglas Corp. v. Green*, the Plaintiff has the burden to demonstrate that the university's proffered nondiscriminatory reason for the hiring decision was pretextual. The Court noted that the fact finder's decision as to which party's explanation of the employer's motivation it believed would not be disturbed on appeal where the finding was supported by the evidence. - **Cummings v. State System of Higher Educ., 860 A.2d 650 (Pa.Cmwlt. 2004).**

E. Miscellaneous Issues

Defendant, county department of corrections and various officials and employees, filed a motion to dismiss an action by plaintiff, who was a former correctional officer. The plaintiff alleged that she was deprived of her constitutional rights without due process in violation of 42 U.S.C. § 1983 and § 1985, and that defendants violated the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 951, et seq. The plaintiff claimed that she was threatened by an inmate and, after an investigation, it was determined that the employee had been engaged in physical conduct of a sexual nature with the inmate. Following the investigation, the Department of Correction placed the plaintiff on administrative leave. At the time, the plaintiff was part of a collective bargaining agreement which contained

grievance procedures. At a hearing, the plaintiff was found guilty and her employment terminated. The plaintiff claimed that her due process rights had been violated and that male corrections officers had not been terminated until they had been charged, admitted, and/or were convicted of sexual misconduct. The court held that the employee's due process claims had to be dismissed because she did not exhaust her administrative remedies by not proceeding to arbitration or providing proof that arbitration was patently inadequate. The court also held that, although the PHRA claim was not subject to arbitration under the CBA, it stayed the proceeding until the parties completed arbitration. - **Fralin v. County of Bucks, 296 F.Supp.2d 609 (E.D.Pa. 2003).**

This case involves the anti-retaliation provisions of Title VII. The court granted defendant's motion for summary judgment. The plaintiff needed to show that: 1. she engaged in a protected activity; 2. the employer took an adverse employment action against her; and a causal link existed between her protected activity and the employer's adverse action. *Farrell v. Planters Lifesaver Co.*, 206 F.3d 271 (3d Cir. 2000). The case turned on defendant's obtaining an injunction against plaintiff preventing her from participating in a symposium wherein she was to discuss confidential information she obtained as part of her previous employment. In order to be retaliatory action, other than discharge or refusal to hire, the employer must alter the employee's compensation, terms, conditions or privileges of employment, deprive him or her of employment opportunities, or adversely affect his or her status as an employee. *Id.* The court found that, as a matter of law, the state court action of obtaining the injunction did not meet the requirements of the "retaliatory action" element. - **Lin v. Rohm & Haas Co., 301 F. Supp.2d 403 (D.Ct. 2004).**

Plaintiff, a discharged employee, brought a wrongful discharge claim in the face of Pennsylvania's long-standing "at-will" employment doctrine by claiming that his discharge violated the public policy of Pennsylvania. Defendant employer moved to dismiss the claim, arguing that no such public policy existed in this instance. The employee, a store manager, filed a report with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), after receiving numerous complaints from employees and customers concerning the air quality within his employer's store, including complaints of illness as a result. The employer promptly received a telephone call and a letter from OSHA indicating a complaint had been received. Within a month the employer discharged the employee who drafted the letter. The court found that the complaint, while heavily dependent upon an indulgent view of the "fair notice" philosophy of federal pleading rules, sufficiently raised a potential violation of the public policy of the Commonwealth of Pennsylvania to defeat the motion to dismiss. It was the clear from the Pennsylvania Worker and Community Right-to-Know Act ("PWCRA"), Pa. Stat. Ann. Title 35, §7301 et seq. (2004), the Occupational Safety and Health Act of 1970, 29 U.S.C.S. §660, and the regulations promulgated thereunder, that the public policy of the Commonwealth of

Pennsylvania was violated if an employer terminated an employee for engaging in protected activity under either of those state or federal laws. Consequently, consistent with the Pennsylvania Supreme Court's decision in *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, the instant court found that the termination of an employee who filed a report with OSHA violated the public policy of the Commonwealth of Pennsylvania, as articulated in the PWCRA, and relief for an allegation of wrongful termination could be granted under some set of facts consistent with the employee's allegations. Consequently, the United State District Court for the Eastern District of Pennsylvania denied the employer's motion to dismiss. - **Wetherhold v. Radioshack Corporation**, 339 F.Supp. 2d 670 (E.D. Pa. 2004).



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