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Wayman Watch

- Congratulations to James W. Creenan, who has been invited to become a member of the firm effective January 1, 2004.
- Dale K. Forsythe and John C. Bogut recently represented the firm at the Department of Labor, Bureau of Workers' Compensation Conference in Lancaster, Pennsylvania.
- Congratulations to Michael L. Magulick and Kate Fagan, who recently became sustaining members of the Academy of Trial Lawyers of Allegheny County.

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because the plaintiffs' expert was unable to eliminate other possible causes for the alleged delay in the alarm system, the plaintiffs failed to offer sufficient evidence of a defect, an essential element to the cause of action. Plaintiffs' expert opined that it was equally possible that the heat sensors were improperly installed or that another component part may have malfunctioned. On this basis, summary judgment was granted in favor of our client and in favor of the other component part manufacturers.

Additionally, we were granted summary judgment on the basis of statute of limitations. As initially detailed, the Complaint to Join our client was filed two and one-half years after the statute of limitations had run. The Bennetts attempted to argue that they were entitled to the benefit of the "discovery rule" in that they were unable to learn the identity of the heat sensor manufacturer until October of 2002. However, documents produced by the alarm company, an original defendant, identified our client as the manufacturer of the heat sensors involved. Further, the documents provided an address and telephone number to contact our client. The Trial Court held that the plaintiffs' failure to read the discovery produced by the original defendant is not a basis to toll the statute of limitations and summary judgment was granted on that alternative grounds. ■

Please contact John Bogut at jbogut@waymanlaw.com with any questions or concerns you may have in this area of law

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specifically show the intent to make a third party beneficiary in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary is needed to effectuate the intentions of the parties, and the promisee's performance satisfies the obligation to the beneficiary or circumstances show that the promisee intends to give the beneficiary the benefit of the promised performance. Id., at 530 Pa. 372-73, 609 A.2d 150-51.

Here, though no intent was expressed in the contract, the court recognized this situation as one where the compelling circumstances surrounding the transaction required recognition of the third party beneficiary. As all the checks were payable to mother as guardian of the minor children, the third party beneficiary status was seen as being within the contemplation of both of the parties. The court noted that the bank had a contractual

duty to inquire as to the court Orders and abide by them, as this was something that implicitly should be done to carry out the purpose for which the contract existed. As plaintiffs were seen as third party beneficiaries, they were entitled to a four year statute of limitations.

As personal injury litigation frequently involves the settlement of claims of minors and the protection of their interests, it is good to know how an appellate court in Pennsylvania will classify these minors relative to a bank account opened for maintenance of their settlement funds. ■

Please contact Dale Forsythe at dforsythe@waymanlaw.com with any questions or concerns you may have in this area of law.

This edition of *Your Best Defense* offers four articles giving helpful insight into areas of law which are repeatedly faced by litigators.

Many times, cases are tried or resolved wherein one of the plaintiffs is a minor. A settlement check or payment is remitted to one of the minor's parents or natural guardians, with an agreement or Order of Court that the funds are to be held in a restricted account for the benefit of the minor or to be held until the minor reaches the age of majority. I am honored in this edition to look at a recent decision by the Superior Court that addresses the duty of a bank in such a situation and the special status of third party beneficiary that is bestowed upon the minor relative to the contract between the bank and the parent.

John Bogut successfully secured summary judgment in favor of our firm's client in a recent case involving a house fire in West Virginia and the resultant product liability claims proffered against the manufacturers and suppliers of the security/fire alarm system. John recounts how the court carefully addressed the sufficiency of the plaintiff expert opinion under applicable



product liability law, giving insight into strategies and arguments at play.

Matthew Ward and Marla Presley, who we welcomed as attorneys to the firm this past Fall, both contributed articles for this edition. Matt takes a look at a case where the jury disregarded the medical opinion of the plaintiff's expert, which was conceded by the defense expert, and still found no causation in what appeared to be a clear liability situation. He reviews how the jury, while possibly able to dismiss certain injuries as being non-compensable, still cannot disregard undisputed evidence as to causation. Marla looks at the Supreme Court of

Pennsylvania's upcoming review of the issue of whether insurance policies will be able to include mandatory UIM/UM arbitration provisions, a topic of monumental importance to many practitioners.

As always, if you have any commentary or question, or if you think someone would benefit from being added to our mailing list, please feel free to contact me at dforsythe@waymanlaw.com.



MINORS AS THIRD PARTY BENEFICIARIES

By: Dale K. Forsythe

The Superior Court recently addressed a situation involving a plaintiff claiming to be a third party beneficiary of a contract between the defendant and another, and the court's treatment of the issues is instructive in the analysis to be given to this frequently cloudy area of law.

In *Melley v. Pioneer Bank, N.A.*, 834 A.2d 1191 (Pa.Super.2003), the bank appealed a verdict which had been entered against it based upon a claim of misappropriation of funds. The father of appellees (minor plaintiffs) in this case was killed in a house fire, and his estate brought and settled a wrongful death suit against the tortfeasor. Checks were issued to

plaintiffs' mother and the minor daughters, the court having ordered that the checks be made out in favor of the mother for the benefit of the minors, as their parent and natural guardian. The mother opened an account in her name only at defendant bank and deposited checks payable to her as parent and natural guardian of the minors. Later, the mother deposited additional checks which stated clearly that the funds were payable to the mother, as parent and natural guardian, pursuant to Court Order dated February 3, 1988. Orders in favor of both minors had stated that the funds were to be deposited in a restricted bank account not to be withdrawn until the minor reached her eighteenth birthday. The transaction was permitted. Upon reaching age of majority, the daughters sued the bank for wrongly allowing the mother to convert funds owned by them and deposit them in her own account.

In order to overcome a potential statute of limitations argument, plaintiffs asserted that a four year statute would apply as this was a contract action, the plaintiffs being intended third party beneficiary's of the deposit contract between the bank and the mother which the bank breached by not protecting the minors' interests. The court looked to the tests for determining whether a party could become a third party beneficiary, citing *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147 (1992), which stated that this status arises where both parties to the contract

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JURY STILL CONFINED TO THE CASE FACTS

By: Matthew Ward



Have you ever wondered what goes on behind the closed doors of jury deliberations? Do you ever think, “How could a jury logically reach such a decision based on the facts?” If you have, you are not alone. The Pennsylvania Superior Court recently addressed a somewhat unusual occurrence in *Smith v. Putter*, 832 A.2d 1094 (Pa.Super. 2003), where a defendant in an automobile accident case conceded negligence, yet the jury returned a zero verdict for the plaintiff, finding that the defendant’s negligence was not a substantial factor in causing the plaintiff’s injuries.

In the underlying motor vehicle accident, plaintiff was injured when the defendant ran a stop sign and hit the driver’s side of the car that plaintiff was driving. During the course of trial, plaintiff’s experts both testified that the accident had caused a previously asymptomatic arthritic condition in the plaintiff’s left hip to become symptomatic, requiring an arthroscopic surgery and full hip replacement. Defendant’s expert agreed with that assessment. He even indicated in his report that any restrictions relating to plaintiff’s hip were casually related to the motor vehicle accident. Even with this testimony, the jury ultimately found that the defendant’s negligence was not a substantial factor in causing plaintiff’s injuries and therefore, never reached the question of damages, and awarded the plaintiff nothing.

Plaintiff subsequently filed post-trial motions alleging that the verdict was against the weight of the evidence and that the trial court had erred in instructing the jury on causation. These motions, as well as one for reconsideration, were all denied at the trial level. On appeal to the Pennsylvania Superior Court, plaintiff asserted that the jury’s verdict as to the absence of legal causation was so contrary to the weight of the evidence that a new trial should be granted, given that all of the medical witnesses, including defendant’s own, agreed that the subject accident had caused asymptomatic arthritis to become symptomatic, necessitating two surgeries.

In evaluating this case, it must be taken into consideration that our judicial system places the responsibility of determining what is a compensable injury in the hands of a group of presumably reasonable people, otherwise known as the jury. It is possible for a jury to decide that a plaintiff’s pain or discomfort is not the type for which compensation is warranted. Such a conclusion is not so uncommon. However, while it is the jury’s function to make this determination, a jury cannot be let to conclude that a defendant’s negligence is not a substantial factor in causing an injury where the undisputed evidence indicates otherwise. If a jury were to find causation, it may conclude that the injury was incidental or non-compensable and thus award no damages. But the jury is not free to wholly ignore the evidence and find no causation exists where the defense expert concedes the same.

In reaching its final decision, the Superior Court relied on two similar cases previously before the Court in *Andrews v. Jackson*, 800 A.2d 959 (Pa.Super.2002) and *Mano v. Madden*, 738 A.2d 493 (Pa.Super.1999). In each of those cases, defense experts

conceded that an aggravation of the plaintiff’s pre-existing condition was caused by the accident in question. Each jury found the defendant negligent, but determined that such negligence was not a substantial factor in causing plaintiff’s injuries. Both trial courts granted new trials for the plaintiff based on the premise that where there is no dispute that the defendant is negligent and both parties’ medical experts agree that the accident caused some injury to the plaintiff, the jury may not find the defendant’s negligence was not a substantial factor in bringing about at least some of plaintiff’s injuries.

As in *Andrews* and *Mano*, the Pennsylvania Superior Court held in this case that where both parties’ medical experts agree that an accident has caused some injury, the jury is not free to disregard this evidence and a verdict finding of such is against the weight of the evidence and entitles the plaintiff to a new trial. It will be interesting to see how a new group of jurors decides when the case goes to trial the second time around. ■

Please contact Matthew Ward at mward@waymanlaw.com with any questions or concerns you may have in this area of law.

MANDATORY UM/UIM ARBITRATION UNDER SCRUTINY

By: Marla Presley



For the past several years, the issue of mandatory arbitration of uninsured and underinsured motorist disputes in Pennsylvania has been widely debated. The legal precedent in this area is riddled with inconsistencies. The Pennsylvania Supreme Court is now set to resolve the controversy of required arbitration in uninsured (UM) and underinsured (UIM) motorist cases. On July 29, 2003 the Supreme Court agreed to hear the Insurance Federation’s appeal in *Insurance Federation of Pennsylvania, Inc. v. Koken*, 801 A.2d 622 (2002).

On June 27, 1997, the Insurance Federation of Pennsylvania attempted to remove the requirement for arbitration in UM and UIM disputes by filing a Petition for Declaratory Order before the Insurance Commissioner. The Federation sought a formal declaration that the Insurance Department does not have the authority under existing statutes and regulations to require private passenger auto policies to include an arbitration provision covering uninsured and underinsured motorist disputes. *Koken*, 801 A.2d at 623, citing *In re: The Requirement of An Arbitration Provision in Private Passenger Uninsured and Underinsured Motorist Coverage*, Docket No. DO97-07-001.

On July 16, 2001, Insurance Commissioner Koken denied the Federation’s petition, mandating that UM and UIM disputes be submitted to arbitration. The Commissioner found that one of the primary goals of the Motor Vehicle Financial Responsibility Law (MVFRL) is “to protect innocent victims from motorists without insurance or with inadequate insurance.” Id. The Commissioner went on to conclude that arbitration provided “a cost and time efficient mechanism for policyholders to obtain benefits specifically provided by their policies.” Id. Thereafter, the Federation appealed the decision of the Commissioner to the Commonwealth Court of Pennsylvania. ☞

PITFALLS IN PRODUCTS LIABILITY WITHOUT THE PRODUCT

By: John Bogut



Recently, our office was involved in defending a products liability claim arising out of a house fire in West Virginia. The homeowners brought a products liability action against all of the manufactures of all of the component parts allegedly used in the security alarm system installed in the home. This firm was retained to represent the manufacturer of the heat sensors that were allegedly used in the garage area where the fire was believed to have begun. We were granted summary judgment, along with the manufacturers of the smoke detectors and control panels.

In *Bennett v. ASCO Services*, et al., the homeowners sought to recover their underinsured damages arising out of a fire that had destroyed their home in March of 1998. The Bennetts filed an action against the company that installed the alarm system, as well as the manufacturers of the various component parts used in the system. Suit was filed in March of 2000. After considerable discovery, our client was joined on October 11, 2002.

The Bennetts alleged that the defective design or the defective manufacture of our client’s heat sensors caused a delay in the response of the alarm system and prevented them from acting to put out the fire in time to save their home. (It is important to note that the Bennetts did not allege that the alarm system itself or any components thereof caused the fire.) The Bennetts alleged essentially identical causes of action against all of the component part manufacturers.

The actual heat sensors, like all of the other components, were never examined or tested in connection with this case. Approximately one month after the fire, the home was razed and the debris was taken to a landfill. None of the component parts were ever examined for defects.

Without direct evidence of a defect, the Bennetts’ case was entirely dependent upon expert testimony. The expert offered by the Bennetts were unable to opine that the design of the heat sensor itself was defective. Instead, he opined that a failure in the fire alarm system was caused by either a manufacturing defect, a design defect, an error committed in the installation of the system or an error in the servicing of the system once it had been installed.

We filed a Motion for Summary Judgment arguing that the evidence offered by the Bennetts was not sufficient to create an issue of fact worthy of presenting to a jury.

Like Pennsylvania, West Virginia has adopted a cause of action for strict products liability which can relieve a plaintiff from proving that the manufacturer was negligent in some particular fashion during the process and permits proof of a defective condition of the product as the principal basis of liability. Under this theory, a plaintiff is not required to identify a specific defect that caused the loss but, instead, may do so by circumstantial evidence. To prove a prima facie case of strict liability by circumstantial evidence, a plaintiff must prove that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect and that the plaintiff must show that there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

In this case, the plaintiffs only evidence was the testimony of their expert who essentially opined four different causes for the alleged failure of the alarm system. The Trial Court found that,

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The Commonwealth Court affirmed the Commissioner’s decision, finding that the Insurance Department had implied authority to further the legislative purposes of the Uninsured Motorist Coverage Act and MVFRL by requiring mandatory arbitration of uninsured motorist and underinsured motorist coverage disputes. The Court held that the Department’s statutory and regulatory authority to mandate arbitration of UIM coverage disputes are found in the MVFRL, 75 Pa.C.S. §1731, which mandates UIM coverage as well as UM coverage, and 75 Pa.C.S. § 1704(b), which expressly establishes the Department’s administrative, regulatory, and enforcement authority over UIM coverage provisions in insurance contracts. *Koken*, at 624. The Federation thereafter appealed the decision of the Commonwealth Court.

The Supreme Court of Pennsylvania granted the Federation’s Petition for Allowance of Appeal and will address the issues of whether 1) the Insurance Department possesses the statutory authority to require that all uninsured and underinsured motorist disputes be submitted to mandatory, binding arbitration; and 2) whether the Insurance Department’s imposition of mandatory, binding arbitration violates the Constitutional right to a trial by jury. *Insurance Federation of Pennsylvania v. Koken*, 829 A.2d 309 (2003).

The issue of the Department’s power with respect to UM

coverage was previously decided in *Prudential Property and Casualty Insurance Co. V. Muir*, 513 A.2d 1129 (Pa.Cmwlt. 1986). In *Koken*, the court, citing the MVFRL, held that the power of the Department to mandate arbitration existed for both UM and UIM cases. The Court went on to find that arbitration would provide the maximum compensation of victims of automobile accidents and protect accident victims from financially irresponsible drivers. *Koken*, 801 A.2d at 622.

In *Popelas v. Travelers Insurance Company*, the Court declined to follow the decision in *Muir*, holding that although the right to UM and UIM benefits is established by statute and not by common law, the method of recovery is not restricted to arbitration unless the terms of the insurance contract dictates such restriction. The Court went on to find that there is no requirement in Pennsylvania law that mandates UM and UIM disputes be submitted to arbitration.

Lawyers and insurance companies alike have heatedly debated the requirement of mandatory arbitration in uninsured and underinsured motorist disputes. The Pennsylvania Supreme Court will presumably resolve this controversy with the decision in *Koken*. This decision will surely impact the Insurance Industry, so be on the look out for the final result. ■

Please contact Marla Presley at mpresley@waymanlaw.com with any questions or concerns you may have in this area of law.