Walsh, Barnes, Collis & Zumpella, P.C.

We are a full-service Civil Litigation Defense firm serving Western/Central Pennsylvania and West Virginia January 2019

The Gulf Tower
14th Floor
707 Grant Street
Pittsburgh, PA 15219

Telephone: 412-258-2255
Fax: 412-263-5632

www.walshlegal.net

Walsh, Barnes, Collis & Zumpella, P.C. represents insurance carriers, their insureds, and corporations in actions encompassing the entire civil litigation spectrum. We provide defense of wrongful death and personal injury claims in addition to property losses resulting from:

- **Automobile and Tractor Trailer Accidents**
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- **Construction Accidents**
- **Employment Practices Liability**
- **Executive Liability**
- **Insurance Coverage**
- **Premises Liability**
- **Product Liability**
- **Professional Liability**

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Middle District of Pennsylvania Grants Motion to Dismiss UIM Bad Faith Claim Due To Insufficient Pleading

In *Rickell v. USAA Cas. Ins. Co.*, 1:18-cv-01279 (M.D.Pa. 2018), the district court dismissed without prejudice plaintiff's claim for bad faith on the grounds the complaint failed to plead the claim with sufficient factual specificity.

Plaintiff presented a UIM claim to USAA following a motor vehicle accident wherein the tortfeasor driver's liability appeared to be clear. When USAA failed to settle the UIM claim within 3 months, plaintiff filed suit.

The district court granted USAA's motion to dismiss because the complaint made only conclusory statements about USAA's alleged bad faith conduct without sufficient supporting facts. The district court conclude that the following allegations, standing alone, are insufficient to survive a motion to dismiss: (1) failing to evaluate the claim objectively and fairly, (2) failing to complete a prompt and thorough investigation, (3) failing to pay a covered loss in a prompt and timely manner, (4) conducting an unfair and unreasonable investigation, (5) violating a fiduciary duty, (6) failing to reasonably and adequately evaluate or review the medical documentation, (7) unreasonably valuing the loss and failing to negotiate the amount of loss, (8) failing to make a reasonable settlement offer despite receipt of medical specials which supported the tender of the full policy limits in the third party claim, (9) unreasonably withholding policy benefits, (10) acting unreasonably and unfairly in response to the claim, and (11) unnecessarily and unreasonably compelling plaintiff to initiate a lawsuit to obtain benefits for a covered loss that should have been paid promptly and without the necessity of litigation.

The court explained that under federal court pleading standards, plaintiffs claiming bad faith have to allege the limited facts of which they are aware, including but not limited to the nature of the correspondence with the insurance company, details of how settlement negotiations proceeded, and detailed allegations supporting the severity of the injury sustained and resulting financial costs.

The court noted that the complaint failed to present facts to demonstrate how the failure to make a reasonable settlement offer could constitute bad faith (e.g., explaining why a 3 month delay was unreasonable, identifying communications ignored by USAA), noting that a 3 month delay, standing alone, does not demonstrate bad faith.

Berks County Holds That UIM Credit Includes Settlement Amounts Paid To Insured From Non-Auto Liability Policy.

In the case of *Adams v. GEICO*, the Court of Common Pleas of Berks County addressed the issue of credits under a UIM policy with respect to a non-auto liability insurance policy issued to a tortfeasor.

The claim involved a plaintiff who was injured while working as part of a construction crew on a road project when a motorist ran over his foot. The plaintiff sued the driver of the vehicle as well as the traffic control company involved in the construction project. Plaintiff settled his claim against the driver for the $100,000 liability limits and settled his claim against the traffic control company $75,000. The traffic control company's liability insurance policy had a $2,000,000 limit.

GEICO sought a credit against the UIM claim in the amount of $2,100,000, the combined amount of liability coverage of the driver and the traffic control company. Plaintiff sought to limit the credit to the $100,000 liability limit of the driver.

The trial court rejected plaintiff's assertion that under the MVFRL only motor vehicle liability policies are to be considered in calculating the credit due to a UIM carrier, citing to the Pennsylvania Superior Court decision in *D'Adamo v. Erie Ins.*, 4 A.3d 1090 (Pa. Super. 2010), wherein the Superior Court held an umbrella policy could be factored into the credit due even though the umbrella policy was not considered an auto liability policy.

However, the trial court rejected GEICO's assertion that it was entitled to a credit for the liability limits of the traffic control firm and limited the credit to the amount paid in settlement under that policy. The trial court relied upon the specific language of the exhaustion clause in the UIM endorsement, which only entitled GEICO to a credit for "all amounts… paid by or for all persons or organizations liable for the injury." The court observed that unlike typical exhaustion clauses, the exhaustion clause contained in the GEICO policy did not allow Geico to claim a credit for the liability limits of all tortfeasors involved.

When determining the amount of a credit due on a UIM claim, it is important to review the specific language of the exhaustion clause to determine if the credit is limited to the amounts the claimant received in settlement from all tortfeasors or can include amounts paid or payable under the liability insurance policies of all tortfeasors.

Pennsylvania Supreme Court Exhibits Trend Toward Expanding Liability Against Governmental Entities

The Pennsylvania Supreme Court issued two opinions overturning long standing precedents that had limited actions against governmental entities, suggesting a more liberal trend toward allowing lawsuits against governmental entities. These holdings are generally consistent with some of the more recent Pennsylvania Supreme Court holdings suggesting the current composition of the court is more willing to entertain overturning court precedents and generally has taken a view that the courts should be more focused on allowing parties to have their cases determined by a jury rather than a judge dismissing actions prior to trial.

In *Balentine v. Chester Water Authority,* 191 A.3d 799 (Pa. 2018) the Decedent's estate brought a negligence action against the defendant water authority after a vehicle struck a water authority vehicle that was parked on the roadway causing the water authority vehicle to run over the Decedent. The trial court granted summary judgment for the water authority. The Commonwealth Court affirmed holding that involuntary movement did not constitute operation of a vehicle for purposes of the motor vehicle exception to governmental immunity. The Supreme Court on appeal reversed holding that operation of a motor vehicle for purposes of governmental immunity means a series of actions and decisions that transport an individual from one place to another, including where and whether to park and use appropriate signals. This overturned the longstanding precedent that in order for the motor vehicle exception to apply the vehicle had to be in actual operation.

Similarly in *Cagey v. Commonwealth Department of Transportation,* 179 A.3d 458 (Pa. 2018) motorists brought a negligence action against the Defendant Department of Transportation after they were injured when their car struck a highway guardrail. The trial court granted judgment on the pleadings for the Defendant. The Commonwealth Court affirmed. The Supreme Court held that where the Department of Transportation negligently designs and installs a guardrail and creates a dangerous condition, the real estate exception to sovereign immunity applies. This overturned numerous Pennsylvania Commonwealth Court holdings that the Department of Transportation could not be held liable for negligent design and installation of a guardrail.

Hills and Ridges Doctrine: A Viable Defense in Pennsylvania Slip and Fall Cases

Winter is the time of slip and falls in Pennsylvania, a state known for its cold and snowy weather. The Hills and Ridges Doctrine has long been the law in Pennsylvania for many years, however it continues to evolve to encompass new and thought provoking fact patterns. In general, the Hills and Ridges Doctrine states that there is no liability to a person who slips and falls on generally slippery conditions, but, for the plaintiff to recover, he or she must prove that there were dangerous conditions due to ridges or elevations which were allowed to remain for an unreasonable length of time. See *Roland v. Kravco, Inc.,* 513 A.2d 1029 (1986). Pennsylvania courts continue to refine the Doctrine in the face of ever changing and ever evolving facts and questions of law, although it remains a viable defense for property owners.

Recently, in *Collins v. Philadelphia Suburban Development Corporation,* 179 A.3d 69 (Pa.Super. 2018), the Superior Court determined that a property owner was not required to pre-treat its sidewalks in light of inclement weather. The Plaintiff, David Collins, slipped and fell on an ice/snow covered sidewalk on property owned by the Defendant, Philadelphia Suburban Development Corporation (PSDC). Mr. Collins admitted at his deposition that it had been snowing since early in the morning on the date of the incident, and snow had accumulated on the ground over a number of hours. A motion for summary judgment was filed by PSDC, wherein the PSDC argued that, pursuant to the Hills and Ridges Doctrine, it had no duty to remove ice/snow from the premises during a blizzard. This motion for summary judgment was granted.

On appeal, Mr. Collins argued that a genuine issue of material fact existed regarding whether PSDC should have pre-treated its sidewalks to make them safer. The Superior Court rejected this argument, and determined that there is no duty for a landowner to pre-treat their premises to prevent generally slippery conditions from occurring during a blizzard. The court further concluded that the PSDC had no duty to remove the snow as it fell during the blizzard.

In *Su Hung v. Parkway Corporation,* 2018 WL 989699 (Pa.Super. 2018), the Superior Court determined that light precipitation turning to ice and creating generally slippery conditions precludes recovery by a plaintiff under the Hills and Ridges Doctrine. The court further held that ongoing precipitation, as in the *Collins* decision, did not give Defendant, Parkway Corporation, enough time to alleviate an icy condition. The Plaintiff, Su Hung, slipped and fell on a ramp on Defendant Parkway Corporation's property after temperatures dropped during and shortly after a light rain. All parties agreed that the ice constituted a smooth, mirror-like surface, and thus no hills or ridges had developed.

The Superior Court in *Staley v. Slicker*, 2018 WL 1615221 (Pa.Super. 2018) held that it is a question of fact for the jury to determine whether an area was intended to be a walkway, sidewalk, or other ingress/egress from the property. In this case, Plaintiff, Robert Staley, was walking along an alleyway on Defendant, Robin Slicker's property to serve a warrant at a property owned by Ms. Slicker when he slipped and fell on an area which was unpaved. A motion for summary judgment was filed by Ms. Slicker, claiming that, because the area that Mr. Staley fell on was unpaved and not intended to be a walkway, the Hills and Ridges Doctrine did not apply. The trial court granted the motion, and Mr. Staley appealed. The Superior Court determined that, as there was evidence that the entrance near the alleyway had been utilized, it was a question for the jury whether the area was intended to be used as a walkway, and thus whether the area was a place where pedestrians would be expected to travel.

These three cases are just an example of the multitude of different and diverse fact patterns which Pennsylvania courts are confronted with as a result of the regular inclement weather that affects the state. Whether it's light rain or a blizzard, these cases show that the Hills and Ridges Doctrine is still a viable defense in Pennsylvania.

Pennsylvania Supreme Court Again Addresses (and Limits) Workers' Compensation Carrier's Subrogation Remedies

In *The Hartford Insurance Group, on behalf of Chunli Chen v. Kamara, et al.*, ___ A.3d ___ (Pa. 2018), the Pennsylvania Supreme Court ruled only the claimant has the right to file a tort lawsuit for the work-related injuries, and specifically held a workers' compensation carrier cannot file a subrogation action in the name of the claimant. Prior cases involving this type of subrogation suit were covered in the Walsh, Barnes, Collis & Zumpella Newsletters in September, 2015 and May, 2017.

In the most recent case, Ms. Chen was struck by a car owned by Thrifty and operated by Mr. Kamara. The Hartford paid workers' compensation benefits to Ms. Chen because she was in the course of her employment with The Hartford's insured, Reliance Sourcing, at the time of the accident. For reasons not explained, Ms. Chen did not file her own lawsuit. The Hartford filed a negligence suit against Thrifty and Mr. Kamara, and captioned it as The Hartford "on behalf of" Ms. Chen. The complaint sought all damages to which Ms. Chen was entitled due to the negligence of Mr. Kamara and Thrifty. The Superior Court approved this handling, and allowed The Hartford to pursue the action, after determining the methodology did not violate the Pennsylvania Supreme Court's decision in *Liberty Mutual Insurance Company, as Subrogee of George Lawrence v. Domtar Paper*, 113 A.3d 1230 (Pa. 2015).

Thrifty and Mr. Kamara appealed the Superior Court's decision, and the Pennsylvania Supreme Court reversed. The high court held, unambiguously, that the workers' compensation carrier has no independent right to file suit, regardless of how it captions the case or whether it is acting on behalf of the claimant. Unless the claimant is a voluntary plaintiff in the tort suit, or contractually assigns to the carrier his or her rights to relief, the carrier has no right to bring an action in the claimant's name.

Based on *Kamara*, a claimant will have to agree to be a plaintiff in a third party suit, or assign his or her rights to the carrier, in order for the compensation carrier to pursue subrogation via a tort action against the tortfeasor. Note the decision does not affect the workers' compensation carrier's *right* to subrogation. Instead, the decision affects the carrier's opportunity to independently pursue subrogation in a civil action.

Act 111 - Pennsylvania Legislature Reinstates Impairment Rating Evaluation Remedy

The Pennsylvania Legislature, in Act 111, reinstated the Impairment Rating Evaluation (IRE) procedure under the Workers' Compensation Act. In *Protz v. Workers' Compensation Appeal Board (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017), the Pennsylvania Supreme Court declared the IRE process unconstitutional as an improper delegation of legislative authority.

With Act 111, the Legislature remedied the constitutional infirmity by directing the use of The Sixth Edition of the Guide to Evaluation of Permanent Impairment (an American Medical Association publication). The "new" IRE is the same as the "old" IRE, with the important proviso that a claimant will maintain total disability status with a rating of 35% or more. In the "old" version, the threshold was 50%. Bureau forms have been amended and filing via WCAIS is available. (The filing mechanism was disabled after the *Protz* decision). Numerous issues remain regarding pre-*Protz* IREs, but the renewed remedy is good news for employers and workers' compensation carriers.

Partner Contact Information

Paul J. Walsh III
412-263-5237
pwalsh@walshlegal.net

Adam M. Barnes
412-261-3268
abarnes@walshlegal.net

Pamela V. Collis
412-263-5238
pcollis@walshlegal.net

Gina M. Zumpella
412-263-5221
gzumpella@walshlegal.net

Susan A. Kostkas
412-261-3389
skostkas@walshlegal.net

Edward A. Yurcon
412-263-5218
eyurcon@walshlegal.net

John M. Polena
412-261-3278
jpolena@walshlegal.net

Announcements

■ **Gina Zumpella** recently served on a panel at a CLE in conjunction with various Allegheny County Court of Common Pleas Judges entitled "Torn From the Headlines—Hot Topics in the News and the Effect on Your Law Practice".

Results

■ In August 2018, **Matthew Hronas** successfully defended a motor vehicle accident arbitration claim. Our client was driving down a road when he was side-swiped by a truck traveling in the opposite direction. Suit was filed by our client's passenger, and the driver of the truck which side-swiped out client's vehicle joined our client to the action, claiming that he caused the accident. The Arbitration Panel found in favor of our client.

■ In August 2018, **Ed Yurcon** was successful on a Motion for Summary Judgment involving a personal injury case arising out of an industrial accident. Plaintiff was a 30 year old married father of 4, and a temporary worker assigned to our hose manufacturing plant. He claimed total disability due to TBI, neck, shoulder and other injuries. The theory against our client was unsafe workplace, defective tools, inadequate training and supervision. Punitive damages were also sought.

We asserted a borrowed servant defense, took extensive discovery and filed the Motion for Summary Judgement which was ultimately granted.

■ In October 2018, **John Polena** obtained a defense verdict in an Arbitration case on behalf of a manufacturer involving claims for breach of contract and breach of warranty based upon the manufacturer's allegedly defective walk-in refrigeration unit.

■ In October 2018, **Gina Zumpella** successfully obtained a dismissal of a Complaint in Civil Action where the Plaintiff alleged a hose that our client distributed was defective and caused approximately $250,000 in property damage. The Plaintiff no longer had possession of the hose in question and we successfully argued spoliation of the same which caused Plaintiff to dismiss the suit with prejudice.

■ In November 2018, **John Polena** obtained dismissal of a Complaint against a home builder based upon Preliminary Objections in a construction litigation case related to alleged faulty plumbing work performed by a subcontractor that caused damage to a residential home based upon a binding arbitration provision in the parties contract. The Plaintiff was directed by the Court to submit its claim to binding arbitration pursuant to the parties' contract.

■ In December 2018, **Amanda Steffy** successfully argued a Petition to Transfer Venue for the case to be transferred from Allegheny County to Clarion County. This case involved a car accident that occurred in Clarion County. We argued for a transfer via the doctrine of forum non conveniens as the site of the accident, potential witnesses, and parties were all located in Clarion County. This transfer is a favorable outcome as the location is closer for the Insured and Clarion County is a more conservative jurisdiction.

■ In December 2018, **John Polena** had Preliminary Objections sustained dismissing a Complaint with leave to amend involving a negligence suit filed by a police officer against a group home for intellectually disabled individuals after the officer was allegedly injured by one of the group home residents.

Top Ten Best Legal TV Shows

10. Suits – Set in a fictional New York law firm, Mike Ross (played by Patrick Adams) is a college dropout who works as a law associate to Harvey Spector (played by Gabriel Macht) despite never having received a law degree. They work to close cases while keeping Ross' secret safe.

9. Franklin and Bash – A pair of independent and irreverent trial lawyers with a small practice are taken in by a prestigious law firm's co-founder and managing partner. They utilize their streetwise savvy to take on strange and interesting cases.

8. JAG – The series follows the exploits of the Navy's judge advocates located in Washington, D.C. as they conduct investigations into military legal issues. This show would often use episodes to expound on issues of the day.

7. Better Call Saul – A spin-off of the immensely popular Breaking Bad, Saul Goodman (played by Bob Odenkirk), a less than ethical criminal lawyer, navigates the worlds of Big Law and crime as he establishes himself as the go to lawyer for drug runners and other criminals.

6. Perry Mason – Perry Mason (played by Raymond Burr) takes on high profile criminal trials and helps to solve the actual case through a little detective work of his own. Half lawyer, half detective, Perry Mason has become an icon in legal drama.

5. L.A. Law – Running through the mid-1980s into the early 1990s, this show revolved around a fictitious Los Angeles based law firm dealing with many of the social issues of the era.

4. Law and Order – A procedural which lasted for 20 years, the show followed a formula of criminal investigation in the first half of the show, and then prosecution of the defendant by the Manhattan District Attorney's Office in the second half. The show focuses on current events and topical content.

3. The Practice – The show concentrated on Robert Donnell and Associates, a fictional Boston law firm, taking on high profile criminal and civil cases. With light comedy and heavy drama, the conflict between legal ethics and personal morality took center stage.

2. Matlock – Starring the incomparable Andy Griffith as Ben Matlock, this show has become synonymous with "gotcha" courtroom drama. Matlock's signature move was confronting the perpetrators of crimes his clients were accused of in dramatic courtroom scenes.

1. Boston Legal – Starring an all-star cast of James Spader, William Shatner and Candice Bergen, this spin-off of The Practice follows Alan Shore (played by James Spader), an ethically-challenged lawyer, at the legal firm of Crane, Poole and Schmidt.