

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

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

January 2018

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
- Catastrophic Fire Losses
- Construction Accidents
- Employment Practices Liability
- Executive Liability
- Insurance Coverage
- Premises Liability
- Product Liability
- Professional Liability

IN THIS ISSUE:

Pennsylvania Supreme Court Overturns Precedent Statute of Limitations on Uninsured (UM) and Underinsured (UIM) Motorist Claims	Page 1
Workers' Compensation - Specific Loss Benefits - Permanency	Page 2
Discrimination Based Upon Sexual Orientation Violates Title VII of the Civil Rights Act of 1964	Page 3
Dueling Product Liability Jury Instructions	Page 4
Announcements/Results	Page 5
Top Ten Greatest American Moments in Winter Olympics History	Page 6

Pennsylvania Supreme Court Overturns Precedent Statute of Limitations on Uninsured (UM) and Underinsured (UIM) Motorist Claims

On November 22, 2017, the Pennsylvania Supreme Court announced a decision on when the statute of limitations for uninsured (UM) and underinsured (UIM) motorist claims begin to run in *Erie Insurance Exchange v. Bristol, et. al., No. 124 MAP 2016, 2017 WL 5617628 (Pa 2017)*. The Court held that the statute of limitations begins to run when the alleged breach of a contractual duty by the insurance carrier occurs, such as a denial of coverage or refusal to arbitrate, and not when the injured claimant first learns the other driver is uninsured or underinsured. This holding overturns the long held precedent in *Boyle v. State Farm Auto Ins. Co., 310 Pa. Super. 10, 456 A.2d 156, 162 (Pa. Super. 1983)* that the statute of limitations for a UM or UIM claim begins to run once the Insured suffers an accident, sustains an injury, and is made aware that the other driver is uninsured or underinsured.

In *Bristol*, the Insured reported his injury in a hit and run incident on July 22, 2005. The commercial auto fleet policy applicable to the Insured had an uninsured/underinsured motorist coverage endorsement providing coverage of \$500,000 per accident. The policy also contained an arbitration clause providing for binding resolution of disputes over liability and the amount of damages, but reserving disputes as to the applicability of any statute of limitations to the courts. The Insured placed Erie on notice of his UM claim on June 19, 2007.

On July 9, 2007, Erie issued a reservation of rights letter. The parties selected arbitrators and in September 2012 the parties communicated regarding the need to wait until the Insured was released from prison on an unrelated matter. On May 29, 2013, Erie filed a declaratory judgment action on the basis that the UM claim was barred by the four (4) year statute of limitations under 42 Pa.C.S. § 5525(a)(8). Erie maintained that the Insured had failed to file a savings action with the court by July 22, 2009, to toll the statute of limitations. The Insured argued that the reservation of rights and agreement to arbitrate precluded the application of the statute of

(Continued on page 2)



Pennsylvania Supreme Court Overturns Precedent Statute of Limitations on Uninsured (UM) and Underinsured (UIM) Motorist Claims (Continued from page 1)

limitations because there was no contractual requirement to file a court action. It also argued that the statute of limitations had been tolled by the agreement to arbitrate and the selection of arbitrators. The trial court granted summary judgment in favor of Erie.

The Pennsylvania Supreme Court noted Erie had never refused arbitration or denied coverage and as such the statute of limitations may breach of contract claim had not begun to run.

The holding in *Bristol*, is a very big change in the application of the statute of limitations period

for Pennsylvania UM and UIM claims. Insurance carriers will need to be aware that the statute of limitations will not begin to run on UM and UIM claims until a refusal of arbitration or denial of coverage is issued to the Insured. In cases where a thorough investigation has identified that coverage does not exist, the denial letter should be transmitted as soon as possible so that the statute of limitations begins to run.

Workers' Compensation - Specific Loss Benefits - Permanency

The Pennsylvania Workers' Compensation Act provides for scheduled losses in limited circumstances, notably when an injured worker has an amputation of a finger, toe, or certain other body parts. Actual amputation is not necessary, however, and benefits can be awarded where the injured worker proves loss of use of the body part for all practical intents and purposes. The loss must be permanent. In *Morocho v. Workers' Compensation Appeal Board (Home Equity Renovations)*, 167 A.3d 855 (Pa. Cmwlth. 2017), the Commonwealth Court emphasized the need for proof of permanent loss of use.

In the case, the worker was injured while using a table saw. His right thumb, index, and middle fingers hit the blade of the saw when his hand slipped. He had surgery to the index finger, including a fusion of one of the joints, and developed complications following surgery. The worker contended he had lost the use of his right index finger, and was entitled to specific loss of the finger. Under the Act, specific loss of an index finger is valued at 50 weeks of benefits at the total disability rate.

The Commonwealth Court held the evidence did not establish permanency, and, therefore, specific loss benefits were not owed. The worker testified he had difficulty writing, playing guitar, grabbing a glass, picking up items, and getting dressed. His right index finger appeared bent toward his middle finger, and he could not perform his pre-injury work in construction. He produced

medical evidence that he had lost function of his index finger for all intents and purposes due to tendon loss, bone loss, and the surgical fusion. But the medical witness did not state the loss was permanent. Under these circumstances, the worker did not meet his burden of proving permanency, and specific loss benefits were not available.



Discrimination Based Upon Sexual Orientation Violates Title VII of the Civil Rights Act of 1964

In *U.S. Equal Employment Opportunity Commission v. Scott Medical Health Center, P.C.*, 217 F.Supp.3d 834 (W.D.Pa. 2016), the court addressed whether allegations of sexually hostile work environment brought by a gay male employee against his employer was actionable under Title VII. The court ruled in the employee's favor.

The claim involved Dale Baxley, a gay male employed and allegedly constructively discharged from employment due to an allegedly sexually hostile work environment perpetuated by a telemarketing manager that consisted of unwelcome and offensive comments about Mr. Baxley's sexual orientation. In addition to Mr. Baxley's claim, the EEOC pursued sex discrimination claims on behalf of five (5) former female employees arising out of conduct by the telemarketing manager.

The employer moved to dismiss Mr. Baxley's claim, in part, on the grounds that discrimination based upon sexual orientation is not actionable under Title VII, citing the Third Circuit decisions of *Bibby v. Philadelphia Coca-Cola Bottling Co.*,



260 F.3d 285 (3d Cir. 2001) and *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009). The EEOC countered that the lack of an express reference to sexual orientation in Title VII was not controlling. The Court framed the issue as "whether, but for Mr. Baxley's sex, would he have been subjected to this discrimination or harassment?" The Court concluded Mr. Baxley would not have been subjected to discrimination or harassment but for his sex.

The Court held that Mr. Baxley's claim was covered under Title VII, focusing upon the prohibition against discrimination "because of sex". The Court cited to cases from the Supreme Court of the United States wherein the court incrementally broadened the scope of Title VII's protections of sex discrimination in the workplace, including prohibiting employers from discrimination based upon sex stereotyping, which the court concluded encompassed discrimination on the basis of sexual orientation. The court also cited to district court rulings from other states recognizing sexual orientation discrimination was covered by Title VII. The court distinguished the *Bibby* decision and focused upon intervening legal developments since the *Bibby* decision was issued.

Mr. Baxler ultimately recovered \$50,000 in compensatory damages (statutory maximum allowed) and \$5,000 in back-pay. The court issued a permanent injunction barring the employer from engaging in any further sex harassment and requiring that it report to the EEOC for a period of five (5) years on any complaints of sex harassment that it receives.

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

Dueling Product Liability Jury Instructions

In response to the Supreme Court's landmark decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa.2014), the Pennsylvania Bar Institute ("PBI") released revised Suggested Standard Jury Instructions for product liability actions during June 2016, without advance circulation for comment. The defense bar's opinion is that these new PBI jury instructions are problematic for numerous reasons, most importantly because they disregard key aspects of the *Tincher* decision and expand liability in a manner favorable to plaintiffs.

Given that PBI jury instructions are relied upon heavily by the bench and bar in developing jury instructions tailored to specific cases, in October 2017 the Pennsylvania Defense Institute ("PDI") developed unbiased standard jury instructions for product liability actions that accurately reflect *Tincher* and subsequent interpreting decisions as an alternative to the PBI instructions. The following briefly describes the key aspects of the *Tincher* decision in the context of the PBI and PDI jury instructions.

Key Aspects of *Tincher*: An examination of *Tincher* and its progeny is beyond the scope of this article. However, the holdings important to jury instructions include that *Tincher* declined to adopt the Restatement (Third) of Torts in favor of sticking with the Restatement (Second) of Torts Section 402A. However, *Tincher* expressly overruled *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa.1978), a decision that improperly attempted to divorce negligence concepts from strict liability and set Pennsylvania's product liability law on an unpredictable path. The *Tincher* Court expressly stated that overruling *Azzarello* may impact the availability of negligence-driven defenses. Additionally, subsequent cases have permitted such defenses. Finally, *Tincher* decided that the threshold inquiry in strict liability design cases is whether a defective condition unreasonably dangerous to the product user existed and further that this inquiry is for the jury, no longer the judge, to decide.

Flaws in PBI instructions: PBI identifies several issues with the PBI instructions. In summary, the PBI instructions ignore *Azzarello's* overruling, disregard the *Tincher* mandate of the threshold jury inquiry, sidestep the *Tincher*

directive to allow unanswered questions about product liability law to develop incrementally, and improperly influence the law's development by presenting one-sided instructions that inure to the benefit of plaintiffs only.

Benefits of PDI instructions: PDI provided 16 suggested standard jury instructions which strive to be faithful to the *Tincher* and related decisions while following the format employed by PBI's

...these new Pennsylvania Bar Institute jury instructions are problematic for numerous reasons...

Suggested Standard Jury Instructions for all types of cases. Notably, the instructions incorporate *Tincher* language favorable to the defense, including addressing the threshold question of whether a defective product is unreasonably dangerous and adding crashworthiness and industry standard instructions.

Impact of Dueling Instructions upon Practice: During charging conferences at trial, plaintiffs will argue the PBI instructions and defendants will argue the PDI instructions. The PDI instructions and their accompanying detailed rationale will facilitate defense counsel's robust argument and preservation of issues for appeal. Defense counsel's position is strengthened by having the formal, competing PDI instructions, especially given the deference PBI instructions have received historically.



Announcements

■ In November, **Adam Barnes** served as a panelist for the Bridge the Gap program, which is a Continuing Legal Education program for newly admitted Pennsylvania lawyers addressing professional ethics.

■ In December, **Adam Barnes** served as an author and presenter for a Continuing Legal Education program conducted by the National Business Institute titled “*Bad Faith: Secrets Insurance Companies Don’t Want Attorneys To Know*”, presenting on various professional ethical issues addressing conflicts of interest with current and former clients, defending an insured, and communications with witnesses.

Results

■ In October 2016, **Pam Collis** obtained voluntary dismissal in dental malpractice action related to an allegation of faulty crown installation. Preliminary objections were filed on the basis that Plaintiff was unable to obtain a valid certificate of merit that the dental provider had breached the standard of care.

■ In October 2017, **Gina Zumpella** successfully obtained voluntary dismissal of a commercial landlord from a negligence lawsuit involving injuries caused by a slip and fall on snow and ice based on the theory that the landlord was not responsible for the same.

■ In December 2017, **Adam Barnes** obtained a defense verdict in an arbitration proceeding in Fayette County, Pennsylvania. The case arose out of a residential fire that started in the clients’ home that allegedly resulted in damage to Plaintiff’s neighboring home. The State Fire Marshal concluded the cause of the fire was undetermined. Plaintiff failed to offer any evidence that the fire began as a result of the clients’ negligent conduct.

■ In December 2017, **Susan Kostkas** secured the dismissal with prejudice of a defendant dentist in a wrongful death and survival action arising from a decedent’s untimely death due to oral cancer based upon statute of limitations arguments advanced in preliminary objections.

■ In November 2017, **Gina Zumpella** obtained a dismissal of two lawsuits in Wheeling, West Virginia involving a multi-party, multi-vehicle motor vehicle accident. After the completion of party depositions, as well as responding police officers and various witnesses, it was established that the client was not the factual cause of the accident and thus all parties agreed to a dismissal.

■ In December 2017, **Adam Barnes** successfully recovered in excess of \$134,000 in a lawsuit filed in Wheeling, Ohio County, West Virginia, for reimbursement of defense costs and indemnity payment made in an underlying personal injury claim. The firm’s client, a general contractor, was sued in connection with an injury sustained by a subcontractor’s employee who fell 30 feet from a window opening during the construction of a hotel. The employee sued the client and his employer. The employer’s general liability carrier refused to accept the additional insured tender, forcing the client to pursue reimbursement after the liability case settled.

■ In November 2017, **Gina Zumpella** successfully tendered the defense of a landlord to a tenant based upon a contractual agreement for providing security. The Plaintiff in the case died from a shooting incident in the parking lot owned by the landlord. Ms. Zumpella recouped all defense costs and expenses incurred from the initial date of tender.

Top Ten Greatest American Moments in Winter Olympics History

- 10. 1980 Winter Olympics Eric Heiden** – Eric Heiden, in the single-best Winter Olympic performance ever, took home 5 gold medals in speed skating. He set five Olympic records and a world record and then retired from the sport on top.
- 9. 1988 Winter Olympics Brian Boitano** – After an intense battle with Brian Orser of Canada in what has come to be known as the Battle of the Brians, Brian Boitano took the gold in free skating by a 5-4 margin.
- 8. 2002 Winter Olympics Sarah Hughes** – Sarah Hughes, 16 at the time, managed to come back from 4th place to take gold by overcoming the more experienced competition.
- 7. 1976 Winter Olympics Dorothy Hamill** – 19 year old Dorothy Hamill took gold in the 1976 Olympics with the performance of a lifetime on her way to take gold at the world championship, coming to be known as “America’s sweetheart”.
- 6. 1924 Winter Olympics Charles Jewtraw** – In the inaugural Winter Olympics games, the first ever Olympic gold was awarded to American speed skater Charles Jewtraw.
- 5. 1960 Winter Olympics U.S. Men’s Hockey Team** – Despite similar circumstances to the 1980 Miracle on Ice, the U.S. Men’s Hockey Team overcame both Canada and the USSR to take the gold. Interestingly the last player cut from the U.S. team was Herb Brooks, who would lead the Miracle on Ice team 20 years later.
- 4. 2002 Winter Olympics Jimmy Shea** – Having just lost his grandfather, a 1931 dual Winter Olympics gold medalist, to a drunk driving accident, Jimmy Shea went on to win gold in the 2002 skeleton with his grandfather’s funeral card in his helmet. He was the first ever American to win gold in the skeleton.
- 3. 1994 Winter Olympics Dan Jansen** – In 1988 the heavily favored Dan Jansen came up short after learning that his sister had lost her battle with leukemia. He again fell short of gold in 1992. After 2 consecutive Olympics without medals, the speed skater managed to earn Olympic gold in 1994. He celebrated the win with a victory lap with his daughter, Jane, who was named after his sister.
- 2. 1998 Winter Olympics U.S. Women’s Hockey Team** – In Nagano, Japan, the U.S. Women’s Hockey team overcame Canada at the introduction of the sport to the Winter Olympics. The 3-1 upset capped off an undefeated medal run.
- 1. 1980 Winter Olympics U.S. Men’s Hockey Team** – In what is known as the greatest moment in Olympics history, the Miracle on Ice, the U.S. Men’s Hockey team, on the back of a brilliant performance from goaltender Jim Craig, defeated the near-invincible Russian Men’s Hockey team on the road to winning Gold in the 1980 Winter Olympics.

