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

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Walsh, Barnes, & 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:

Examining the Immunity Available to Pennsylvania Health Care Providers during the Pandemic

On March 6, 2020, Pennsylvania Governor Tom Wolf declared a disaster emergency in response to COVID-19 cases. Within two months, Governor Wolf "signed an executive order to afford health care practitioners protection against liability for good faith actions taken in response to the call to supplement the health care provider workforce during the COVID-19 pandemic." (Office of Governor, May 6, 2020 Press Release, https://www.governor.pa.gov/newsroom/gov-wolf-signs-executive-order-to-provide-civil-immunity-for-health-care-providers/) (Full text of the order: https://www.governor.pa.gov/wp-content/uploads/2020/05/20200506-GOV-health-care-professionals-protection-order-COVID-19.pdf) The following examines the immunity provided by the May 6, 2020 Executive Order, the failed effort to expand immunity, and the interplay of federal immunity.

Immunity Only Applies to Individuals. The executive order grants immunity to any individual who is authorized to practice a health care profession or occupation in Pennsylvania. **Health care facilities and entities are excluded**.

Immunity Only Applies to Emergency and Disaster Services. Immunity is limited to acts or omissions by an authorized individual health care provider engaged in rendering COVID-19 treatment or services during the disaster emergency response. The order describes immunity as applying to "emergency services" and "disaster services," but these terms are not defined in the order.

Governor Wolf renewed his initial proclamation on multiple occasions with the last renewal occurring on May 20, 2021. However, Pennsylvania's General Assembly terminated this renewal by a June 19, 2021 concurrent resolution. Thus, while the May 6, 2020 Executive Order expressly provides

(Continued on page 2)

(Continued from page 1)

that it remained in effect "for the duration of the disaster emergency," presumably the General Assembly's June 17, 2021 resolution ended the immunity extended by the executive order. Thus, the immunity provision potentially applies to claims arising during a closed period from May 6, 2020 until June 19, 2021.

Immunity Only Applies to COVID-19 Care. The May 6, 2020 Executive Order states, "This grant of immunity shall not extend to health care professionals rendering non-COVID-19 medical and health treatment or services to individuals." Additionally, the order emphasizes that that the immunity does not extend to willful misconduct or gross negligence.

Veto of Effort to Expand Immunity. The General Assembly's effort to broaden the scope of immunity afforded by the May 6, 2020 Executive Order to health care providers was vetoed by Governor Wolf.

Federal Immunity. The federal Pubic Readiness and Emergency Preparedness Act (PREP Act) contains an immunity provision and is in effect until the end of the federal government's public emergency declaration or until October 1, 2024, whichever occurs first. The nationwide public health emergency, last renewed on July 19, 2021, remains in effect. The PREP Act provides immunity, except for willful misconduct, for claims arising out of the use of covered COVID-19 countermeasures. Immunity is not limited to individuals or COVID-19 care. The PREP Act focuses on immunity for the manufacturing, distribution and administration of COVID-19 tests, drugs and vaccines. However, it has been amended seven times so there is value in examining any professional liability claim involving COVID-19 in the context of the PREP Act to determine if removal to federal court is warranted.

Conclusion: Immunity pursuant to Governor Wolf's executive order is somewhat illusory. The PREP Act warrants consideration. However, the best defense for a COVID-19 professional liability claim likely arises from usual and traditional strategies.

Pennsylvania Superior Court Holds that New UM/UIM Stacking Waiver is not Required when a Vehicle is Removed from a Personal Auto Policy

The Pennsylvania Superior Court issued a ruling in *Franks v. State Farm Mut. Auto. Inc. Co.*, 2021 Pa.Super. 192 (September 24, 2021) wherein it held that under the plain language of 75 Pa.C.S. §1738(c), the removal of a vehicle from an insurance policy does not constitute a "purchase" of coverage so as to require the insured be provided another opportunity to waive stacked coverage.

In January 2013, the Frankses applied for automobile coverage with State Farm for two vehicles and rejected stacked UIM coverage. In January 2014, the Frankses added a third vehicle to the policy and executed a second rejection of stacked limits of UIM coverage.

In July 2014, one of the vehicles was deleted from the policy, but otherwise did not make any changes to the coverage afforded by the policy for the remaining 2 vehicles. A new waiver of stacking was not secured.

Mr. Franks was involved in a motor vehicle accident on August 11, 2016. Thereafter, State Farm paid Mr. Franks the $100,000 non-stacked UIM coverage limits. Mr. Franks asserted he was entitled to $200,000 in stacked coverage for the accident. State Farm rejected the request.

Mr. Franks filed a declaratory judgment action in Bucks County, and following a non-jury trial the trial court declared Mr. Franks was only entitled to non-stacked UIM coverage. On appeal, a divided three judge panel of the Superior Court reversed the trial court decision. State Farm requested an *en banc* re-argument.

The *en banc* panel affirmed the trial court's decision, holding that under the plain language of §1738(c) the removal of a vehicle from an insurance policy is not the same as the "purchase" of coverage, and §1738(c) does not require a new stacking waiver whenever there is any change in the potential amount of stacked coverage. The court observed that had the legislature intended to require a new waiver every time a named insured changes UM or UIM coverage, it could have replaced the word "purchasing" with "changing" to effectuate this requirement.

In closing, when an existing vehicle is replaced by another vehicle or when an existing vehicle is removed from the policy, there is no requirement for the insurance company to secure a new rejection of stacked UM and UIM coverage; however, whenever a vehicle is **added** to an insurance policy so as to increase the total number of vehicles insured by that policy and purchase new insurance coverage for that vehicle, insurance companies should make sure that the named insured executes a new waiver of stacked UM and UIM coverage or else the insurance company will risk having to provide stacked UM or UIM coverage without the benefit of collecting the appropriate premium.

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Pennsylvania Superior Court Suggests Joint and Several Liability Still Available if Plaintiff is not Assessed Comparative Fault

In *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021), the Pennsylvania Superior Court raised the question of whether the Fair Share Act was applicable in a situation where the plaintiff is not assessed comparative fault by the trier of fact. While this aspect of the decision is *dicta*, there is the concern that trial courts will rely upon the analysis to fundamentally alter the joint and several liability exposure of defendants.

Keith Spencer was a pedestrian legally walking across the street in Philadelphia when he was struck by a vehicle operated by Cleveland Johnson. The vehicle was owned by Philadelphia Joint Board Workers United, SEIU ("PJB") and provided to its employee, Tina Johnson (Cleveland's wife). Suit was filed against Mr. Johnson, Mrs. Johnson, and PJB. There was no dispute that Mr. Spencer was not at fault and Mr. Johnson was negligent in his operation of the vehicle; however, the parties disputed whether Mrs. Johnson was negligent in allowing her husband to operate her work vehicle and whether PJB was negligent under the laws of agency and vicarious liability.

The case proceeded to trial and the jury found that Mr. Johnson was 36% liable, Mrs. Johnson was 19% liable, and PJB was 45% liable. The total jury award was just under $13 Million.

Mr. Spencer's counsel moved to mold the jury verdict to hold PJB jointly and severally liable for the entire verdict amount pursuant to the Fair Share Act. Specifically, by combining the negligence of PJB and Mrs. Johnson, PJB's liability apportionment would total 64%, triggering joint and several liability. The trial court denied this motion and Mr. Spencer appealed.

The Superior Court reversed the trial court's ruling and held that PJB's liability and Mrs. Johnson's liability should be combined under the law of vicarious liability. Since the combined negligence exceeded 60%, PJB was held to be jointly and severally liable for the entire verdict pursuant to the Fair Share Act.

In *dicta*, the Superior Court went on to state that even if PJB was not held by the jury to have been vicariously liable for Mrs. Johnson's negligence, the court would nevertheless have ruled in Mr. Spencer's favor on the issue of joint and several liability. The Court stated that the Fair Share Act does not apply when the plaintiff is not contributorily negligent. As such, the traditional rules of joint and several liability apply.

Following the Superior Court's decision, the parties reached a settlement.

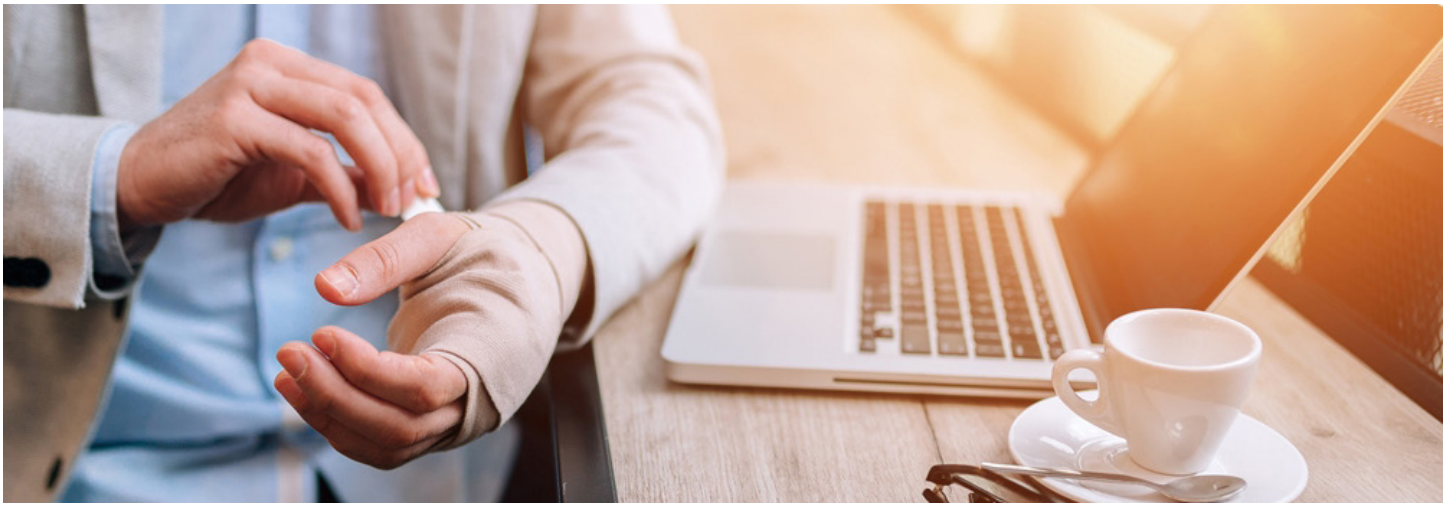
Moving forward, it is expected trial courts will combine the negligence of an agent or employee with the negligence assessed against a master or employer for purposes of determining whether the 60% threshold of the Fair Share Act is satisfied.

There is the concern trial courts will follow the Superior Court's analysis that the Fair Share Act does not apply when the plaintiff is not assessed comparative negligence and apply joint and several liability among all liable defendants. While this analysis is contrary to the legislature's intent when it passed the Fair Share Act, the Superior Court has created a pathway for a direct appeal on whether joint and several liability applies when the plaintiff is not assessed any fault for the incident.

Courts Are Expanding The Course Of Employment For Workers' Compensation Purposes

In recent cases, both the Pennsylvania Supreme Court and the Commonwealth Court, addressing course of employment issues, held employees who were not working, and were not on their employer's premises, were entitled to benefits. The Commonwealth Court handles all appeals in workers' compensation cases, and its expansion of the right to recovery is noteworthy.

The Supreme Court reversed the Commonwealth Court's determination that a salesman was not in the course of employment while he was on his way home from an after-hours gathering of co-workers. *Peters v. Workers' Compensation Appeal Board (Cintas)*, 2021 WL 5349146 (Pa. 2021). The Commonwealth Court's decision was highlighted in our December, 2019 newsletter. The employee was "in the field" for his entire workday, stopped at a bar to meet co-workers, and was injured in a motor vehicle accident on the way home from the bar. He was a "traveling employee" and thus entitled to a broader scope of employment than a stationary employee. As to the employee's activities, the Supreme Court noted a voluntary social event can be a work-related event, and the event in question so qualified. The Supreme Court remanded the matter for a determination of whether the employee had abandoned his employment, based on unresolved conflicting testimony as to whether the employee had stopped at another event after leaving the work gathering and before beginning the drive to his home.



In *Weaver v. Workers' Compensation Appeal Board (Breinig),* 2021 WL 3010108 (Pa.Cmwlth. 2021), the employee fell and suffered a wrist fracture while walking from a parking lot to her employer's premises to start work. The parking lot was owned by the local municipality and was located behind the employer's building. The employer leased three parking spots in the lot for its 11 employees, and the employee used one of the spots every day she worked. The employee walked through a municipality owned park along an alley and, while trying to avoid ice in her path, slipped and fell. It was undisputed the employee fell on property not owned by the employer.

The Commonwealth Court held the employee was in the course of employment and entitled to benefits. The Court highlighted prior cases in which an employee was injured while using a reasonable means of ingress to or egress from the employer's premises.

In *Stewart v. Workers' Compensation Appeal Board (Bravo Group Services, Inc.),* 2021 WL 2760072 (Pa. Cmwlth. 2021), the employee worked as a cleaner at a suburban Philadelphia office building. The employee used public transportation to a certain point, and then had access to a shuttle bus operated by the office building, not his employer. While stepping off the shuttle bus prior to the start of his work shift, the employee twisted his left foot and fell. He was a few feet from the entrance to the building. The employer defended on the basis the employee's injury occurred while he was commuting to or from work, the so-called "going and coming" rule. The Commonwealth Court disagreed, and, as in *Weaver*, concluded the case was governed by the line of cases focused on reasonable means of ingress/egress.

Both of the Commonwealth Court cases relied in part on the Pennsylvania Supreme Court's decision in *US Airways, Inc. v. Workers' Compensation Appeal Board (Bockelman)*, 221 A.3d 171 (Pa. 2019), which, as noted in our December, 2019 newsletter, addressed a similar issue and suggested a focus on the reasonable means of ingress/egress to the employer's premises. The *Bockelman* decision is being broadly interpreted to expand the course of employment.

Announcements/Results

Announcements

■ **Paul J Walsh III, Adam M Barnes, and Gina M Zumpella** have been named 2021 Pennsylvania Superlawyers, a list comprised of the Top 5 Percent of Attorneys in Pennsylvania.

■ **Gina Zumpella** secured a defense verdict on a magistrate case wherein the Plaintiff asserted that Defendant negligently installed a roof, and specifically failed to properly install the flashing when the roof was installed.

Results

■ **John Polena** obtained a defense verdict in favor of the insured driver against the Plaintiff driver and an award of only $1,000 for pain and suffering in favor of the Plaintiff front seat passenger involving a rear end collision in which the defendant admitted rear ending the Plaintiffs' vehicle.

■ **John Polena** recently obtained dismissal of a contractor involving a trip and fall by a tenant employee at an active construction site at an office building.

■ **John Polena** obtained the dismissal of an insured property owner involving a slip and fall on ice on the sidewalk of a shopping center due to a water leak from an overhead awning

■ **Paul Walsh** obtained Summary Judgment in a limited tort case. Plaintiff was a limited tort selector, who alleged a serious injury in the at-issue motor vehicle accident. We argued Plaintiff did not sustain a "serious injury" as defined by the Pennsylvania Motor Vehicle Financial Responsibility, **75 Pa.C.S. §1701 et. seq.**, and therefore Plaintiff was not entitled to collect non-economic damages. The Court granted Defendants' Motion for Summary Judgment and ultimately dismissed the case.

■ **Adam Barnes** obtained summary judgment on behalf of an insurance company in a coverage action filed in the Western District of Pennsylvania. The lawsuit involved a claim for coverage under a first-party commercial property insurance policy to recoup the cost to clean the insured's commercial building after the tenant filed for bankruptcy and vacated the premises without cleaning the interior of the building as required by the lease agreement. The coverage dispute centered on whether the tenant's failure to clean the interior of the building involved direct accidental physical loss or accidental physical damage to the building or, in the alternative, whether the black powder left behind to be cleaned up constituted a "pollutant" such that the claim was excluded from coverage by the "pollutants" exclusion. The District Court held that the claim did not involve a "loss" and, even if it did, the claim was excluded from coverage by the "pollutants" exclusion.

■ **Adam Barnes** obtained summary judgment on behalf of a retailer in a product liability action filed in Dauphin County, Pennsylvania. The lawsuit involved a residential fire alleged to have been started by an electric space heater that was allowed to operate unattended for over 8 hours. Summary judgment was granted on the grounds the plaintiffs failed to create a genuine issue of material fact that the heater had a defect that caused the fire.

■ **John Polena** obtained dismissal based upon Preliminary Objections of an insured business owner in their individual capacity involving a claim for piercing the corporate veil related to negligent demolition work that caused damage to an adjoining structure.

■ **Adam Barnes** secured the voluntary dismissal of a lawsuit filed in Monongalia County, West Virginia. The lawsuit alleged the plaintiff slipped and fell inside a store due to wet tiles. The incident was captured by store surveillance, which clearly demonstrated the flooring was dry and the plaintiff fell due to her shoes being wet from outside rainy conditions.

■ **John Polena** obtained a dismissal of the insured property owners and property management company on a Motion for Judgment on the Pleadings in a slip and fall case based upon a failure to name the right parties within the statute of limitations.

■ **Susan Kostkas** secured a dismissal of a dentist client from a multi-party lawsuit after a judgment of non-pros in favor of the client.

■ **John Polena** obtained a defense verdict in an Arbitration case in favor of a Municipal Water Authority regarding a claim for property damages due to a water line break involving an authority owned water line.

■ **Susan Kostkas** secured a defense verdict in favor of the insured dentist alleged to be negligent for failure of a dental implant.