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

June 2023

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Walsh Barnes, 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 Clarifies Holding in *Gallagher v. GEICO Indemnity Co.* and Validity of Household Exclusion in UM/UIM Coverage Forms

In *Gallagher v. GEICO Indemnity Co.*, 201 A.3d 131 (Pa. 2019), the Pennsylvania Supreme Court held "that the household vehicle exclusion violates the Motor Vehicle Financial Responsibility Law ("MVFRL"); and therefore, these exclusions are unenforceable as a matter of law". This holding was based on the rationale that the MVFRL requires the execution of a statutory form to reject stacking of UM/UIM benefits and as a result the preclusion of stacking of benefits through the enforcement of an exclusion violates 75 Pa.C.S. §1738 and is unenforceable.

The Supreme Court revisited and clarified this holding in *Erie Ins. Exchange v. Mione*, 289 A.3d 524 (Pa. 2023).

In *Mione*, Mr. Mione was involved in a collision while operating his motorcycle. The motorcycle was insured by Progressive Insurance under a policy that did not include UIM coverage. The Miones owned a car insured by Erie Insurance on a single-vehicle policy that included stacked UIM coverage. The Miones' adult daughter, who lived in the home, owned a car insured by Erie Insurance on a single-vehicle policy. Both Erie Insurance policies contained a household vehicle exclusion barring UIM coverage for injuries sustained while operating a household vehicle not listed on the policy under which benefits are sought.

Mr. Mione settled with the at-fault driver for the driver's full liability limits. Mr. Mione then applied for UIM benefits from Erie Insurance under his auto policy and his daughter's auto policy, and Erie Insurance denied both claims pursuant to the household vehicle exclusions.

The trial court enforced the household vehicle exclusions, concluding the *Gallagher* decision did not apply as the claimant in *Gallagher* had purchased UIM coverage for his motorcycle, while Mr. Mione did not.

On appeal, the Superior Court affirmed the trial court decision, concluding that stacking and §1738 were not implicated because Mr. Mione did not purchase UIM coverage for the motorcycle and, therefore, he did not have the requisite UIM coverage on which to stack the UIM coverage of the personal auto policies. The Superior Court observed that "*Gallagher* only invalidated household exclusions in cases where they are used to circumvent Section 1738's specific requirements for waiving stacking."

The Supreme Court affirmed.

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The Supreme Court explained that the *Gallagher* decision and holding turned on the fact that "Gallagher did not sign the statutorily-prescribed UIM stacking waiver form for either of his … policies" and the fact that he would have received the UIM coverage that he bought and paid for under his motorcycle policy and his personal auto policy pursuant to §1738(a), but for the household vehicle exclusion.

In the present matter, the court observed that Mr. Mione was not attempting to stack anything at all. The household vehicle exclusion did not act as a *de facto* waiver of stacking because the Miones were not attempting to stack UIM benefits from the personal auto policies on top of UIM benefits from the motorcycle policy as the motorcycle policy did not have UIM benefits to begin with and, therefore, "Section 1738's rules for waiving stacking - - which were the basis for this Court's decision in *Gallagher* - - are simply not implicated".

The Supreme Court reiterated that "the holding in *Gallagher* was based on the unique facts before us in that case, and that the decision there should be construed narrowly." The court further explained that in *Gallagher*, Gallagher was attempting to stack UIM coverage of the motorcycle policy and the personal auto policy as well as stacked UIM coverage within the personal auto policy and when confronted with these "unique facts", the Court concluded that "enforcing the exclusion would be 'inconsistent with the unambiguous requirements [of] Section 1738 of the MVFRL".

As Mr. Mione did not purchase UIM benefits for the motorcycle, enforcement of the household vehicle exclusions in the personal auto policies did not have the effect of operating as a disguised waiver of stacking that was disapproved in *Gallagher*, but rather "an unambiguous preclusion of *all* UM/UIM coverage (even unstacked coverage) for damages sustained while operating an unlisted household vehicle".

"[F]or a household vehicle exclusion to be acting as an impermissible *de facto* waiver of stacking, the insured must have received UM/UIM coverage under some other policy first, or else Section 1738 is not implicated at all".

The court closed its opinion with the following statement: "in sum, we continue to reject the view that household vehicle exclusions are *ipso facto* unenforceable....in cases where the exclusion does not interfere with the insurance ability to stack UM/UIM coverage, *Gallagher's de facto* waiver rationale is not applicable".

Clearly, the Supreme Court felt the need to limit the application of the sweeping holding of the *Gallagher* case, if for no other reason than to bring that holding in line with other case law, specifically *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006 (Pa. 1998) and *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530 (Pa. 2006), which enforced household vehicle exclusions where there was no UM/UIM coverage to be stacked.

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Trial Courts Applying Appellate Court's *Dicta*, Eroding Pennsylvania's Fair Share Act

As anticipated by the defense bar, Pennsylvania trial courts are eroding the Fair Share Act, 42 Pa.C.S.A. §7102, even though no appellate court has converted the *dicta* of the Superior Court in *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021), to precedent.

With the Fair Share Act in 2011, the consensus was that joint and several liability was abolished, and defendants were no longer at risk of being responsible for 100% of an award even if they were found to be as little as 1% liable.

Barring the application of targeted exceptions (i.e.: intentional misrepresentation, intentional tort, 60% or more responsible, release of hazardous substances, and dram shop liability), a defendant is responsible for its percentage apportionment of an adverse verdict.

In 2021, the *Spencer* decision upended this understanding. In a decision issued by less than the whole court, the Superior Court suggested in a comment not necessary to resolve the case (*dicta*, which is not legally binding) that the Fair Share Act did not apply to a verdict that did not apportion any fault to the plaintiff.

Despite the fact that the *Spencer* analysis of the Fair Share Act is not binding precedent, trial courts have nevertheless begun to apply joint and several liability in cases where the plaintiff has not been apportioned any fault by the jury.

In *Ace v. Ace*, No. 6242-CIVIL-2020 (Pa.Com.Pl. Monroe Co. 2023), the trial court characterized the rationale of *Spencer* as "*dicta*" and referred to the appellate court's reasoning as "absurd," but nevertheless held the plaintiff was able to collect 100% of the verdict from either defendant - - under the Fair Share Act only the defendant that was found 70% liable would have been subject to joint and several liability for the entire verdict.

In *Tucchi v. Carroll*, No. CV-2018-1794 (Pa.Com.Pl. Northumberland Co. 2023), the trial court denied a post-trial motion that a verdict against all three defendants for 100% of the award should be stricken under the Fair Share Act on the grounds the minor plaintiff was not assess any percentage of fault at trial and in reliance upon the *Spencer* decision, which was described as a "precedential holding".

Trial courts are beginning to apply the Superior Court's analysis of the Fair Share Act to verdicts where the plaintiff is not assessed any percentage of fault. When evaluating a case that is headed for trial, you should consider the likelihood of whether the trier of fact will apportion any fault to the plaintiff and, if not, be prepared for the plaintiff to assert that all defendants that were held liable are jointly and severally responsible for the payment of the verdict.

Pennsylvania Supreme Court Holds that When Removing a Vehicle from a Personal Auto Policy the Insurance Company Does Not have to Secure a New UM/UIM Waiver of Stacked Coverage

In *Franks v. State Farm Mut. Auto. Ins. Co.*, A.3d, 2023 WL 2993881 (Pa. 2013), the Superior Court addressed whether the removal of a vehicle from a multiple motor vehicle insurance policy, in which stacked coverage had previously been waived, requires a new express waiver of stacked coverage pursuant to 75 Pa.C.S. 1738(c) of the MVFRL.

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Robert and Kelly Franks purchased a personal auto policy from State Farm in 2013 that insured two vehicles. The Franks purchased UIM coverage for the insurance policy but rejected stacked coverage by executing the required statutory waiver. In 2014, the Franks added a third vehicle and executed the statutory waiver form. A few months later, the Franks removed a vehicle from the policy without any change to the coverage or premiums relative to remaining vehicles and State Farm did not secure a new stacking waiver form. In 2015, the Franks replaced a vehicle, and no new stacking waiver form was secured.

In 2016, Mr. Franks was involved in a motor vehicle accident and sustained injuries. He settled with the at-fault driver and then pursued UIM coverage with State Farm, asserting that he was entitled to stacked UIM benefits due to State Farm's failure to secure a new stacking waiver form after the removal of the third vehicle in 2014. State Farm disagreed on the grounds that the removal of a vehicle from a multi-vehicle policy, without more, did not alter the status of the prior waiver nor trigger the need to execute a new waiver.

The trial court sided with State Farm and enforced the stacking waiver. On appeal, the Superior Court and an *en banc* panel of the Superior Court affirmed the trial court after concluding that the removal of the vehicle from a multi-vehicle policy where appropriate credits were made, with the remaining coverage and premiums continuing unchanged, did not involve the "purchase" of insurance, which would have triggered the need to secure a new stacking waiver.

The Supreme Court affirmed and held "the removal of a vehicle from coverage under a multi-vehicle policy under conditions that do not alter the pre-existing coverage or costs relative to the remaining vehicles is not a purchase requiring a renewed expressed waiver per Section 1738(c)".

Pennsylvania Superior Court Enforces Statutory Employer Defense and Vacates $5.6 Million Verdict

In *Yoder v. McCarthy Constr., Inc.*, 2023 WL 1113573, ___ A.3d ___ (Pa. Super. 2023), the Superior Court confirmed the validity of the statutory employer defense, applied the five-factor test of *McDonald v. Levinson Steel Co.*, 153 A. 424 (1930), and vacated a jury verdict of $5.6 million with instructions to enter judgment for the defendant.

The *McDonald* five-factor test requires the defendant to prove the following to establish immunity under the Workers' Compensation Act as a statutory employer:

1. An employer who is under contract with an owner or one in the position of an owner;
2. Premises occupied by or under the control of such employer;
3. A subcontract made by such employer;
4. Part of the employer's regular business entrusted to such subcontractor; and,
5. An employee of such subcontractor.

Mr. Yoder worked for a roofing company on a construction project for which McCarthy Construction served as the general contractor. While performing his roofing duties, Mr. Yoder fell through an unmarked and uncovered hole in the roof and suffered spinal fractures and other injuries that reportedly will require pain management for the rest of his life.

Mr. Yoder sought and obtained workers' compensation benefits from the roofing company and filed a civil suit against McCarthy Construction. To defeat the argument that McCarthy Construction was Mr. Yoder's statutory employer, Mr. Yoder maintained that he had worked on the project as an independent contractor rather than as an employee of the roofing contractor.

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The trial court rejected McCarthy Construction's statutory employer defense, the jury returned a verdict in Mr. Yoder's favor, and McCarthy Construction appealed.

The Superior Court determined the trial record established that:

1. McCarthy Construction was under contract with an owner or one in the position of an owner;
2. McCarthy Construction was occupying or had control of the premises;
3. McCarthy Construction had a subcontract with Mr. Yoder's employer;
4. McCarthy Construction entrusted a part of its regular business to Mr. Yoder's employer; and,
5. Mr. Yoder an employee of the roofing contractor, and an independent contractor.

In concluding that Mr. Yoder was an employer of the roofing contractor and not an independent contract, the Superior Court outlined ten factors typically weighed:

1. Does the worker or the hirer control the manner in which the work is done?
2. Does the worker have responsibility only for the result?
3. What are the terms of any agreement between the hirer and the worker?
4. What is the nature of the work/occupation to be performed?
5. What skill is required for performance of the work?
6. Is the worker engaged in a distinct occupation or business?
7. Which party supplies the tools or equipment for the work?
8. What is the method of payment, that is, whether payment is by time or by the job?
9. Is the work part of the regular business of the hirer?
10. Does the hirer have the right to terminate the work relationship, that is, terminate the worker's employment?

That said, the Superior Court ultimately concluded that Mr. Yoder's successful application for workers' compensation benefits conclusively established he was an employee of McCarthy Construction and judicially estopped him from asserting independent contractor status in the civil proceedings.

Results

Paul Walsh was successful in having the insured EMTs dismissed with prejudice from a wrongful death & survival action in a highly publicized matter that was ultimately settled by other defts for $8 million.

Adam Barnes obtained summary judgment on behalf of a client in a case involving asbestos litigation filed in Allegheny County based upon the lack of evidence that the plaintiff ever came into contact with any asbestos-containing product sold by the client.

Susan Koskas obtained dismissal of all claims against a client, including claims for intentional tort and punitive damages, in a case filed in Armstrong County. She also successfully tendered the defense of a client in an Allegheny County premises liability matter to a co-defendant.

Bob Grimm, on behalf of the insured shopping plaza owner, successfully tendered defense and indemnification to the maintenance contractor and its insurer in a slip & fall action.

John Polena obtained a defense verdict in Allegheny County for a speech generating device manufacturer involving claims made for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and other tort claims. He also obtained the dismissal of a demolition contractor in an action filed in Clearfield County.