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

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WALSH BARNES, P.C.

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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 Upholds Ban on Admissibility of Industry and Governmental Standards in Strict Products Liability Cases

For many years, Pennsylvania courts have precluded evidence of compliance with industry and governmental standards in strict products liability cases. With the overruling of *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), the defense bar was optimistic that Pennsylvania would join most states and permit product manufacturers and sellers to introduce compliance with applicable standards in defending a product's design. However, the Supreme Court's decision in *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023), extinguished this optimism.

Sullivan involves a worker injured when scaffolding collapsed. In response to the worker's motion, the trial court precluded evidence of the scaffolding's compliance with the standards of the American National Standards Institute (ANSI) and the Occupational Safety and Health Administration (OSHA). The jury determined the scaffolding product was defective and awarded $2.5 million in damages. The scaffolding's manufacturer appealed.

In affirming the trial court's decision to preclude the evidence, the Superior Court stated:

> [I]t is irrelevant if a product is designed with all possible care, including whether it has complied with all industry and governmental standards, because the manufacturer is still liable if the product is unsafe.... Under such reasoning, evidence of industry standards may be excluded because those standards do not go to the safety of the product itself but to the manufacturers' "possible care in preparation of product," which is irrelevant to whether a product is unsafe or strict liability is established.

Sullivan v. Werner Co., 253 A.3d 730, 747 (Pa. Super. 2023) (citation omitted). The scaffolding's manufacturer appealed to the Supreme Court, and the defense bar was hopeful that the state's highest court would change course and permit the introduction of evidence of industry and governmental standards in keeping with other state courts. The Court's decision in *Tincher*, overruling *Azzarello*, was responsible for this hope. *Azzarello* was relied upon by the Supreme Court in deciding *Lewis v. Coffing Hoist Division*, 528 A.2d 590 (Pa. 1987), the seminal case excluding such evidence in products liability cases.

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Unfortunately for product manufacturers and sellers, the Pennsylvania Supreme Court stayed the course and affirmed the Superior Court's decision, including expressly reaffirming *Lewis*. Therefore, Pennsylvania trial courts will continue to routinely preclude evidence of compliance with industry and governmental standards in strict products liability cases.

Pennsylvania Superior Court Allows Plaintiff to Recover Liability and UIM Coverage from the Same Policy

In *Erie Insurance Exchange v. Baluch*, 2025 WL 22562, __ A.3d __ (Pa. Super. 2025), the Pennsylvania Superior Court held that the fact scenario presented allowed a plaintiff to recover both liability and UIM coverage from the same insurance policy.

The Court framed the issue as "whether an insured is entitled to stack UIM benefits although another household policy excludes vehicles that are insured under the policy from the definition of 'underinsured motor vehicles." *Id*. at *1.

The relevant facts of the case were that in April 2022, Baluch was riding as a passenger on a motorcycle involved in a single vehicle accident. The motorcycle was operated by her stepfather.

Erie Insurance issued a policy to the stepfather and mother that covered the motorcycle and other vehicles and afforded $100,000 in liability coverage and $100,000 in stacked UM/UIM coverage. As a member of the household, Baluch was an insured.

Erie Insurance issued a policy to Baluch for her personal vehicle that afforded $100,000 in stacked UM/UIM coverage.

Erie Insurance paid Baluch the $100,000 liability limits under the stepfather's policy and the $100,000 in UM/UIM coverage under Baluch's policy.

Erie Insurance denied Baluch's claim for UM/UIM coverage under the stepfather's policy asserting that Baluch was not permitted to recover liability coverage and UM/UIM coverage under the same insurance policy pursuant to the holdings in *Wolgemuth v. Harleysville Mut. Ins. Co.*, 535 A.2d 1145 (Pa. Super. 1998)(en banc) and *Newkirk v. United Servs. Auto. Ass'n*, 564 A.2dd 1263 (Pa. Super. 1989).

The trial court ruled in Erie Insurance's favor which the Superior Court reversed.

The Superior Court concluded that under the facts of the case the definition of "underinsured motor vehicle", which did not include the motorcycle at issue, prevented Baluch from recovering stacked UIM coverage in violation of the MVFRL. Significantly, Baluch had her own insurance policy that afforded stacked UIM coverage whereas the *Wolgemuth* and *Newkirk* cases focused on the issue of whether the claimant was entitled to UIM benefits in the first instance, thereby distinguishing those cases from Baluch's claim. The Court further observed "[t]he controlling fact in *Wolgemuth* and *Newkirk* was not that the passenger was injured in a single vehicle accident, but rather that the passenger was covered under the same insurance policy as the driver and did not have a separate insurance policy which provided UM/UIM coverage." *Baluch*, at *5.

In sum, the Court concluded that Baluch had paid for stacked UIM coverage and was therefore entitled to such coverage. The definition of "underinsured motor vehicle" in the stepfather's insurance policy "acted as a disguised waiver of stacking. Such disguised waivers cannot prevent and insured from recovering UIM benefits and are invalid." *Id*. at *6.

A Plaintiff Can Recover Both Treble Damages and Punitive Damages Under the Unfair Trade Practices & Consumer Protection Law

In *Dwyer v. Ameriprise Financial*, 313 A.3d 969 (Pa. 2024), the Pennsylvania Supreme Court addressed the issue of whether a plaintiff can recover both treble damages under the Unfair Trade Practices & Consumer Protection Act, 73 P.S. §2-201, *et seq*. (UTPCPL) and punitive damages under common law claims.

The Dwyers sued Ameriprise Financial for negligent misrepresentation and fraudulent misrepresentation in connection with a representation that their quarterly premium payments for a life insurance policy would remain the same for the life of the insurance policy.

The trial court declined to award treble damages under the UTPCPL on the grounds that such an award would be duplicative of the punitive damages award provided by the jury on the common law claims. The decision was upheld on appeal by the Pennsylvania Superior Court.

The Supreme Court reversed.

The Court observed that "[t]reble damages under [UTPCPL] are central to this remedial purpose and operate in tandem with the private action to effectuate the legislative goals of the [UTPCPL]. The availability of treble damages, as well as attorneys' fees … incentivizes the private enforcement of the [UTPCPL], which serves the overarching legislative goal of eradicating unfair and deceptive trade practices." *Id*. at 980.

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The Court further stated that "[p]unitive damages, on the other hand, are penal in nature and are intended to punish a tortfeasor and to deter the tortfeasor and others from similar conduct. Such damages are appropriate 'where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.'" *Id*. at 980-981.

Additionally, the Court stated "[t]he purposes of a remedial statute such as the [UTPCPL] are not served by restricting the availability of damages to those that may already exist under the common law. Withholding treble damages under the [UTPCPL] because of an award of punitive damages for common-law claims does not serve the object to be attained with the enactment of the [UTPCPL]. Indeed, the award of punitive damages under the common law has no bearing whatsoever on the court's exercise of discretion to award treble damages under the [UTPCPL]. A court's discretion under the [UTPCPL] is limited to providing the relief prescribed in the statute. It does not extend to nullifying the availability of such relief based upon distinct common-law damages." *Id*. at 981-982.

Discoverability of Surveillance of a Plaintiff in Pennsylvania

When a personal injury plaintiff's claims of a serious injury, ongoing symptoms, or an incomplete recovery are suspect, an insurance company or its defense counsel may be inclined to consider conducting surveillance of the plaintiff. Video footage or photographs of the plaintiff working a long shift on her feet or vigorously exercising at the gym could expose the plaintiff's embellishment, if not outright fabrication, and be leveraged to impeach her credibility. One should consider, however, not only the potential benefits of surveillance, but also certain consequences that may follow, including its discoverability.

As a general matter, such surveillance is discoverable. *See Dominick v. Hanson*, 753 A.2d 824 (Pa. Super. 2000); *Bindschusz v. Phillips*, 771 A.2d 803 (Pa. Super. 2001). This is because beyond its strategic use for impeachment purposes, surveillance is substantive and probative in nature, rendering it discoverable.

Nevertheless, defense counsel may refrain from producing surveillance *prior* to taking the plaintiff's deposition, or even altogether withhold it from production if the surveillance will not be introduced and relied upon at trial. *See Morganti v. Ace Tire & Parts Inc.*, 70 Pa. D. & C.4th 1, 4-5 (Allegheny County CCP 2004) (Wettick, J.) (surveying the case law and observing, "most courts do not require the defendant, even after the plaintiff has been deposed, to furnish information concerning surveillance activities or to produce surveillance tapes where the defendant does not intend to introduce any surveillance tapes or to refer to any surveillance activities at trial.").

What if the plaintiff specifically inquires as to the existence of surveillance through written discovery requests propounded in advance of her deposition? According to the case law, *Dominick*, *supra*, defense counsel need not disclose that surveillance exists and, instead, should pose objections to the surveillance discovery requests. Defense counsel may then use the surveillance at the plaintiff's deposition, despite the nondisclosure. At that time, however, the surveillance must be produced, especially if defense counsel wishes to have the surveillance admitted at trial for viewing by the jury. Moreover, if the plaintiff is surveilled following her deposition, defense counsel should be mindful of the duty to supplement discovery responses by producing the surveillance, particularly if its admission will be sought at trial.

Guy Blass Joins Walsh Barnes, P.C.

The firm is happy to announce the addition of **Guy Blass** as a **Partner**. Guy has practiced in the field of insurance defense for over 25 years with extensive experience in commercial litigation matters involving construction claims, product liability actions, toxic tort litigation, premises liability, motor vehicle accidents, and general liability. Guy has litigated cases in Pennsylvania and West Virginia, tried cases to verdict throughout Pennsylvania, and handled appeals before appellate courts in Pennsylvania.

Guy is a native of Morgantown, West Virginia. He earned his undergraduate degree from Illinois Wesleyan University and his law degree from Duquesne University School of Law.

Results

Over the past year, the firm has secured the dismissal of clients in 18 matters.

We obtained summary judgment in several matters, including three (3) asbestos cases and an Allegheny County case involving a trip and fall on a city sidewalk granted on the eve of trial.

We successfully tendered four (4) cases to other parties based upon contractual indemnification, including a case involving a construction accident wherein an employee of a subcontractor fell from a scaffold and died.

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