IMPORTANT DEVELOPMENTS IN PERSONAL INJURY LAW
TENTH ANNUAL UPDATE

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ABOUT MARK K. ALTEMOSE, ESQUIRE

Mark Altemose is a native of Pen Argyl where he attended Pen Argyl High School. He attended college at Lafayette College in Easton, Pennsylvania, where he graduated Cum Laude with Honors in Economics. He attended Villanova University School of Law. He is a Partner with Cohen, Feeley, Altemose & Rambo, P.C., 2851 Baglyos Circle, Suite 200, Bethlehem, PA 18020; phone: (610) 625-2100; email: maltemose@cohenfeeley.com.

During his legal career, Mark has limited his practice to personal injury and construction litigation. He has extensive expertise handling serious injury and death cases involving automobile, trucking and motorcycle negligence; medical malpractice; pharmaceutical malpractice; construction accidents; gas and chemical exposure and explosion accidents; product liability; dog bites; and slips and falls. He has acted as a lead counsel in many well-known Lehigh Valley catastrophic injury and death cases including most recently the Charles Cullen serial murder cases, the DePUY ASR defective hip implant litigation, the Allentown natural gas explosion and the underground propane tank explosion in Bushkill Township. He has achieved many multi-million-dollar results for his clients, several exceeding $10 million, including verdicts of $95 million, $4.36 million and $1.5 million.

Mark is a member of the Million Dollar Advocates Forum, an organization with membership limited to attorneys who have won verdicts or settlements equal to or exceeding $1 million. He has been an invited lecturer to Bar Associations and other lawyers' groups to discuss the trial strategy and tactics that have enabled him to win large verdicts and settlements for his clients. He also regularly teaches continuing legal education courses to fellow attorneys regarding personal injury litigation and is often selected by Plaintiff and Defense attorneys as an independent mediator and arbitrator in complex personal injury cases.

Mark is Board Certified as a Civil Trial Advocate by the National Board of Trial Advocacy, a Pennsylvania Supreme Court Accredited Agency. He has been elected by his peers Statewide since 2010 as one of the Top 100 Trial Lawyers in Pennsylvania and as a Pennsylvania Superlawyer since 2008. In 2014, his peers in the Lehigh Valley elected him as a "Select Lawyer", recognizing him as a premier Lehigh Valley attorney in the areas of general civil litigation, medical malpractice law and personal injury and auto accidents.

In 1998, he was elected to Who's Who in American Law. Also in 1998, he was elected to the Board of Governors of the Pennsylvania Association for Justice and served on the Board until 2007. In 1999 he was appointed to the Leadership Council of the New Lawyer Committee of the Pennsylvania Association for Justice; in 2000 he was appointed to Education Committee and in 2001 he was one of only 10 attorneys in the State asked to serve as a founding member and director of the Pennsylvania Association for Justice Auto Negligence Section. Also, in 2001 Mark was elected as a member of America's Registry of Outstanding Professionals. He was selected as a "Top 100 Trial Lawyer" in Pennsylvania in 2009, as an AV Preeminent Lawyer in 2014 and an AV Preeminent Lawyer-Judicial Edition in 2018.

Mark served as a member of the Board of Directors of the Lehigh County Bar Association from 2001 to 2005 and spent 10 years as Co-chairman of the Lehigh County Bar Association Law Day Committee. He received the Association's Service Award in 1998.

Mark is admitted to practice law in the Courts of the Commonwealth of Pennsylvania, State of New Jersey, the United States District Court for the Eastern and Middle Districts of Pennsylvania, the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals.

Mark is an active member of the American Bar Association, Lehigh County Bar Association, Northampton County Bar Association, Association of Trial Lawyers of America, Pennsylvania Association for Justice, and the Donald E. Wieand Barristers' Inn, an organization dedicated to professionalism in law and comprised of a select group of attorneys and judges. He was elected Secretary/Treasurer of the Inn in 2007 and Counselor to the Inn in 2011. He was elected President of the Inn in 2013 and served a two-year term.

I. IMPORTANT DEVELOPMENTS IN UM/UIM COVERAGE LAW

A. THE REGULARLY USED, NON-OWNED VEHICLE EXCEPTION IS VOID AS IT VIOLATES SECTION 1731 OF THE MVFRL

In *Rush v. Erie Ins. Exch.*, 265 A.3d 794 (Pa. Super. Ct. 2021), Matthew Rush, a City of Easton police detective, suffered serious injuries when two other drivers crashed into his police car on November 28, 2015. The parties agree that Mr. and Mrs. Rush did not own or insure the police car on their Erie Policies and that Rush regularly used the car for work.

The City of Easton insured the police car through a policy of insurance ("the Easton Policy") that provided for, *inter alia*, $35,000 in underinsured motorist ("UIM") coverage.

Additionally, Mr. and Mrs. Rush insured three personal automobiles on two insurance policies through Erie Insurance. Insureds paid for stacked UIM coverage on both policies ("Erie Policies"). The first policy provided for $250,000 of stacked UIM coverage on one vehicle and the second provided for $250,000 of UIM coverage stacked on two vehicles.

Both Erie Policies include identical "regular use" exclusion clauses, limiting the scope of UIM coverage under the policies. In particular, the "regular use" exclusion precludes Erie Insurance from providing UIM coverage when an insured suffers injuries arising from the use of a motor vehicle that he (1) regularly uses, (2) does not own, and (3) does not insure on the Erie Policies. The relevant provision of the Erie Policies provides:

> This insurance does not apply to:
>
> Bodily injury to "you" or a "resident" using a non-owned "motor vehicle" or a "non-owned" miscellaneous vehicle which is regularly used by "you" or a "resident", but not insured for uninsured or underinsured motorist coverage under this policy.

After receiving payments from the liability policies and from the City of Easton UIM policy, Mr. and Mrs. Rush then filed a claim for UIM benefits under the Erie Policies. Erie Insurance denied coverage based on the "regular use" exclusion.

Plaintiffs argued that the regular use exclusion violated Section 1731 of the MVFRL because it acted as a de facto waiver of the UIM coverage mandated under Section 1731 without the insureds executing the statutorily mandated waiver form.

Erie argued that the regular use exclusion was previously upheld by the Pennsylvania Supreme Court in Burstein v. Prudential Property Supreme Court's decision to uphold the "regular use" exclusion in *Williams v. GEICO Gov't Employees Ins. Co.*, 32 A.3d 1195 (Pa. 2011).

The Superior Court looked to the MVFRL to make its ruling. It noted that Section 1731 of the MVFRL governs the scope of UIM coverage in Pennsylvania. 75 Pa.C.S. § 1731. It provides that, absent a rejection of coverage, insurers shall provide UIM coverage that "protect[s] persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles."

Further, insurers are relieved of the obligation of providing UIM coverage only when an insured waives such coverage by executing a statutorily prescribed rejection form. In the absence of a signed and valid rejection form, "uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits."

The Court therefore reasoned that, taken as a whole, Section 1731 mandates that insurers provide insureds coverage when the insured satisfies three requirements. The insured must (1) have suffered injuries arising out of the maintenance or use of a motor vehicle; (2) be legally entitled to recover damages from the at-fault underinsured driver; and (3) have not rejected UIM coverage by signing a valid rejection form.

Thus, the Superior Court agreed with the trial Court. The "regular use" exclusion in the Erie Policies limits the scope of UIM coverage required by Section 1731 by precluding coverage if an insured is injured while using a motor vehicle that the insured regularly uses but does not own. This exclusion conflicts with the broad language of Section 1731(c), which requires UIM coverage in those situations where an insured is injured arising out of the "use of a motor vehicle." In other words, the exclusion limits Section 1731(c)'s coverage mandate to situations where an insured is injured arising out of "use of an owned or occasionally used motor vehicle." Since the "regular use" exclusion conflicts with the clear and unambiguous language of Section 1731 of the MVFRL, it is unenforceable, the Court held.

In reaching this conclusion, the Superior Court rejected Erie's argument that it was bound by *Burstein* and *Williams*. The Superior Court held that the issue before the Court in *Burstein* and *Williams* was whether the regular use exclusion violated general public policy, not the express terms of the statute, and the analysis of the validity of an exclusion is different where the argument is that it violates general public policy. In Rush, Mr. and Mrs. Rush argued that the exclusion violated the express terms of the statute. The Superior Court thus referred to *Rush* as a matter of first impression.

Erie had argued that *Williams* did, in fact, address the statutory violation argument being made by Mr. and Mrs. Rush, and held that the exclusion did not violate Section 1731. Mr. and Mrs. Rush responded to that argument, by arguing that *Williams'* discussion of Section 1731 was merely *dicta*. Mr. and Mrs. Rush also pointed out that the *Williams* adopted the reasoning of the Pennsylvania Supreme Court's decision in *Erie Ins. Exch. v. Baker*, 972 A.2d 507 (Pa. 2009), an opinion where a plurality of the Supreme Court upheld the household exclusion as not violating Section 1734 of the MVFRL, to uphold the regular use exclusion, since the two statutory sections had a similar purpose and had similar requirements. In *Gallagher v. GEICO Indemn. Co*., 201 A.3d 131 (Pa. 2019), the Pennsylvania Supreme Court held that *Bake*r was only a plurality opinion and was not binding on the Court, rejected its reasoning and held that the household exclusion violated Section 1734 of the MVFRL by acting as a de facto waiver of stacked UIM coverage without the insured executing the mandatory waiver form. Accordingly, Mr. and Mrs. Rush argued that the Superior Court should apply Gallagher's reasoning to the instant case. The Superior Court agreed with the argument of Mr. and Mrs. Rush.

Following the Superior Court's decision in *Rush*, two federal Courts have addressed the validity of the regular use exclusion in *Evanina v. First Liberty Ins. Corp.*, 2022 U.S. Dist. LEXIS 33922 (M.D. Pa. 2022) and *Johnson v. Progressive Advanced Ins. Co.*, 2022 U.S. Dist. LEXIS 32154 (W.D. Pa. 2022). In both cases, the Courts relied upon *Rush* to invalidate the exclusion, predicting that the Pennsylvania Supreme Court would follow Rush and invalidate the exclusion.

B. HOUSEHOLD EXCLUSION COULD APPLY TO PREVENT UNDERINSURED MOTORIST COVERAGE FOR ACCIDENT INVOLVING A VEHICLE COVERED BY A SEPARATE POLICY WHERE THAT SEPARATE POLICY DID NOT INCLUDE UIM COVERAGE

In *Erie Ins. Exch. v. Mione*, 253 A.3d 754 (Pa. Super. Ct. 2021), the Court held that the household exclusion could apply to prevent underinsured motorist coverage for accident involving a vehicle covered by a separate policy where the separate policy did not include UIM coverage, meaning there was nothing for UIM benefits in other policies held by the household to stack onto. Order of the trial Court affirmed.

Albert and Lisa Mione appealed from the grant of appellee Erie Insurance Exchange's motion for judgment on the pleadings. Albert was injured in an accident while riding his motorcycle. Albert recovered the policy limits from the insurer of the tortfeasor and then subsequently sought to recover benefits under two policies issued to appellants by Erie. However, neither Erie policy listed the motorcycle as a covered vehicle.

In response, Erie filed the present declaratory judgment action. Arguing that appellants were not entitled to UIM benefits under the policy because the motorcycle was not listed as a covered vehicle under either policy, because both policies included a household exclusion the precluded recovering UIM benefits from injuries suffered in an accident involving a non-covered vehicle, and because the household exclusion could apply where Albert had failed to pay for UIM coverage on the policy that covered his motorcycle.

In opposing judgement on the pleadings, appellants argued that although Albert's motorcycle was not listed on either Erie policy, Erie knew that the motorcycle was a vehicle owned and used by appellants' household. Appellants argued that it was against the Motor Vehicle Financial Responsibilities Law to exclude motorcycles from coverage and that the household exclusion in the Erie policies was void under *Gallagher v. GEICO Indemn. Co*., 201 A.3d 131 (Pa. 2019). Appellants further contended that the rejection of UIM coverage under the policy covering the motorcycle did not preclude them from accessing UIM coverage under the Erie policies; appellants asserted that they did not procure UIM coverage in the motorcycle policy due to the abundance of UIM coverage under their Erie policies.

The trial Court granted judgement to Erie, ruling that appellants were not entitled to UIM coverage under the Erie policies because they had rejected UIM benefits on the motorcycle insurance policy, meaning that there was nothing for the UIM benefits under the Erie policies to "stack" onto. The trial Court further held that applicable case law required enforcing the household exclusion because Albert was operating a vehicle on a separate insurance policy that did not provide UIM coverage.

On appeal, the Court reject appellants' contention that case law had invalidated all household exclusions. Instead, the Court ruled that the exclusion could not be used to evade the requirements for waiving stacking of UIM benefits. But the Court agreed with Erie that UIM stacking and the waiver requirements were not relevant to the present case because the policy covering the motorcycle did not have UIM coverage, meaning that there was nothing for the UIM benefits in the Erie policies to stack onto. Therefore, the Court ruled that the household exclusion was enforceable to preclude appellants from seeking UIM coverage in the first place from the Erie policies.

C. THE SUPREME COURT OF PENNSYLVANIA HAS RULED THAT A WAIVER SIGNED BY AN INSURED DID NOT WAIVE THE RIGHT TO AGGREGATE OR "STACK" THE LIMITS OF COVERAGE FOR UNDERINSURED BENEFITS BETWEEN TWO SEPARATE POLICIES OF INSURANCE.

In *Donovan v. State Farm Mut. Auto. Ins. Co.*, 256 A.3d 1145 (Pa. 2021), the certified questions included: (1) whether an insured's signature on a waiver

form mandated by the statute results in the insured's waiver of inter-policy stacking of underinsured ("UIM") coverage where the relevant policy insures multiple vehicles; (2) whether the policy's household vehicle exclusion is enforceable following the Court's recent decision in *Gallagher v. GEICO Indem. Co*., 201 A./3d 131 (Pa. 2019); and (3) whether the coordination of benefits provisions apply so as to limit the insured's recovery for UIM benefits. As set forth in greater detail below, the Court found in favor of the insured on each question.

Corey Donovan was seriously injured in an accident while driving a motorcycle he owned. The other vehicle was underinsured. Corey recovered the $25,000 policy limit from the tort-feasor's insurer and the $50,000 per person limit available under his motorcycle policy issued by State Farm. At the time of the accident, Corey lived with his mother, Linda Donovan. Linda Donovan also had a State Farm Auto policy which insured three automobiles but did not provide coverage for Corey's motorcycle. Linda signed a waiver of stacked UIM coverage which complied with the statute.

The parties filed cross motions for summary judgment in the district Court. The Donovans argued that Linda's policy waived only intra-policy stacking for multiple vehicles under the same policy, not inter-policy stacking. The waiver provided, in part, as follows:

By signing this waiver, I am rejecting stacked limits of UIM coverage under the policy for myself and members of my household under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy.

The Court focused heavily on the fact that the waiver, which is a statutory form, repeatedly uses the terms "the policy" rather than referring to or otherwise addressing other policies which may provide coverage for a given loss.

The policy also contained a household vehicle exclusion under Coverage W3 (non-stacking coverage option). The policy exclusion read as follows:

THERE IS NO COVERAGE FOR AN INSURED WHO SUSTAINS BODILY INJURY WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF IT IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR.

The policy further defined "your car" to mean vehicles identified on the policy's declarations page. Corey's motorcycle was not listed on the declarations page for Linda's policy.

The policy also contained a coordination of benefits provision. According to the policy, coverage was afforded if certain conditions were met. Specifically, the policy stated:

If UIM Coverage provided by this policy and one or more other vehicle policies issued to you or any resident relative by one or more of State Farm Companies applies to the same bodily injury, then:

a. the UIM Coverage limits of such policy will not be added together to determine the most that may be paid; and

b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.

The parties filed cross motions for summary judgment in the district Court. The Donovans argued that Linda's policy waived only intra-policy stacking for multiple vehicles under the same policy, not inter-policy stacking. Since the waiver was void on these facts, the Donovans argued, the Coverage W3 provisions including the household vehicle exclusion and the coordination of benefits provisions were inapplicable since those provisions only applied to unstacked UIM coverage. State Farm argued that the waiver precluded stacking, the household vehicle exclusion precluded coverage under Linda's policy, and even if coverage applied, it would be limited pursuant to the coordination of benefit provisions. The district Court granted the Donovans' motion finding Corey was eligible for up to $100,000 of additional UIM benefits under Linda's policy. State Farm appealed. The Third Circuit certified the questions to the Pennsylvania Supreme Court.

The Court answered the first certified question in the negative essentially finding that the waiver would have to include the terms "the policy and the policies" to be valid. The rationale was based on the suggestion of former Chief Justice Cappy who suggested in a 2006 case that the legislature should amend the statute to address inter-policy stacking as follows:

> By signing this waiver, I am rejecting stacked limits of UIM coverage under the policy for myself and members of my household . . . for each motor vehicle insured under the policy or the policies. *Craley v. State Farm Fire & Cas. Co.*, 895 A.2d 530, 543 (Pa. 2006).

The Court then moved to the second question, which required consideration of whether the household vehicle exclusion was applicable in light of *Gallagher v. GEICO Indem. Ins. Co.*, 201 A.3d 131 (Pa. 2019). State Farm argued that Gallagher was inapplicable because unlike Linda here, the Plaintiff in that case never signed a stacking waiver. The Court disagreed, finding instead that "whether the insured did not sign a waiver, as in Gallagher, or signed a deficient waiver as to inter-policy stacking, as in the case at bar, the result is the same: the policy defaults to inter-policy stacking of UM/UIM coverage.

Finally, the Court addressed the coordination of benefits provisions, again finding for the Plaintiffs. In so holding, the Court reasoned that the lack of a valid waiver of inter-policy stacking renders the coordination of benefits provision inapplicable.

The concurring and dissenting opinions of Justices Wecht and Saylor highlight the pro Plaintiff spin of the current Court. Both Justices Wecht and Saylor reference their dissents in *Gallagher* and their belief that the decision was wrongly decided in that it "ignored bind precedent and because the Court's flimsy 'de facto waiver' rationale is at odds with the text of the MVFRL."

D. WHILE THE INSURED'S DAUGHTER HAD BEEN ABSENT FROM HIS HOME AT THE TIME OF INJURIES DUE TO A QUARREL AND SUBSEQUENT STAY WITH OTHER FAMILY, SHE QUALIFIED AS AN INSURED UNDER FATHER'S POLICY SINCE DAUGHTER'S TRUE AND PERMANENT RESIDENCE WAS IN PENNSYLVANIA WITH FATHER

In the non-precedential case of *Erie Ins. Exch. v. Montesano*, No. 262 EDA 2021, 2022 Pa. Super. Unpub. LEXIS 485 (Feb. 24, 2022), the Pennsylvania Superior Court affirmed a trial Court's decision that a Plaintiff insured met the definition of a "resident" as defined by the insurance company's policy in this UIM coverage litigation.

According to the Opinion, the Plaintiff's parents had divorced when the Plaintiff was 2 years of age. It was reported that the Plaintiff resided with her father and her stepmother in their Montgomery County home through the Plaintiff's birth through her graduation from high school in 2013. At times, the Plaintiff would visit her mother in Florida for one (1) month over the summer and for one (1) week every other Christmas.

At the time of the accident, the Plaintiff's father and stepmother owned three (3) vehicles, all of which were insured under an Erie Insurance policy. Under that policy, the term "resident" was defined as "a person who physically lives with 'you' in 'your' household on a regular basis."

The Court also noted that, on August 3, 2013, following an argument with her father and stepmother and without the knowledge of her father and stepmother, the Plaintiff left her father's home and flew to Florida to stay with her mother. The Plaintiff took some clothing, a couple of shoes, deodorant, a toothbrush, toothpaste and underwear with her on the trip to Florida. It was noted that the Plaintiff did not take her computer or any jewelry and did not make any arrangements to have those items shipped to Florida. The Court noted that the Plaintiff retained her key to her stepfather's home and continued to receive mail there.

The Plaintiff then lived in Florida and slept on her mother's couch for approximately one (1) month. While the Plaintiff was in Florida, she obtained state-issued driver's license and registered to vote.

Seeking another change of scenery, the Plaintiff then left her mother's home in September of 2013 to visit her maternal grandparents in Alabama. While in Alabama, the Plaintiff obtained an Alabama-state-issued driver's license, transferred her voter's registration, and purchased a new month-to-month cell phone plan through an Alabama service provider. The Plaintiff also obtained a job obtained a job and had her own bedroom in her grandmother's house.

In December of 2013, the Plaintiff returned to her father's house in Pennsylvania but stayed at a hotel. However, the Plaintiff did visit her father's house for dinner and, at that dinner, reconciled with her dad and her stepmother and told them that she "wanted to come back home." The Plaintiff decided to take her scheduled flight back to Alabama to retrieve her personal items and then return to her father's home in Pennsylvania sometime in January.

The Plaintiff then returned to Alabama after her short visit to Pennsylvania. She decided to drive back to Florida with her mother after her mother had visited the grandmother in Alabama for the Christmas holidays.

The Plaintiff then planned to fly home to Pennsylvania from Florida on January 8, 2014. However, on the drive to Florida on January 2, 2014, the Plaintiff sustained injuries in a motor vehicle accident in Florida while a passenger in her mother's minivan.

Following the accident, the Plaintiff presented a claim for UIM benefits under the Erie Insurance policy that was issued to her father in Pennsylvania.

Erie investigated the claim and ultimately concluded that the Plaintiff did not qualify as a "resident" of her father's Pennsylvania home because she had not been physically living there on a regular basis at the time of the accident.

After a bench trial held at the trial Court level, that Court found that, "for all intents and purposes [the Plaintiff's] true and permanent residence" was her father's home in Pennsylvania.

On appeal, the Pennsylvania Superior Court affirmed in this decision.

After reviewing the law of residency in this context and applying the particular language of the policy at issue in terms of the definition of a resident, the Court focused on the fact that the definition in the Erie policy define resident, in part, as involving a person who resided in the insured's residence "on a regular basis."

The appellate Court agreed with the trial Court's finding that such a phrase indicates a broader coverage for individuals who, with some regularity, have lived and will live with the insured, even though they may have physically dwelled somewhere else at the time of the accident. As such, the Court found that the law

does not require that the insured be physically living at the residence of the insured at the time of an accident in order to be covered under an insurance policy.

Here, where at the time of the accident, the Plaintiff was found to have lived with her father and stepmother in Pennsylvania on a regular basis, the Plaintiff qualified as a "resident" as defined under the policy and was, therefore, found to be entitled to the benefit of UIM coverage under the policy at issue.

II. IMPORTANT DEVELOPMENTS IN EVIDENCE LAW

A. IT WAS REVERSIBLE ERROR TO PRECLUDE A LIFE CARE PLANNER FROM TESTIFYING

In the case of *Povrzenich v. Ripepi*, 257 A.3d 61 (Pa. Super. Ct. 2021), the Pennsylvania Superior Court found that the trial Court abused its discretion in precluding a certified life care planner from testifying in the Plaintiff's medical malpractice case after the appellate Court found that the expert had sufficient specialized knowledge and experience to offer an expert opinion regarding future medical expenses associated with the care at issue.

According to the Opinion, the Plaintiff argued that the trial Court's concerns went to the weight of the testimony rather than the admissibility of the expert opinion and that the exclusion of the evidence by the trial Court led to the Plaintiff's future medical damages not being submitted to the jury.

On appeal, the Superior Court found that evidence was presented to establish that the Plaintiff's expert has sufficient specialized knowledge and experience to offer her expert opinions. The Court found that the fact that the life care planner had little experience with regards to the particular types of patients at issue in this case did not disqualify the expert from using her skills and experience to analyze the cost that would be associated with the future medical treatment required.

Notably, the appellate Court also agreed that the claim for damages for future medical expenses was sufficiently independent and discrete from the other damages to permit a new trial limited to future medical expenses issues only.

The appellate Court also addressed delay damages issues. The Plaintiff asserted that the trial Court had erred in calculated delay damages.

According to the Opinion, the trial Court excluded from the calculations of delay damages, three periods of time when the Plaintiff sought and obtained discovery extensions. Those times periods were excluded from the calculation of delay damages because those delays were attributable to the Plaintiff.

The appellate Court declined to follow the trial Court's position that every extension of discovery sought by a Plaintiff in a complicated medical malpractice action constituted a delay of trial. The Court noted that the trial date had not yet been set in the matter until after discovery was closed.

The case was remanded to the trial Court to determine whether the Plaintiff displayed a lack of due diligence that delayed the trial during the times that the Plaintiff sought and obtained discovery extensions.

B. DEFENDANTS FAILED TO SHOW EXTRAORDINARY CIRCUMSTANCES TO WARRANT SUBPOENA FOR PLAINTIFFS' ENTIRE FIRST-PARTY INSURANCE FILE

In *Dorward v. Clemence*, 2020 Pa. Dist. & Cnty. Dec. LEXIS 4140 (C.C.P. Lehigh 2020), Thomas and Sharon Dorward filed a negligence action against Colin Clemence and Neil Clemence arising out of an automobile accident. Defendants proposed to issue a subpoena to Hartford Financial Services Group seeking Plaintiff's entire first-party insurance file for Thomas Dorward. Plaintiffs objected to the subpoena, arguing that some contents of the first party file were not discoverable, and that the remainder could be obtained through normal discovery. Defendants filed a motion to strike Plaintiffs' objections.

The Court noted that there was very little authority on the issue. The report of an independent medical examination of a Plaintiff by an expert retained by his insurance carrier is not discoverable by a Defendant in a third-party case unless the expert will be called as a witness at trial. If the expert is not a witness, the party seeking disclosure must show special circumstances.

The Court held it was improper to seek the entire first-party file because some of the documents may be discoverable:

> Significantly, Plaintiffs do not intend to use any such first-party carrier's reports or records at trial, any such report(s) were not prepared by any treating physician of the Plaintiff, and any such reports were not prepared by an expert hired in the pending litigation. Defendants may conduct further discovery including depositions and are not prevented from hiring an expert or scheduling an independent medical examination of Plaintiff on their own. Defendants can obtain the information sought by the subpoena through other means that do not violate the Pennsylvania Rules of Civil Procedure.

Any discoverable documents could be properly obtained pursuant to other discovery methods. Defendants failed to show extraordinary circumstances to warrant disclosure. Plaintiffs' objections were sustained, and Defendants' motion to strike was denied.

III. IMPORTANT DEVELOPMENTS IN CIVIL PROCEDURE LAW

A. PERSONAL JURISDICTION EXISTS OVER AN OUT-OF-STATE DEFENDANT IN A PRODUCTS LIABILITY CLAIM

The United States Supreme Court recently issued a notable decision in the case of *Ford v. Mont. Eighth Judicial District*, 141 S.Ct. 1017 (U.S. 2021), in which the Court affirmed a decision finding the existence of personal jurisdiction over products liability claims by an in-state Plaintiff for in-state injuries against an out-of-state Defendant.

Defendant Ford had sought to extend the Supreme Court's decision in B*ristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), which rejected personal jurisdiction over claims by out-of-state Plaintiffs against out-of-state Defendants for out-of-state injuries.

Ford asserted that, under the *Bristol-Myers* analysis, specific jurisdiction requires a "causal link" between the Defendant's forum contacts and the Plaintiff's claims, which was not present in this *Ford* case because the cars involved in the accidents were not designed, manufactured, or first sold in-state.

The five-justice majority disagreed. The majority rejected a strict causal link standard and distinguishing the forum-shopping circumstances of *Bristol-Myers* from the claims in *Ford* by in-state Plaintiffs for in-state injuries. The majority held that the Court's specific jurisdiction standard includes suits that sufficiently "relate to" a Defendant's forum contacts, even in the absence of a causal link.

Applying this standard to the two cases before it, the majority held that Ford's activities in Montana and Minnesota, including marketing, selling, and servicing the same models of cars at issue in the cases, enticed residents to purchase Ford cars and, as such, were sufficiently related to the Plaintiffs' claims to create specific jurisdiction over their suits. The Court held: "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the Plaintiffs allege malfunctioned and injured them in those States. So there is a strong 'relationship among the Defendant, the forum, and the litigation,'—the 'essential foundation' of specific jurisdiction."

Commentators have noted that now, following the *Ford* decision, it appears that a Defendant's showing that a Plaintiff's claim does not arise out of or is not causally linked to the Defendant's conduct in the forum state may not be enough to prevail on a defense argument that a Court lacks personal jurisdiction if a Plaintiff can show that the claim sufficiently "relates to" the Defendant's conduct in the state.

Commentators have also noted that the *Bristol-Myers* analysis still also stands. Those commentators have asserted that the *Ford* decision does not

disturb the U.S. Supreme Court's previous rejection in *Bristol-Myers* of specific jurisdiction over claims by non-resident Plaintiffs against a non-resident company whose product allegedly injured the Plaintiffs.

IV. IMPORTANT DEVELOPMENTS IN PRODUCTS LIABILITY LAW

A. MANUFACTURER CHALLENGED JURY'S STRICT LIABILITY AWARD TO PLAINTIFF AFTER SCAFFOLD COLLAPSED UNDER HIM AND COURT FOUND TRIAL COURT PROPERLY PRECLUDED EVIDENCE OF INDUSTRY AND GOVERNMENT STANDARDS, PROPERLY BARRED MANUFACTURER FROM ARGUING PLAINTIFF'S NEGLIGENCE CAUSED THE ACCIDENT AND PROPERLY ALLOWED PLAINTIFF'S EXPERT'S OPINION TESTIMONY

In *Sullivan v. Werner Co.*, 253 A.3d 730 (Pa. Super. Ct. 2021), a scaffold user filed strict products liability action against manufacturer and seller after he fell through scaffold while working as carpenter, suffering permanent injuries to lumbar vertebrae and sacrum. The trial Court granted user's motion in limine to bar admission of government or industry standards evidence at trial and denied manufacturer's motions to limit expert testimony, and jury returned verdict in favor of user based on design defect of scaffold. Manufacturer appealed.

Plaintiff fell through a scaffold manufactured by company. He alleged strict products liability due to design defect and failing to warn. Plaintiff cerapter assembled scaffold his foreman provided following manufacturer's directions. Plaintiff had assembled scaffolding hundreds of times in his 17 years of work experience. While Plaintiff was on the scaffold, the platform collapsed underneath him sending him crashing to the ground. He argued the design of the deck pins was defective because they could rotate during use, allow the platform to become unseated and platform would stay unseated because of the weld protrusion in one corner. He contended the warning label was defective because it did not clarify that "each use" included checking the pins and platform each time the user climbed off the platform. Plaintiff expert opined the platform was defective because the deck pins cold inadvertently rotate off the platform and there were safer alternative designs to protect against a platform collapsing during normal use. He noted that other manufacturers used four deck pins instead of two deck pins and included positive alignment devices to ensure their deck pins could not be rotated off the platform. Manufacturer's expert disagreed that it was foreseeable that user would unknowingly rotate the deck pins off the platform during use and noted scaffold complied with ANSI and OSHA standards. He testified accident happened because Plaintiff did not properly place the platform within the side rails. Trial Court granted Plaintiff's motion in limine preventing manufacturer motion in limine to limit Plaintiff's expert testimony. At trial Court prohibited manufacturer from arguing Plaintiff's negligence was the sole cause of the accident. Jury awarded Plaintiff $2.5 Million in damages. Manufacturer appealed.

First, the Manufacturer argued that *Tincher v. Omega Flex, Inc.* 104 A.3d 328 (Pa. 2014) overturned the prohibition on industry and government standards. In review, the appellate Court found that *Tincher* loosened some standards but did not overturn the prohibition, therefore the trial Court ruling was not improper. The Court highlights that *Tincher* overruled *Azzarello* but also was remanded to reconsider the post-trial motions pursuant to Section 402A of the Restatement 2nd of Torts. Under this restatement: "provides that strict liability is established, notwithstanding that the "the seller has exercised all possible care in the preparation and sale of his product." Whether a manufacturer has complied with industry or government standards goes to whether it "exercised all possible care in preparation of product" in making the design choice, not on whether there was a design defect in the product itself." 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.

Next, the manufacturer argued that the Plaintiff's negligence should be allowed into evidence at trial. The Court finds that, generally the manufacturer is right. The manufacturer is allowed to admit evidence are argue the Plaintiff's ordinary negligence was the sole cause of the accident in a strict liability case. This is only allowed when the accident is not related in any way with the alleged defect in the product. Because the manufacturer's allegations of negligence are related to using the product, its argument collapses on itself. As these cases show, a Defendant cannot argue that a Plaintiff's ordinary negligence was the sole cause of an accident unless it is unrelated to the product. Manufacturer's theory of Sullivan's negligence - that he did not set up the scaffold correctly - directly relates to the product. Despite this requirement being spelled out in our case law, Manufacturer does not address it in their argument, failing to explain how Sullivan's alleged failure to properly assemble the scaffold showed that none of the alleged product defects contributed in any way to the accident.

(**Editor's note**: While the ultimate decision in this case is correct, it is the editor's opinion that the court erred in concluding that there are circumstances where a product user's ordinary negligence may be admissible on the issue of causation in a strict liability action. The Supreme Court in *Reott* also affirmed prior precedent holding that a user's conduct may be admissible on the issue of causation, but only where the evidence establishes highly reckless conduct/product misuse. Importantly, the Court made it clear that "highly reckless conduct" and "product misuse" are NOT separate defenses. They are one and the same defense, despite the fact that they were often times described in prior precedent as separate defenses with separate elements. *See Reott*, 55 A.3d at 1097 ("While there are some conceptual nuances between assumption of the risk and highly reckless conduct, in that assumption of the risk involves knowledge of the product's defect where highly reckless conduct does not, we fail, generally, to

recognize a similar nuance between product misuse and highly reckless conduct.").

The Court held that a user's "highly reckless conduct" could not be raised by a manufacturer merely to rebut the plaintiff's proof of causation. *See id.* at 1098. The Court noted that "under Pennsylvania's scheme of products liability, evidence of highly reckless conduct has the potential to erroneously and unnecessarily blend concepts of comparative/contributory negligence with affirmative proof that a plaintiff's assumption of the risk, product misuse, or as styled herein, highly reckless conduct was the cause of the injury." *Id.* at 1098. Thus, the Court found that it was important to construe "highly reckless conduct" as an affirmative defense with the burden of proof on the defendant. *See id.* Otherwise, "highly reckless conduct allegations by defendants could become vehicles through which to eviscerate a Section 402A action by demonstrating a plaintiff's comparative or contributory negligence." *Id.*

In order for the manufacturer to prove the plaintiff engaged in highly reckless conduct, the manufacturer must show that the "plaintiff acted in a manner illustrating the plaintiff's **conscious understanding of the risks involved** either in (1) merely using the product or (2) using the product in an unanticipated and dangerous manner." *Id.* at 1097. **Further,** the defendant must prove that "**the plaintiff would have been injured despite the curing of any alleged defect, or [the plaintiff's conduct] is so extraordinary and unforeseeable as to constitute a superseding cause**." *Id.* at 1101.

Although Reott was decided before Tincher, the courts have concluded that *Tincher* did not overrule *Reott*. *See Rapchak v. Haldex Brake Prods. Corp.*, 2016 U.S. Dist. LEXIS 91554 (W.D. Pa. 2016); *Nathan v. Techtronic Indus. N. Am.*, 92 F. Supp.3d 264 (M.D. Pa. 2015); *McKenzie v. Dematic Corp.*, 2015 U.S. Dist. LEXIS 81166 (W.D.Pa. 2015); *Wright v. Ryobi Techs., Inc.*, 2016 U.S. Dist. LEXIS 42003 (E.D. Pa. 2016); *DeJesus v. Knight Indus. & Assocs.*, 2016 U.S. Dist. LEXIS 121697 (E.D. Pa. 2016); *Punch v. Dollar Tree Stores, Inc.*, 2017 U.S. Dist. LEXIS 23443 (W.D.Pa. 2017); *Dyvex Indus., Inc. v. Agilex Flavors & Fragrances, Inc.*, 2018 U.S. Dist. LEXIS 159241 (M.D. Pa. 2018); *Zimmerman v. Alexander Andrew, Inc.*, 189 A.3d 447 (Pa. Super. 2018)).

V. IMPORTANT DEVELOPMENTS IN PREMISES LIABILITY LAW

A. AN INCAPACITATED STUDENT'S CLAIMS FOR NEGLIGENCE AND INTENTIONAL MISREPRESENTATION AGAINST A COLLEGE AND COLLEGE COACHES WAS ALLOWED TO PROCEED

In *Baumbach v. Lafayette Coll.*, 2022 PA Super 40, 2022 Pa. Super. LEXIS 102 (Pa. Superior Ct. 2022), in the fall of 2013, Aubrey Brumbach matriculated as a freshman at Lafayette College in Easton and joined Lafayette's club crew team. Lafayette leased from the City of Easton a boathouse located on Lehigh Drive out of which the Team practiced.

Lafayette employed Richard Kelliher and Allison Sobiech as, respectively, the head and assistant Team coaches. Within the course and scope of their employment, Coaches taught the Team members the sport of crew, ran Team practices, conducted physical training, managed the Team equipment, and supervised the Team when travelling to regattas. Coaches often required freshman Team members to run from Lafayette's main campus along Lehigh Drive to the Boathouse before practice and, for the first several team practices of the season Coach Sobiech ran with them and instructed them to run in a single file line, be careful, and watch for cars. Coaches were aware that sometime shortly before the start of the 2013 school year, an accident took place on Lehigh Drive whereby a vehicle struck and killed a pedestrian walking along the road.

The Team's Boathouse was located approximately two miles from Lafayette's campus. There were no sidewalks or other pedestrian walkways to allow students to walk between Lafayette and the Boathouse. The Boathouse was only accessible via Lehigh Drive. Lehigh Drive has a speed limit of 45 miles per hour, but vehicles commonly drove in excess of the posted speed limit. The stretch of road in the vicinity of Boathouse is poorly lit at night.

Lafayette did not provide transportation to Team members to and from the Boathouse. Team members were responsible for their own transportation to and from Team practices. Team members regularly parked their private vehicles in a parking lot adjacent to Boathouse. Team members also had access to a remote parking lot located hundreds of yards from the Boathouse on Lehigh Drive.

On November 8, 2013, at approximately 4:00 PM, Aubrey arrived in a teammate's car at the Boathouse for a regularly scheduled Team practice. However, upon their arrival, they observed that Coaches had parked the Team truck and trailer in a manner that obstructed access to the usual lot adjacent to the Boathouse, thereby preventing other vehicles from parking in the usual lot. Thus, Aubrey's teammate parked her vehicle in the remote lot on Lehigh Drive and Aubrey and her teammates traversed the narrow, shoulder-less stretch of Lehigh Drive to reach practice. By the time practice ended at 6:00 PM, the sun had set,

and Aubrey and her teammates had to walk back down the dark, narrow, shoulder-less stretch of Lehigh Drive to reach the remote parking lot. Aubrey and her teammates walked single-file along Lehigh Drive, as far away from the roadway as conditions permitted. Nevertheless, during the walk back to the parking lot, Aubrey was hit by a drunk driver, William Kneebone ("Kneebone"). As a result of the accident, Aubrey sustained serious and lifelong injuries, including brain injuries, requiring multiple and ongoing surgeries and therapies.

On September 3, 2014, Appellants filed a Second Amended Complaint raising claims of negligence and intentional misrepresentation against The Lafayette Defendants. In particular, Appellants alleged that the Lafayette Defendants had breached the duty of care owed to Aubrey. They further alleged that the Lafayette Defendants intentionally misrepresented, inter alia, that it was safe: (1) for Team members to park in the remote lot not adjacent to the Boathouse; and (2) to walk or run along Lehigh Drive when it knew that there was no sidewalk and that the absence of a sidewalk posed an imminent threat to the Team members' safety.

On September 3, 2015, the trial Court granted the Lafayette Defendants' Motion for Judgment on the Pleadings and dismissed Appellants' Complaint. The trial Court concluded that Appellants failed to establish that the Lafayette Defendants owed a duty of care to Aubrey. It further concluded that Aubrey did not justifiably rely on the Lafayette Defendants' representations pertaining to the safety of walking or running along Lehigh Drive.

On appeal, the Superior Court reversed. It focused on the allegations by Plaintiff that Defendant's actions included (1) entering into a management agreement for the Boathouse that required College to follow safety practices at the facility; (2) providing a "usual" parking lot next to the Boathouse for Team members to park their personal vehicles; and (3) hiring Coaches who taught the sport of crew, provided physical training, supervised the team's equipment and logistics, and instructed the students with respect to their conduct along Lehigh Drive. They alleged that these affirmative actions imposed upon the Lafayette Defendants a duty of care to protect Team members, including Aubrey, against an unreasonable risk of harm arising from that affirmative conduct.

The Court agreed that these allegations demonstrated that the Lafayette Defendants undertook for Team members the provision of a safe environment for members to engage in crew, including providing safe and accessible parking to attend practice. Accordingly, the Court found that the trial Court erred in concluding that the Lafayette Defendants were under no legal duty to protect Aubrey and were, thus, were entitled to judgment as a matter of law.

On the issue of intentional misrepresentation, the Superior Court also agreed with Plaintiffs. The Court's review of the Second Amended Complaint indicated that Appellants alleged numerous facts in support of their intentional

misrepresentation claim. For example, Appellants alleged that Coaches misrepresented that Lehigh Drive was safe for the Team members' use as pedestrians, while also periodically cautioning Team members to run single-file and watch for cars. Appellants further alleged that Coaches made representations to Team members about the safety of parking in the remote parking lot and walking down Lehigh Drive to reach the boathouse. Appellants alleged that Coaches made these representations either knowing that the statements were false or without adequate knowledge about the safety conditions of Lehigh Drive but professing to have such knowledge. Appellants also alleged that Coaches knew that there had been a prior fatal pedestrian-involved accident on Lehigh Drive in the vicinity of the boathouse during the summer before Aubrey enrolled at Lafayette College. Appellants further alleged that Coach Sobiech's conduct in leading freshman Team members on runs along Lehigh Drive and subsequently sending the members on unsupervised runs falsely represented that running or walking along Lehigh Drive was safe. Last, Appellants alleged that the Lafayette Defendants misrepresented Lehigh Drive's safety when it encouraged Team members to park in the remote parking lot when the lot adjacent to the Boathouse was not available to and walk along Lehigh Drive to reach the Boathouse.

When viewed in a light most favorable to Plaintiff, the Court found the allegations sufficient to establish a *prima facie* claim.

B. A COLLEGE STUDENT SUFFICIENTLY PLED SCHOOL'S NEGLIGENCE AS A DIRECT AND PROXIMATE CAUSE OF STUDENT'S SEXUAL ASSAULT

In *Doe v. Allegheny*, *Doe v. Allegheny Coll.*, No. 20-212 Erie, 2021 U.S. Dist. LEXIS 187886 (W.D. Pa. Sep. 30, 2021), a college student sufficiently pled school's negligence as a direct and proximate cause of student's sexual assault where school was alleged to have actual or constructive knowledge of broken or malfunctioning security systems in its residence halls and the frequent recent sexual assaults on campus. Defendant's motion to dismiss was denied.

Allegheny College moved to dismiss Plaintiff Jane Doe's premises liability action. Plaintiff was a student enrolled at Allegheny and resided in an on-campus residence hall. Access to the residence hall was controlled by a card entry system. Plaintiff alleged that one morning while she was in bed alone in her room, she heard a knock on the door. The door had no mechanism to observe who was on the other side of the door. Plaintiff alleged that due to negligent security mechanisms in the residence hall and the lack of a mechanism to identify the person on the other side of the door, an assailant entered her dorm room and sexually assaulted her at gunpoint.

Plaintiff filed suit, alleging that Allegheny was vicariously negligent for the conduct of its employees in failing to provide safe and secure housing for students, and that such negligence was directly and proximately responsible for her sexual

assault. Allegheny moved to dismiss Plaintiff's action, arguing that she could not establish the elements of duty and causation in support of her negligence claim.

The Court denied Allegheny's motion to dismiss. The Court noted that Plaintiff had alleged that Allegheny was aware or should have been aware that the entrances to the residence hall were not secure because doors did not fully close, or the lock systems were broken or malfunctioning. Plaintiff had also alleged that Allegheny was aware of frequent and recurring sexual assaults on campus and in dormitories in the years immediately preceding Plaintiff's assault. Thus, the Court ruled that Plaintiff had sufficiently alleged that Allegheny knew or should have known that sexual assault was a foreseeable risk for which it owed Plaintiff a duty of care to protect her from.

Although the Court acknowledged that Plaintiff had not alleged that her assailant entered the resident hall due to a broken or malfunctioning door or lock, the Court ruled that Plaintiff's allegations were sufficient to support a finding that Allegheny could be held liable for Plaintiff's harm as a matter of law. The Court held that Plaintiff was entitled to discovery to determine the facts surrounding how her assailant gained access to the resident hall and what role, if any, Allegheny's negligence played in facilitating the attack.

VI. IMPORTANT DEVELOPMENTS IN SOVEREIGN IMMUNITY LAW

A. CITY COULD NOT RELY ON EXCULPATORY RELEASE EXECUTED BY PARTICIPANT IN CHARITY BIKE RIDE TO IMMUNIZE THE CITY FROM CLAIMS OF NEGLIGENCE ARISING FROM THE CITY'S PURPORTED FAILURE TO MAINTAIN STREETS, WHERE A PARTY THAT HAD DUTY OF PUBLIC SERVICE COULD NOT CONTRACTUALLY IMMUNIZE ITSELF FROM LIABILITY ARISING FROM THE EXECUTION OF THAT DUTY

In *Degliomini v. ESM Prods.*, 253 A.3d 226 (Pa. 2021), the Court found that it was contrary to public policy to enforce an exculpatory contract immunizing the city from its essential duty of public service, which existed notwithstanding the context of a recreational event. Because any other application of the Release would elevate the city's private exculpatory contract over the public duties assigned to it and the authority afforded to it by the Pennsylvania General Assembly, under the discrete circumstances, enforcement of the Release would jeopardize the health, safety, and welfare of the public at large, and the Release was, thus, rendered invalid as it violated public policy principles.

There is a well-defined public interest in the maintenance and safe repair of dangerous conditions existing on government-owned streets, and the municipal owners are thus charged with a duty of public service to perform such maintenance and repairs as a matter of necessity to members of the public. This dominant public

policy is derived from over one hundred years of common law, is codified by statute within the Tort Claims Act, and is reflected by the organizational assignment of explicit duties within the Philadelphia Home Rule Charter.

While the clearly established policy of the Tort Claims Act is to provide an absolute rule of governmental immunity from negligence subject to its few, explicit exceptions without creating new causes of action, it is likewise the clear policy of the Act to codify and define the parameters of those excepted, permissible causes of action. Relevant here, the Tort Claims Act provides "[a] local agency shall be liable for damages on account of an injury to a person" where "damages would be recoverable under common law or a statute" if caused by a non-government entity, for "negligent acts of the local agency" consisting of "[a] dangerous condition of streets owned by the local agency" when the condition created a "reasonably foreseeable risk" of the kind of injury suffered, and when "the local agency had actual notice or could reasonably be charged with notice under the circumstances." 42 Pa.C.S. §8542(a), (b)(6). Similarly, though whether the Philadelphia Home Rule Charter creates a duty giving rise to a cause of action, or expresses a dominant public policy, is not squarely before us, what it certainly does do is "define" — with the same legal force as a statute, *see In re Addison*, 122 A.2d at 275-76 — the City's mandatory and exclusive responsibility, through its Department of Streets, to "design construct, repair and maintain [c]ity streets[.]" 53 Pa.C.S. §2902 (definition of "home rule charter"); Philadelphia Home Rule Charter §5-500(a)(1). In furtherance of the Tort Claims Act's expression of policy to protect the public "fisc" by limiting municipalities' exposure to liability, for instances where immunity is waived, the General Assembly provided a statutory cap on the amount of damages recoverable, defined the circumstances under which damages shall be recoverable, authorized local agencies to purchase or administer liability insurance, and prescribed permissible payment planning for judgments not fully indemnified by insurance. 42 Pa.C.S. §§8553, 8559, 8564. What the General Assembly did not provide, however, is a mechanism for a municipality to immunize itself, through exculpatory contracts or any other means.

The City is a municipality, an agent of the state, "invested with certain subordinate governmental functions for reasons of convenience and public policy[,] . . .and the extent of [its] powers [is] determined by the [l]egislature[.]" *Carroll*, 437 A.2d at 396 (citations and quotations omitted). "[T]he legislature is the exclusive body with authority to confer immunity upon political subdivisions" for claims arising out of exceptions to the Tort Claims Act. *Dorsey*, 96 A.3d at 340 (citation omitted). Because the Release would allow the City to confer immunity upon itself for such claims, the Release prohibits what the Act expressly allows, and would achieve for the City what our jurisprudence plainly prohibits. *Id.*; *cf. Gray*, 633 A.2d at 1093-94. "Where the legislature has, by definite and unequivocal language, determined the public policy of this Commonwealth with regard to a particular subject," — here, the definitive policy to remove the shield of immunity for a municipality's negligence in the maintenance or repair of dangerous street conditions for which they have proper notice — "that

pronouncement cannot be set aside and rendered unenforceable by a contract between individuals." *Boyd*, 94 A.2d at 46 (internal quotations omitted). Thus, the Release is invalid because it contravenes public policy.

The Court disagreed with the City's position that its role is identical to any private host of a recreational or non-essential event that may immunize itself from liability for breach of its duty to maintain safe premises. Though the Court recognized a Plaintiff's ordinary negligence claims may generally be barred where he voluntarily executes an exculpatory contract in order to participate in such activities, the recreational, non-essential nature of the event was not dispositive in this instance. A private host is not assigned the same mandatory duty of public service as is the City, to maintain its public streets in a condition that is "reasonably safe for their intended purpose," that is, "safe for the activities for which [they are] regularly used, intended to be used or reasonably foreseen to be used" by the travelling public under the conditions specified by the Tort Claims Act. Though the event's use of the City's streets may have been time-limited and non-essential, the City's duty to exercise reasonable care in discharging its independently derived and essential function of street repair arose long before the Bike Ride. The City's duty materialized when the City had actual notice or could reasonably be charged with notice of the existence of the sinkhole. Under these circumstances — where the City was charged with an essential public-service duty, and the fact-finder determined the requisite elements of the statutory exception to immunity (including proper notice of a dangerous condition and a reasonably foreseeable risk of injury) had been established — enforcing the Release to immunize the City would jeopardize health, safety, and welfare of the people by removing any incentive for parties to exercise minimal standards of care due to maintain public streets in reasonably safe condition for their reasonably foreseeable uses, such as a planned charity bike ride, where known or knowable dangerous conditions pose great and reasonably preventable risks.

B. A CLAIM FOR INSUFFICIENT LIGHTING ON A SIDEWALK FELL WITHIN THE REAL ESTATE EXCEPTION TO SOVEREIGN IMMUNITY

In *Wise v. Huntington County Housing Dev Corp.,* 249 A.3d 506 (Pa. 2021), a pedestrian brought personal injury action against public housing entities, after she fell and was injured walking on sidewalk in front of public housing development around midnight, alleging that insufficient outdoor lighting in the sidewalk area created a dangerous condition. Her claim states that the cause of her fall was insufficient outdoor lighting resulting from the relative position of a light pole and a tree. The Court of Common Pleas, Huntingdon County granted summary judgment in favor of housing entities. Pedestrian appealed. The Commonwealth Court affirmed. Petition for discretionary review was granted.

The real estate exception to sovereign immunity applied to pedestrian's claim, as a matter of law.

The commonwealth Court erred in affirming the trial Court's award of summary judgment in favor of a county housing authority on the basis that the real estate exception in the Sovereign Immunity Act, 42 Pa.C.S. § 8522(b)(4), did not apply to a pedestrian's claim because she alleged the existence of a "dangerous condition," i.e., insufficient outdoor lighting; [2]-Because the pedestrian's claim that the insufficient outdoor lighting stemmed from the existence and position of a pole light and tree in relation to the sidewalk area of the authority's property, she met the requirement that the dangerous condition derived, originated from, or had as its source the Commonwealth real estate; [3]-The pedestrian further alleged that the dangerous condition of inadequate lighting caused her injuries. Thus, the authority could not raise immunity as a matter of law to bar her claim. The Supreme Court relied on the precedent of Commonwealth v. Cagey. To meet the real estate exemption, the Plaintiff must prove that the injury resulted from a “dangerous condition.” The “dangerous condition” must “be a condition ‘of Commonwealth agency real estate.” Cagey v. Commonwealth, 645 Pa. 268, 179 A.3d 458, 463 (2018) (quoting 42 Pa.C.S. § 8522(b)(4)). In Cagey the Court found that a faulty guardrail, not the absence of a guardrail, created the dangerous condition. This was persuasive to the Court and they held that the inadequate natural light, not the existence of natural darkness, was the cause of the claim therefore allowing the claim to fall under the real estate exemption.

VII. IMPORTANT MISCELLANEOUS DEVELOPMENTS IN PERSONAL INJURY LAW

A. TRIAL COURT PROPERLY DISMISSED MOTHER'S COMPLAINT FOR INDEMNIFICATION AND GROSS NEGLIGENCE AGAINST MEDICAL DEFENDANTS WHO TREATED HER SON BEFORE HE KILLED FOUR MEN BUT ERRED IN NOT DISMISSING HER CLAIMS FOR COMPENSATORY DAMAGES BECAUSE THE NO FELONY CONVICTION RECOVERY RULE APPLIED SINCE ALL OF THE ASSERTED DAMAGES FLOWED FROM SON'S CRIMINAL CONDUCT FOR WHICH HE HAD BEEN CONVICTED AND THE RULE BARRED RECOVERY

In *Dinardo v. Kohler*, 2022 PA Super 14, 2022 Pa. Super. LEXIS 40 (Pa. Superior Ct. 2022), the mother of a confessed murderer, acting as the murderer's power of attorney, alleges that several medical Defendants are liable for negligent psychiatric treatment that they provided to her son in the months leading up to the murders he committed. The medical Defendants filed preliminary objections seeking dismissal of the mother's amended complaint, which the trial Court sustained in part and overruled in part. The parties filed petitions for permission to appeal from this order, which this Court granted.

On appeal to the Superior Court, the singular issue for the Defendants was:

> Whether the Trial Court erred in overruling [the Medical] Defendants' Preliminary Objections to [Mother's] Amended Complaint seeking dismissal of all claims for damages related to alleged emotional distress, pain and other personal injuries, where [Mother's] alleged damages are the collateral consequences of admitted criminal conduct and felony convictions based on the facts as pleaded in [Mother's] Amended Complaint?
>
> The two issues raised by the Plaintiff were:
>
> 1. Did the Trial Court err in sustaining preliminary objections to [Son's] legal process damages in a suit where patient engaged in criminal conduct, without active fault, because [his] psychiatrist's gross negligence caused him to devolve into violent, homicidal psychosis?
> 2. Did the Trial Court err by failing to accept as true [Mother's] averments that [Son] was not at active fault when ruling on a demurrer?

In their lone argument, the Defendants contend that the trial Court erred in overruling their preliminary objection seeking dismissal of all claims for compensatory damages. The Medical Defendants argue that Mother is barred from recovery under Pennsylvania's felony rule, which precludes convicted felons from collecting damages that would not have resulted absent the criminal conviction.

The "no felony conviction recovery" rule enunciated in *Holt v. Navarro*, 2007 PA Super 243, 932 A.2d 915 (Pa. Super. 2007), "applies to discourage Courts from assisting convicted felons in collecting damages that would not have occurred absent the criminal conviction."

The Court held that the amended complaint failed to state a valid claim for compensatory damages pursuant to the "no felony conviction recovery" rule. The amended complaint alleges that Son seeks recovery for emotional distress and pain because (1) he murdered four men; (2) his family's business suffered harm because of the murders he committed; (3) his family has and will incur litigation and other costs because of the murders he committed; and (4) he will be imprisoned for the rest of his life. Through this allegation, the amended complaint expressly links Son's compensatory damages to murders for which he has been convicted and sentenced. Under the "no felony conviction recovery" rule, these alleged damages are not actionable because they flow from his own criminal conduct for which he has been convicted.

B. CLAIMS FOR RES IPSA LOQUITOR AND DIRECT NEGLIGENCE CAN BE BROUGHT SIMULTANEOUSLY AND BOTH CHARGED TO THE JURY

In *Lageman v. Zepp*, 266 A.3d 572 (Pa. 2021), the Pennsylvania Supreme Court granted review to clarify whether resort to the doctrine of res ipsa loquitur

("Doctrine") is precluded when the Plaintiff has introduced enough "direct" evidence that the Doctrine is not the only avenue to a finding of liability — whether, in short, the two approaches to satisfying the Plaintiff's evidentiary burden are mutually exclusive.

Elizabeth Lageman underwent surgery for a small bowel obstruction secondary to a large ventral hernia at Defendant, York Hospital. Defendant, John Zepp, IV, D.O., an anesthesiologist, was responsible for monitoring the patient's vital signs. To do this, Zepp employed a central *venous* pressure line ("CVP"), which he attempted to insert into the internal jugular vein, located near the internal (or "common") carotid artery. From his insertion point, the carotid lay directly behind Lageman's jugular.

Zepp passed the CVP through the far wall of the vein and into the right common carotid artery behind. Zepp did not realize his error and secured the placement by sewing the CVP into place. Zepp later determined that the waveform of the pressure indicated arterial rather than venous placement. Zepp called for a vascular surgeon to address the misplacement and repair any damage. A catheter was placed in a vein in Lageman's groin to enable proper monitoring, and the surgery continued.

After the procedure, Lageman had little or no movement in her left-side extremities. She was diagnosed with one or more strokes in the distribution of the right internal carotid artery to the right middle cerebral artery. Zepp acknowledged that arterial cannulation has been associated with stroke, because of the potential penetration of air, fluids, or medications entering the artery, or due to the creation of a blood clot or the dislodgment of arterial plaque which then travels to the brain. But he also testified that, "if it's managed appropriately, we should be able to hopefully avoid those complications." He said that if such were to occur in the right internal carotid artery, any associated strokes would occur in the right distribution to the right middle cerebral artery, as in this case.

Lagerman's expert, Pepple, testified that Zepp departed from the standard of care in utilizing a short-axis ultrasound method (opposed long-axis ultrasound) to place the CVP that did not enable him to visualize the tip of the needle, leaving him blind to the fact that the needle passed through the vein and entered the artery. Pepple also questioned Zepp's assertion that he relied upon manometry to confirm the needle's placement because Zepp made no note to that effect in the chart. In Pepple's view, the difference in what manometry would show between venous and arterial placement would be too striking to miss. Pepple also testified that cannulating the artery increased the risk of stroke "exponentially," and, taken collectively, there was no evidence of another cause in this case.

Zepp's expert, Hudson, testified that Zepp's use of short-axis ultrasound in needle placement is the state of the art but does not eliminate the risk of arterial cannulation. Hudson also testified that "there's really no compelling medical

evidence that suggests that one is better than the other to . . . prevent[] carotid artery cannulation," adding that the "vast majority" of practitioners favor short-axis ultrasound. However, Hudson acknowledged that Zepp did not confirm the presence of the wire in the vein by ultrasound before placing the catheter.

The trial Court declined to charge the jury on *res ipsa loquitur*, a discrete category of "circumstantial evidence," which may suffice to establish negligence where more specific evidence of the events surrounding the injury eludes even diligent investigation. The trial Court did however charge the jury on the distinction between direct and circumstantial evidence, and on the jury's prerogative to base its verdict in whole or in part on the latter. The Superior Court reversed.

The Supreme Court agreed with the Superior Court and held that under the circumstances of this case, where the evidence available to the Plaintiff is equivocal and less than conclusive on the elements of negligence, asking the Plaintiff to choose which evidentiary approach to pursue is manifestly unfair. If there is first-hand evidence to support a negligence claim, the jury should be so charged. If there is indirect, circumstantial evidence to cover gaps in the (more) direct evidence, and that evidence constitutes a prima facie showing under Section 328D, the jury should be so charged. The Court also determined that Plaintiff satisfied Restatement (Second) of Torts § 328D since Pepple testified that this event ordinarily cannot happen without negligence on the part of the provider. Further, with the parties' experts acknowledging the association between arterial cannulation and stroke, there can be no serious question that Lageman succeeded, entitling her to a jury determination on the Doctrine.

C. THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES IN A MALICIOUS PROSECUTION SUIT CONTAINED TERMS THAT WERE AGREED TO BY THE PARTIES, MAKING THE AGREEMENT VALID AND ENFORCEABLE

In *Teeple v. Leck*, PICS Case No. 21-1486 (C.P. Monroe Dec. 2, 2021), Zulick, J., Plaintiff and Defendant participated in a mediation of the claim, which resulted in a settlement. After reviewing a draft of the agreement, Plaintiff asked for certain language to be added by Defendant. Defendant agreed to this request and circulated a second draft with the added language. Approximately two months after the mediation, Plaintiff communicated that she would not sign the settlement agreement and, instead, wanted to go to trial. There was no dispute with the added language or with the language contained in the first draft of the agreement. Defendant filed a motion to enforce the settlement agreement.

The Court noted in its opinion that Plaintiff was present and participated in the mediation. She was also represented by counsel throughout the process. Prior to the mediations' completion, Plaintiff communicated to her attorney the lowest dollar figure that she would accept for settlement. Also, Plaintiff expressed her acceptance that the settlement agreement would not contain a confidentiality

clause or a non-disparagement clause. The case ultimately settled for the dollar amount agreed to by the Plaintiff. The agreement did not contain a confidentiality clause or a non-disparagement clause.

The Court applied the rule that settlement agreements were binding on the parties where there was a meeting of the minds; further, a settlement agreement could not be set aside absent a showing of fraud or duress. Plaintiff did not assert that there was fraud. Plaintiff, however, felt that she felt pressure from her attorney to enter into the settlement agreement. The Court rejected the notion that pressure constituted duress that was sufficient to overturn the settlement agreement.

The Court found that there was a meeting of the minds, and the terms of the agreement were properly negotiated and agreed upon. The Court ordered the Plaintiff to execute the agreement.

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