IMPORTANT DEVELOPMENTS IN PERSONAL INJURY LAW
FOURTEENTH ANNUAL UPDATE

Lehigh County Bar Association
April 10, 2026

Northampton County Bar Association
April 13, 2026

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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 the Managing Shareholder and CEO of Cohen, Feeley, Altemose, Berg & McKarski, 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 2023 and 2024 he was elected to the Pennsylvania Superlawyer Top 100 lawyers list. 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.

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 ten attorneys in the State asked to serve as a founding member and director of the Pennsylvania Association for Justice Auto Negligence Section.

Mark served as a member of the Board of Directors of the Lehigh County Bar Association from 2001 to 2005 and spent ten 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 DOG BITE LAW

A. *SUMMARY JUDGMENT WAS GRANTED FOR DEFENDANTS IN A DOG BITE CASE, REASONING THAT A MAGISTRATE'S GUILTY VERDICT IS REQUIRED FOR A DOG TO BE CONSIDERED "DANGEROUS" FOR NEGLIGENCE PER SE*

In the case of *Bushner v. Nimeh*, 2025 Pa. Dist. & Cnty. Dec. LEXIS 21; 2025 LX 78648, Plaintiffs, Christine and Edward Bushner, and Defendants, Michael and Lisa Nimeh, were at a park with their dogs. At the Plaintiffs' suggestion, all parties allowed their dogs to run and play off-leash. The Defendants' dogs, a Great Dane named "Elliott" and a yellow Labrador Retriever, allegedly ran into Christine Bushner, causing her injuries. Christine Bushner conceded that the dogs did not attack her but merely collided with her while playing. She also testified that she believed the Defendants should not have done anything differently before the collision. The Plaintiffs filed suit alleging negligence and negligence per se.

Plaintiffs argued that a duty of care was imposed on the Defendants under Pennsylvania common law and the Dog Law because, as pet owners, they are liable for injuries caused by their pets. They asserted that Defendants knew their dogs, particularly Elliott, had high energy and were uncontrollable, and thus risked the safety of others by allowing them off-leash or failing to train them. Plaintiffs claimed Defendants had a duty to warn them that their dogs would be uncontrollable and posed a threat. They also argued a violation of Pennsylvania's Dog Law sections 459-502-A, 459-504-A (dangerous dog provisions), and 459-305 (requiring dogs to be confined, secured, or under reasonable control). Defendants (Nimeh) argued they were entitled to summary judgment because no duty of care was imposed upon them by common law or the Dog Law to protect Plaintiffs from dog-to-human collisions when all parties participated in allowing their dogs to play unleashed. Alternatively, they argued that even if a duty existed, Plaintiffs could not establish a breach, as there was no evidence to suggest Defendants could have prevented Christine Bushner from being in the dogs' path. They contended that pulling on leashes and using pronged collars did not demonstrate "dangerous propensities" sufficient to put them on notice.

The Court of Common Pleas of Lehigh County granted the Defendants' motion for summary judgment. The court noted that Pennsylvania does not impose absolute liability on dog owners; proof of negligence is required. Liability attaches if the owner "knows or has reason to know that the dog has dangerous propensities and yet fails to exercise reasonable care to secure the dog to prevent it from injuring another." The court defined "dangerous propensity" as a tendency to do any act that might endanger others, including overly-friendly or playful behavior. However, the court found that the Plaintiffs failed to produce evidence that the Defendants' dogs had dangerous propensities of which the Defendants were aware. Mere pulling on leashes and the use of pronged collars

were deemed insufficient to infer a tendency to run into people dangerously. There was no evidence of the dogs biting, barking, scratching, growling, damaging property, jumping onto people, charging, or other behaviors that would indicate a need for greater care.

Regarding negligence per se, the court stated that a dog is only considered "dangerous" if a magisterial district judge has made such a finding beyond a reasonable doubt based on specific criteria (e.g., inflicting severe injury without provocation, attacking humans). Since the record lacked any evidence of such a finding for Defendants' dogs, these sections could not be used to support a negligence per se claim. For Section 459-305 (Confinement/Control), which makes it unlawful for an owner to fail to keep a dog confined, secured, or under reasonable control, the court found that this section was intended to prevent dogs from "running at large" and causing harm to "passersby or a person out in the public or on their own property" who did not assent to engage with the dogs. In this case, the Plaintiffs initiated and participated in the activity of allowing the dogs to run off-leash at the park. Christine Bushner was not a "mere passerby" and willingly participated. Therefore, the court concluded that the harm sustained was not the kind of harm Section 459-305 was intended to avoid, and Christine Bushner was not within the class of persons the statute was intended to protect under these circumstances. Applying this section to the facts would not fulfill its purpose and it did not apply to the conduct at issue. The court found that Plaintiffs failed to create a genuine issue of material fact as to a duty owed by Defendants to them, both under common law negligence and negligence per se based on the Dog Law.

EDITOR'S NOTE: This case was wrongly decided. The Courts have repeatedly held that a conviction by a magistrate is not required in order to establish liability under Section 502A of the Dog Law. *See Underwood v. Wind*, 954 A.2d 1199 (Pa. Super. 2008), *O'Mara-Conley v. Boudaher*, No. CV-2019-11232 (Northampton County 2019) (Morganelli, J.); *Rosen v. Tate*, 64 Pa. D. & C.4th 524, 530-531 (Lehigh County 2003) (Wallitsch, J.); *Walsh v. Toth*, No. 22 CV 96 (Lackawanna County 2022) (Nealon, J.).

II. <u>IMPORTANT DEVELOPMENTS IN CIVIL PROCEDURE & EVIDENCE LAW</u>

A. *THE COURT UPHELD A VENUE SELECTION CLAUSE THAT PLAINTIFFS CONTENDED WAS UNCONSCIONABLE*

In the case of *Somerlot v. Jung*, 343 A.3d 324 (Pa. Super. 2025), Plaintiffs filed a medical malpractice claim stemming from a spinal-cord operation on October 1, 2021, which allegedly caused severe injuries to Plaintiffs. The Plaintiffs, husband and wife, were residents of Bucks County, Pennsylvania.

The core issue arose when the Trial Court sustained the Preliminary Objections of Defendants, Soon Jung M.D. and S.E. PA Pain Management, LTD d/b/a SEPA Pain & Spine, and transferred the case from Philadelphia County to

Bucks County. The basis for this transfer was a forum selection clause contained within a consent form signed by Somerlot prior to the surgery. This clause mandated that all claims related to the surgery be litigated solely in the Courts of Bucks County.

On appeal, the Plaintiffs presented several arguments. First, they contended that venue was proper in Philadelphia County for all Defendants because another Defendant, Boston Scientific Corporation, which was the alleged manufacturer of the spinal stimulation device, had stipulated that venue was proper there. They cited Pennsylvania Rule of Civil Procedure 1006(c) regarding venue in support of this argument. Second, they argued that the venue selection clause in the medical consent form was unenforceable because it was ambiguous, unreasonable, unconscionable, and/or against public policy. They also suggested the clause was "inconspicuously buried" within the agreement and that Somerlot signed it shortly before the procedure, implying a lack of genuine choice. Finally, they claimed that Somerlot was "in pain, in need of medical treatment, and could not realistically go elsewhere" at the time of signing, making the agreement unconscionable.

The Court, however, upheld the transfer of the case to Bucks County. The Court acknowledged that Philadelphia was indeed a proper venue due to the stipulation with Boston Scientific Corporation and Pa. R.C.P. 1006(c). However, it clarified that finding venue proper in one county does not end the analysis when the Plaintiff has contractually agreed to litigate in a different, also proper, venue. The Court emphasized that valid forum selection clauses are given "controlling weight in all but the most exceptional cases".

Regarding the enforceability of the clause, the Court found it to be valid. It stated that the one-page consent form used typical patient-facing language, was not overly technical, and had a reasonable text size. The specific paragraph containing the venue clause, the seventh bulleted paragraph, was emphasized by a capitalized "NOTICE". The language of the clause was deemed unambiguous and not confusing. Importantly, immediately below the clause, it stated: "If patient or undersigned does not agree to this paragraph number 6, then he/she will initial here," followed by a blank space, which Somerlot did not initial. The Court considered the incorrect reference to "paragraph number 6" instead of "paragraph number 7" a minor typographical error that did not diminish the agreement's validity. The Court also rejected the argument that the clause was "buried" due to its emphasis. Finally, the Court dismissed the unconscionability argument, stating that the document's simplicity, reasonableness, and the absence of coercion or deception on the record meant there was no issue of unconscionability. The Court stated that the need for medical treatment does not automatically call into question the agreed-upon terms.

EDITOR'S NOTE: In the editor's opinion, the Plaintiffs in *Somerlot* failed to make a crucial argument against the venue selection clause: that it violates public policy. A similar argument was successfully made in *Leidy v. Deseret*

Enterprises, Inc., 381 A.2d 164 (Pa. Super. 1977). In Leidy, plaintiff made a medical malpractice claim against a physical therapy group. The service contract included a release of liability for negligence by spa employees. The court in *Leidy* determined that contracts involving health and safety are matters of public policy concern and that exculpatory clauses in such agreements are void as a violation of public policy. While the Somerlot case dealt with a venue selection clause and not a liability waiver, the same public policy reasoning should have been raised to challenge the enforceability of the venue clause. A strong argument could be made that a venue selection clause, especially when presented in a contract of adhesion just before a medical procedure, restricts a Plaintiff's right to access justice and, therefore, violates the public policy of protecting patients' health and safety. The court in Somerlot found no evidence that the Plaintiff lacked a meaningful choice or that the clause was unfairly one-sided, but a public policy argument based on Leidy could have provided a stronger legal foundation for those claims.

B. SUIT LIMITATION PROVISIONS WERE UPHELD, RESULTING IN THE PLAINTIFF'S CASE BEING DISMISSED BASED ON THE STATUTE OF LIMITATIONS

In *Sciacca Service Center v. Certain Underwriters at Lloyd's London*, No. 2023-CV-20559 (C.P.. Mont. Co. May 15, 2025 Saltz, J.), the Pennsylvania Court of Common Pleas of Montgomery County addressed the enforceability of suit limitation provisions in insurance policies. The case stemmed from Hurricane Ida hitting Montgomery County on September 1 and 2, 2021, causing alleged significant damage to Sciacca Service Center's property. Sciacca Service Center, an automobile service and repair shop, held two insurance policies, one from Lloyd's and another from MMG Insurance Company, covering its business property in Norristown. After submitting claims, Lloyd's denied the claim on April 4, 2022, and MMG denied its claim on August 16, 2022, both asserting the damage preexisted the storm. Sciacca Service Center filed a Complaint on September 15, 2023, alleging breach of contract by both insurers.

MMG and Lloyd's each asserted that the lawsuit was time-barred by suit limitation provisions in their respective policies. MMG's policy required legal action to be initiated "within two years after the date on which the direct physical loss or damage occurred". Lloyd's policy stipulated that a suit must be started "within 12 months from the date we mailed you notice that we have denied your claim, or part of your claim." Sciacca Service Center argued that it could not discover the structural damage until January 2022 and that ongoing discussions with the insurers about the dispute through June 2023 constituted a waiver or estoppel of the suit limitation provisions.

The issue before the Court was whether the suit limitation provisions in the insurance policies were valid and enforceable, and if Sciacca Service Center had

failed to comply with them, or if the insurers had waived or were estopped from asserting these provisions.

The Court held that the suit limitation provisions in both insurance policies were valid and enforceable, and that Sciacca Service Center failed to bring suit within the established time limits. The Court also held that Sciacca Service Center did not provide a sufficient basis for finding that the Defendants waived these provisions or were estopped from asserting them. Accordingly, the Court granted the Defendants' Motions for Judgment on the Pleadings.

The Court's rationale was based on established Pennsylvania law recognizing the validity and enforceability of suit limitation provisions in insurance policies, even if they shorten the statutory period of limitations. For MMG, the Court noted that the hurricane occurred on September 1 and 2, 2021, and the lawsuit was filed on September 15, 2023, which was more than two years later. The Court rejected Sciacca Service Center's argument regarding the discovery of damage, stating that MMG's provision runs from the date "direct physical loss or damage occurred," not from the date of discovery. For Lloyd's, the Court found that the claim was denied on April 4, 2022, but the suit was not brought until September 15, 2023, exceeding the twelve-month limitation. Regarding waiver or estoppel, the Court stated that such provisions can only be waived by an insurer's action that reasonably leads the insured to believe the limitation will not be enforced. The Court found that continuation of negotiations alone was insufficient to establish waiver or estoppel, and insurers were not obligated to warn Sciacca Service Center of their intent to enforce the provisions.

C. THE SUPERIOR COURT UPHELD A TRANSFER BASED ON FORUM NON CONVENIENS

In *Tranter v. Z&D Tour, Inc.*, 343 A.3d 1106 (Pa. 2025), the Pennsylvania Supreme Court addressed the legal doctrine of *forum non conveniens*. The case arose from a catastrophic multi-vehicle collision on January 5, 2020, on the Pennsylvania Turnpike in Westmoreland County. A tour bus crashed and was subsequently struck by multiple tractor-trailers, resulting in five fatalities and numerous severe injuries. The large-scale emergency response and subsequent investigations involved personnel primarily from Westmoreland County and the surrounding area. Following the crash, several groups of Plaintiffs filed lawsuits in Philadelphia County, a technically proper venue as the corporate defendants conducted business statewide. The central legal issue was whether the Superior Court erred by reversing the trial court's decision to transfer the case from Philadelphia to Westmoreland County based on *forum non conveniens*. The dispute focused on the standard a Defendant must meet to prove a Plaintiff's chosen forum is "oppressive" due to witness hardship, specifically questioning the Superior Court's requirement that Defendants identify "key witnesses" whose testimony would be "critical" to the defense.

Defendants, including FedEx and UPS, petitioned for the transfer, arguing Philadelphia was an "oppressive" forum because sixty-six potential witnesses,

including first responders and eyewitnesses, resided over two hundred miles away in or near Westmoreland County. They provided eleven affidavits detailing the significant personal and professional hardships these witnesses would face. They contended that the "key witness" standard was an unrealistic burden at an early stage of litigation and would prematurely reveal their trial strategy. In contrast, Plaintiffs argued their choice of forum deserved significant weight and that modern technology like virtual testimony mitigates travel concerns. They claimed the Defendants' affidavits were generic and failed to prove the witnesses were "critical" to the defense.

The Pennsylvania Supreme Court reversed the Superior Court's order, reinstating the trial court's decision to transfer the case to Westmoreland County. The Court's rationale was grounded in its prior precedents, particularly *Cheeseman* and *Bratic*. It decisively rejected the "key witness" requirement as an unreasonably high burden, noting it is impractical for a Defendant to have a fully formed trial strategy at the outset of a case. Reaffirming its holding in *Bratic*, the Court emphasized that a travel distance of over two hundred miles goes beyond mere inconvenience and approaches oppressiveness. The Court found Defendants' evidence, including the identification of numerous witnesses concentrated far from the chosen forum, was sufficient to justify the transfer. It also strongly rejected Plaintiffs' technology argument, stating that virtual testimony is not a substitute for in-person proceedings and that accepting this argument would effectively eliminate the doctrine of *forum non conveniens*, which is a necessary counterbalance to a Plaintiff's choice of forum. Ultimately, the Court held that the trial court's decision was a proper exercise of its discretion, as it was based on the significant hardship posed to a large number of witnesses.

EDITOR'S NOTE: While the court granted the motion in this case, the court did give guidance regarding the distance from the jurisdiction where the incident occurred that will likely not be too far for a defendant to succeed on a motion to transfer venue due to *forum non conveniens*. The court looked to its prior decision in *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014). After reviewing the decision, the Court made the following statement:

> A distance of one hundred miles provides a valuable benchmark for distinguishing between oppressiveness and mere inconvenience. This guideline finds support in the observation that our Rules of Civil Procedure repeatedly use the same distance—one hundred miles—as the triggering point for various provisions relating to the conduct and use of depositions, which similarly concern the burdens of requiring witnesses to travel. This is not to say that a venue is always oppressive where witnesses must travel further than one hundred miles, nor does it mean that a shorter distance can never contribute to a finding of oppressiveness. As *Bratic* explained, "distance alone is not dispositive, but it is inherently part of the equation."As a general rule, however, consistent with the discussion in *Bratic*, a distance of one hundred miles is a

reasonable line, for "as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway."

D. A PARENT MAY NOT BIND A MINOR TO AN ARBITRATION AGREEMENT; A SPOUSE MAY NOT BIND A NON-SIGNING SPOUSE TO AN ARBITRATION AGREEMENT

In *Santiago v. Philly Trampoline Park, LLC*, 343 A.3d 995 (Pa. 2025), the Pennsylvania Supreme Court issued a significant decision regarding the enforceability of arbitration agreements signed by one parent on behalf of their minor child and their non-signing spouse. The case consolidated two similar incidents at Sky Zone trampoline parks where minors were injured. In each case, one parent had signed a "Participation Agreement, Release and Assumption of the Risk" containing a broad arbitration clause, while the other parent had not. The families subsequently filed lawsuits for damages, and Sky Zone moved to compel arbitration. After the lower courts found the arbitration clause unenforceable against both the minors and the non-signing spouses, Sky Zone appealed, bringing two primary legal questions to the Pennsylvania Supreme Court: whether an arbitration agreement signed by one spouse is enforceable against the other based on a theory of agency, and whether a parent has the authority to bind a minor child to a pre-injury arbitration agreement for personal injury claims.

Sky Zone, the appellant, argued that an agency relationship existed between the spouses, which should bind the non-signing parent. They also characterized the arbitration clause as a mere "forum selection clause" that did not extinguish the minor's substantive rights and warned that failing to enforce such agreements would harm businesses that offer recreational activities. In response, the families contended that marriage alone does not create an agency relationship and that Sky Zone had failed to prove one existed. They argued the agreement was a prospective release of liability, not just a choice of forum, and that parents, as natural guardians of a child's *person*, lack the inherent authority to sign away a child's *property* rights, which include a legal cause of action. They emphasized that arbitration strips minors of critical procedural protections guaranteed by the judicial system.

The Supreme Court of Pennsylvania affirmed the lower court's decision, holding that the arbitration agreement was unenforceable against both the non-signing spouses and the minor children. The Court's rationale for the spousal agency holding reaffirmed the long-standing principle that an agency relationship does not arise from marriage alone. Agency authority must be granted by the principal, and Sky Zone presented no evidence of such a grant. Regarding the minor's claims, the Court's reasoning was grounded in Pennsylvania's strong public policy of protecting minors. It distinguished between a parent's role as a

"guardian of the person" and a "guardian of the estate," noting that a legal cause of action is property belonging to the minor's estate. The Court rejected Sky Zone's "forum selection" argument, reasoning that an agreement to arbitrate dictates procedure, not just location. Critically, arbitration lacks the procedural safeguards the judicial system provides for minors, such as court supervision and the appointment of a guardian to protect the child's best interests. Therefore, a parent's act of signing a pre-injury arbitration agreement constitutes an unauthorized "intermeddling" with the minor's property rights and is unenforceable.

EDITOR'S NOTE: The reasoning in this case has also been applied to invalidate any exculpatory releases a/k/a liability waivers for minor children. In Apicella v. Valley Forge Military Acad. & Junior Coll., 630 F. Supp. 20 (E.D. Pa. 1985), the Eastern District of Pennsylvania found that under Pennsylvania law, parents do not possess the authority to release potential claims of a minor child merely because of the parental relationship. (See also Holland v. Marcy, 2002 PA Super 381 (2002)). In *Simmons v. Parkette National Gymnastic Training Center, et al.,* 670 F. Supp. 140 (3d Cir. 1987), the Third Circuit Court of Appeals, applying Pennsylvania law, held that a parent's signature on a pre-event release is not enforceable against the minor child. The Court noted that "the common law rule that minors...may disaffirm their contracts has as its basis the public policy concern that minors should not be bound by mistakes resulting from their immaturity or the overbearance of unscrupulous adults." In *Troshak v. Terminix Int'l Co., L.P.*, 1998 U.S. Dist. LEXIS 9890 (E.D. Pa. 1998), relying on the reasoning of the cases described above, the court held that under Pennsylvania law, a parent also cannot bind a minor child to an arbitration provision that requires the minor to waive the right to file a claim in a court of law. If a parent cannot prospectively release the potential claims of a minor child, then a parent does not have authority to bind a minor child to an arbitration provision, thus, waiving the right to litigate their claim in the court system.

E. A JUDICIALLY EXCLUDED EXPERT IS NOT A MISSING WITNESS SUCH THAT A PARTY MAY STATE THAT THE OPPOSITION WAS "UNABLE TO FIND AN EXPERT"

In the case of *Lewis v. Reading Hosp.*, 345 A.3d 257 (Pa. Super. 2025), plaintiff filed a medical malpractice claim against Reading Hospital and related parties following complications from a vascular surgery in 2021. The central theory of negligence focused on Defendants' negligent deviation from the required standard of care during post-operative treatment. The trial was contentious, and prior to trial, the Court issued an order precluding Defendants' causation expert from testifying. Despite this judicial preclusion, Defendants proceeded to trial, which ultimately concluded with a jury finding them liable and awarding Plaintiff $869,000 in damages.

Defendants appealed the judgment, raising multiple issues, including an improper jury instruction on the "increased risk of harm" doctrine and several prejudicial evidentiary rulings. The most relevant issue concerning the expert testimony was whether the trial Court erred in denying a mistrial after Plaintiff's counsel stated during opening arguments that the defense would not be presenting a causation expert. Defendants argued that the pre-trial exclusion of their causation expert meant that Plaintiff's counsel's comment, stating that the defense was "unable to retain an expert," was highly prejudicial and a misrepresentation of fact. They contended that their expert's absence was due to a specific judicial ruling, not an inability to find support for their defense, and that the comment wrongly implied a lack of merit, thereby necessitating a new trial. Plaintiff implicitly maintained that the comment was either harmless or constituted fair comment on the status of the evidence they expected to see.

The Pennsylvania Superior Court sided with Defendants, vacating the judgment and remanding the case for a new trial based on a combination of two errors. First, the Court found the jury instruction on causation was flawed because it permitted the jury to find liability based only on an increased risk of harm without properly requiring a concurrent finding that this increased risk was a factual cause of Plaintiff's injuries. Second, and significantly regarding the expert issue, the Court held that Plaintiff's counsel's remarks during the opening statement were highly prejudicial. The Court's rationale hinged on the fact that the defense expert's absence was due to a judicial ruling that made the witness judicially unavailable. Therefore, the opposing counsel's insinuation that Defendants could not *find* a qualified expert was deemed a prejudicial misstatement of fact. This situation was explicitly distinguished from the Missing Witness Rule, which allows for an unfavorable inference only when a party chooses not to call an available witness. The Court reasoned that where a Court order dictates a witness's absence, the opposing counsel is barred from exploiting that absence to suggest evidential weakness, making the comments improper and requiring the verdict to be set aside.

F. THE PENNSYLVANIA SUPREME COURT HAS REAFFIRMED THE STATUTORY EMPLOYER DOCTRINE

In the case of *Yoder v. McCarthy Constr., Inc.*, 345 A.3d 668 (Pa. 2025), the Pennsylvania Supreme Court addressed the scope and durability of the "statutory employer" doctrine under the Workers' Compensation Act ("Act"). The case arose after Jason Yoder, an employee of RRR Contractors, Inc. ("RRR"), sustained severe and permanent injuries when he fell through an uncovered hole while working on the Norwood Public Library roof. The library's owner, the Borough of Norwood, had hired McCarthy Construction, Inc. ("McCarthy") as the general contractor to replace the roof. McCarthy then subcontracted the roofing work to Yoder's employer, RRR. Yoder received workers' compensation benefits from RRR but also filed a negligence lawsuit against McCarthy in the Philadelphia County Court of Common Pleas, where a jury awarded him five

million dollars. McCarthy sought to overturn the verdict, arguing it was immune from the tort suit because the Act made it Yoder's "statutory employer," which grants general contractors the same tort immunity as a direct employer in exchange for bearing secondary liability for workers' compensation payments. The trial court had granted Yoder's motion to preclude McCarthy from raising this defense, finding it was waived because it was raised in an untimely answer. The Superior Court reversed, finding the defense was jurisdictional and could not be waived, and that McCarthy did qualify for immunity.

Yoder appealed to the Supreme Court, presenting three main issues: (1) whether the Court should overrule its 1999 precedent in *Fonner v. Shandon*, which holds that a general contractor is immune even if it does not actually pay benefits (because the subcontractor paid); (2) whether the Court should overrule its 1986 precedent in *LeFlar v. Gulf Creek*, which holds that the statutory employer defense is a non-waivable question of subject matter jurisdiction; and (3) whether the Superior Court erred in finding McCarthy met the five-part *McDonald* test to qualify as a statutory employer. Yoder argued that 1974 amendments to the Act, which mandated workers' compensation insurance, eliminated the rationale for *Fonner* and that immunity should only attach if the general contractor is "called on to pay" benefits. He also argued the defense should be an affirmative defense that McCarthy waived by failing to plead it in a timely manner. McCarthy argued that *Fonner* and *LeFlar* were settled law protected by *stare decisis* and legislative acquiescence, noting the legislature had not amended the Act in the decades since those decisions. McCarthy maintained the defense was jurisdictional and, therefore, unwaivable.

The Pennsylvania Supreme Court, in an opinion by Justice Brobson, reaffirmed its holdings in both *Fonner* and *LeFlar* but ultimately reversed the Superior Court's order on procedural grounds. The Court's rationale for upholding its precedents rested firmly on *stare decisis*, noting that this principle has "special force" in matters of statutory interpretation. The Court held that Yoder failed to provide a "special justification" to overrule *Fonner*, beyond simply disagreeing with its outcome. The Court acknowledged the extensive judicial criticism of the doctrine's "egregiously unfair result" but stated that any policy changes must come from the General Assembly, not the courts. The Court likewise reaffirmed *LeFlar*, holding that the Act deprives the common pleas court of subject matter jurisdiction over tort actions against a statutory employer, meaning the defense is not waivable and "may be raised at any time."

However, the Supreme Court found that the Superior Court committed an error of law and abused its discretion in its application of the *McDonald* test. Yoder argued McCarthy failed three of the five required elements, claiming McCarthy was not the general contractor, did not occupy or control the premises, and that roofing was not part of its "regular business." The Supreme Court noted that because the trial court had improperly precluded McCarthy from raising the defense, no evidence on these disputed elements was presented at trial. The Superior Court, therefore, erred by "scouring the entire record" (including pre-trial and post-trial filings) to find facts to support its conclusion that McCarthy met the

test. The Supreme Court reversed the Superior Court, vacated the trial court's judgment, and remanded the case. The trial court was instructed to conduct an evidentiary hearing to determine, as a question of law, whether McCarthy satisfies the disputed elements of the *McDonald* test. If McCarthy succeeds, the trial court must grant judgment notwithstanding the verdict (JNOV) in its favor; if it fails, the five-million-dollar judgment for Yoder must be entered.

G. THE SUPERIOR COURT HELD THAT THE "GIST OF THE ACTION" DOCTRINE CANNOT BE USED TO RECLASSIFY A CONTRACT ACTION AS A TIME-BARRED TORT

The case of *Poteat v. Asteak,* 350 A.3d 198 (Pa. Super. 2025) involved an appeal by Appellant Antoine Poteat against Appellees Gary Asteak, Esq., and Nino V. Tinari, Esq., stemming from a legal malpractice dispute characterized as a breach of contract. The factual background began when Mr. Poteat entered into a retainer agreement with the Appellees to represent him in a criminal matter, paying them each $7,500. Following a trial where he was convicted and sentenced to five to ten years of incarceration, Mr. Poteat successfully petitioned for relief under the Post Conviction Relief Act (PCRA) on the grounds that the Appellees provided ineffective assistance of counsel. Consequently, on September 19, 2022, Mr. Poteat filed a civil complaint alleging the attorneys breached their retainer agreement by failing to provide competent legal services. Notably, the complaint did not cite an explicit provision in the agreement requiring competent services, relying instead on the general failure to perform adequately.

The central issue on appeal was whether the trial Court erred in sustaining the Appellees' preliminary objections and dismissing the complaint. The Appellees argued that Mr. Poteat's claim, despite being labeled as a breach of contract, actually sounded in tort, specifically, professional negligence. They invoked the "gist of the action" doctrine, asserting that because the claim was essentially negligence, it was barred by the two-year statute of limitations applicable to torts, rather than the four-year period for contracts. Furthermore, the Appellees contended that the complaint was legally insufficient because it failed to identify a breach of a specific executory promise within the written retainer agreement. Mr. Poteat countered that identifying a specific term was unnecessary and that general assertions of a breach of duty were sufficient to maintain the contract action. The trial Court agreed with the Appellees, converting the contract claim into a tort claim under the gist of the action doctrine and dismissing it as time-barred, while also ruling the complaint insufficient for lacking a specific contractual provision.

The Superior Court of Pennsylvania reversed the trial Court's order, holding that the lower Court erred on two grounds: first, by misapplying the gist of the action doctrine to dismiss the contract action, and second, by requiring Mr. Poteat to identify a specific provision in the retainer agreement. Regarding the gist of the action doctrine, the Court relied on the precedent set in *Swatt v. Nottingham Village*, which established that the doctrine cannot be used to

convert a breach of contract claim into a tort claim solely to dismiss it based on the statute of limitations. The Court clarified that contract claims are not subject to the gist of the action doctrine and that a Defendant's conduct constituting a tort does not extinguish a plaintiff's contractual rights. Because Mr. Poteat sought economic damages for a breach of the retainer agreement, the Court determined the claim was properly pled as a contract action subject to the four-year statute of limitations.

Regarding the sufficiency of the complaint, the Superior Court rejected the trial Court's reliance on *Bruno v. Erie Ins. Co.*, finding that *Bruno* did not address the enforceability of implied duties in legal service contracts. Instead, the Court looked to *Bailey v. Tucker* and *Gorski v. Smith*, which established that every contract for legal services contains an implied term requiring the attorney to render services consistent with the profession at large. The Court reasoned that when an attorney enters a retainer agreement, a contractual duty to provide competent representation automatically arises, regardless of whether the written agreement explicitly states it. Therefore, the Court held that Mr. Poteat's complaint was legally sufficient because a breach of contract claim against an attorney can be premised solely on this implied duty of competence.

III. IMPORTANT DEVELOPMENTS IN SOVEREIGN IMMUNITY LAW

A. THE COMMONWEALTH COURT OF PENNSYLVANIA HELD THAT THE "SEXUAL ABUSE EXCEPTION" TO GOVERNMENTAL IMMUNITY PERMITS NEGLIGENCE CLAIMS APPLIES AGAINST A SCHOOL DISTRICT WHEN ITS EMPLOYEES' FAILURE TO SUPERVISE EFFECTIVELY ENABLES A STUDENT-ON-STUDENT SEXUAL ASSAULT

In the case of *N.N. v. Sch. Dist. of Phila.*, 349 A.3d 1081 (Pa. Commw. 2025), the Commonwealth Court of Pennsylvania addressed whether the "sexual abuse exception" to governmental immunity under the Political Subdivision Tort Claims Act applies when the alleged abuse is committed by a third party—specifically another student—rather than a school district employee.

The exception, 42 P.S. Section 8542(b)(9) provides as follows:

> **(9) *Sexual abuse.*** — Conduct which constitutes an offense enumerated under section 5551(7) (relating to no limitation applicable) if the injuries to the plaintiff were caused by actions or omissions of the local agency which constitute negligence.

The offenses set forth in section 5551(7), 42 P.S. Section 5551 that have no limitation are as follows:

[A]ny offense under any of the following provisions of 18 Pa.C.S. (relating to crimes and offenses) . . . if the victim was under 18 years of age at the time of the offense:

Section 3121 (relating to rape).

Section 3122.1 (relating to statutory sexual assault).

Section 3123 (relating to involuntary deviate sexual intercourse).

Section 3124.1 (relating to sexual assault).

Section 3124.2 (relating to institutional sexual assault).

Section 3125 (relating to aggravated indecent assault).

42 Pa.C.S. § 5551(7).

The factual background involves K.W., a 14-year-old mentally disabled minor, who was allegedly sexually assaulted for 22 minutes by another male student while riding a school bus home in March 2020. The plaintiff, K.W.'s parent, filed a negligence suit against the School District, the bus driver, and the bus attendant, asserting that the District's employees failed to supervise the students; specifically, it was alleged that the bus attendant was distracted by a personal cell phone call during the entire duration of the assault, which occurred directly behind her.

The central legal issue was whether the School District was entitled to summary judgment based on governmental immunity. The District argued that under the Tort Claims Act, local agencies are generally immune from liability for the criminal acts of third parties and that the sexual abuse exception, enacted in 2019, should only abrogate immunity if a District employee committed the abuse. Conversely, the plaintiff argued that the language of the exception allows for liability when the injuries are caused by the "actions or omissions" of the local agency that constitute negligence, regardless of the identity of the assailant. The trial court denied the District's motion for summary judgment, finding that the legislature intended to protect children and that the District's failure to act (an omission) fell within the waiver of immunity.

On appeal, the Commonwealth Court affirmed the trial court's decision. The court's holding clarified that the sexual abuse exception to governmental immunity is applicable where a local agency is accused of "negligently enabling" sexual abuse. The court's rationale relied heavily on its concurrent *en banc* decision in *L.F.V. v. South Philadelphia High School*, which held that for the exception to apply, there is no requirement for the local agency or its employees to have committed the specific criminal acts listed in the statute. Instead, the court reasoned that the legislative intent was to hold municipalities accountable for negligence that allows such abuse to occur. Because the plaintiff alleged that

the District's employees' omissions—namely, the failure to supervise the bus—negligently enabled the student-on-student assault, the court concluded that the District was not immune from the suit and that the trial court properly denied the motion for summary judgment.

IV. IMPORTANT DEVELOPMENTS IN PREMISES LIABILITY LAW

A. *DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS DENIED BECAUSE A QUESTION OF FACT EXISTED WHERE FALL OCCURRED AFTER SNOW REMOVAL CONTRACTOR PLOWED*

In the case of *Coolbaugh v. Sonesta Select Allentown Bethlehem Airport*, 2024 Pa. Dist. & Cnty. Dec. LEXIS 1178 (Lehigh County 2024) the Lehigh County Court of Common Pleas denied Defendants' motion for summary judgment in a slip and fall case involving an artificial condition exception to the hills and ridges doctrine and a snow removal contractor. The factual background details that on January 8, 2022, Plaintiff William Coolbaugh was staying at the Sonesta Hotel and observed snowy parking lot conditions, a situation he had noted for several weeks prior. On January 9, 2022, Country2Coast, LLC performed a de-icing at the hotel. On January 10, 2022, around 2:00 AM, Coolbaugh slipped and fell due to ice and/or slippery conditions in the parking lot, sustaining injuries. Coolbaugh testified he saw snow and ice mounds between vehicles but did not detect the glazed ice he stepped on, stating he "didn't think it was that icy" and "it did not look that bad". He later reported the incident and was transported to Lehigh Valley Hospital – Muhlenberg for treatment of injuries to his right knee, right shoulder, and head. Coolbaugh filed his complaint on June 5, 2023, and Defendants subsequently filed a motion for summary judgment on August 5, 2024.

Defendants' filed a motion for summary judgment, which was premised on two grounds: first, that the hills and ridges doctrine barred Coolbaugh's recovery, and second, that Coolbaugh failed to prove the required elements of his negligence claim. The second ground was further broken down into sub-arguments: that Defendants owed no duty to Coolbaugh regarding open and obvious conditions, that they fulfilled their duty by contracting snow and ice removal to Country2Coast, LLC, that they lacked notice of the dangerous condition, and that Coolbaugh had not proven his claimed damages.

Concerning the negligence claim and the argument of an open and obvious condition, the Court noted that while landowners are generally not liable for dangers known or obvious to invitees, liability can exist if the possessor should anticipate harm despite such obviousness. The question of whether a condition is known and obvious is typically a factual one for a jury. Crucially, to relieve a defendant of a duty of care, an open and obvious condition must be avoidable. Coolbaugh's testimony, describing mounds of ice and snow and indicating that the "drive-in area wasn't taken care of real well" and that the hotel "could have

told people not to park in areas" or "took care of the parking lot a lot easier," suggested ambiguity regarding the avoidability of the icy conditions. Therefore, the Court found a genuine issue of material fact as to whether the danger was avoidable, precluding summary judgment on this ground.

The Court also addressed Defendants' argument that they were relieved of duty by contracting snow removal. The Court stated that merely contracting snow and ice removal does not automatically relieve a landowner of their common law duty to protect business invitees. For a landowner's responsibility to be replaced, the independent contractor must be in possession and control of the work area, and the owner must be "out of possession and without control over the work or the premises". The record did not establish a lessening or cessation of Sonesta's possession and control during or after Country2Coast, LLC's services, making Defendants' argument without merit.

Regarding notice, the Court highlighted that an invitee must prove the landowner had actual or constructive notice of the harmful condition. Coolbaugh's testimony that he had observed snowy and icy conditions at the hotel for weeks prior to his fall, two days before, and on the night of his fall, provided evidence from which a jury could conclude that the dangerous icy conditions persisted despite de-icing efforts. This created a genuine issue of material fact as to whether Defendants had constructive notice.

Finally, on the issue of damages, the Court found that Coolbaugh had presented sufficient evidence for medical expenses through his testimony and medical records, even though he was not claiming wage loss. Defendants' assertion that the economic damages were "nominal" was deemed insufficient to warrant summary judgment, as nominal damages are recoverable when an actual loss has occurred. Therefore, the Court concluded that genuine issues of material fact existed concerning Coolbaugh's negligence claim, leading the court to deny the motion for summary judgment.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS DENIED WHERE THE NATURE OF THE DEFECT PERTAINED TO THE DURABILITY OF THE FLOORMAT

In *Montanez-Fontanez v. Lehigh Valley Health Network*, 2024 Pa. Dist. & Cnty. Dec. LEXIS 1177 (Lehigh County 2024), on April 6, 2021, Sarah Montanez-Fontanez, who used a walker after a left knee replacement five years prior and had recently undergone a right knee replacement, attended a physical therapy appointment at the Lehigh Valley Hospital-Muhlenberg campus. She had attended physical therapy at this facility approximately two other times, always using the same doorway. After her 2:00 PM appointment, as she exited the facility with her daughter, her walker's wheels became stuck on the rubber edge of a floormat, causing her to fall. She hit her head on the door and her face on the ground, breaking her walker. The Plaintiff testified that the rubber edge of the

floormat was "kind of worn out" and turned up. She did not have any problems with the floormat when entering. She was subsequently transported to St. Luke's Hospital. Photographs were taken of the area by her daughters and a security officer, but these photos did not show the worn condition of the floormat's rubber edge.

The Defendants argued for summary judgment on two main points: first, that they did not owe a duty of care to the Plaintiff because the floormat did not present an unreasonable risk of harm, and there was no evidence that they created the risk or had actual or constructive notice of it. Secondly, even if the floormat did present an unreasonable risk, they argued they could not be held liable because the alleged defects were open and obvious.

The Court denied the Defendants' motion for summary judgment. The Court found that a genuine issue of material fact existed as to whether the Defendants had notice of the dangerous condition alleged by the Plaintiff. While a turned-up edge could be a temporary defect, the alleged "worn condition" of the rubber edge of the floormat would be a defect of a "more sustained quality." When a defect is of the durability of the object, and a witness saw the defect immediately before or after the accident, a Plaintiff does not need to produce positive testimony as to how long the defect existed to charge a Defendant with constructive notice. The Court noted that no evidence was presented regarding how long the floormat's rubber edge had been in the alleged worn condition, nor was there evidence that Defendants caused the condition or had actual notice. However, viewing the record in the light most favorable to the Plaintiff, the Court determined that the worn condition of the floormat raised a factual dispute regarding constructive notice.

The Court likewise concluded that a genuine issue of material fact existed as to whether the alleged condition of the floormat amounted to an unreasonable risk of harm. The Plaintiff's testimony that the floormat was "worn to the point where it was a tripping hazard" could be found credible by a jury. Regarding the "open and obvious" defense, the Court stated that the record lacked any evidence or testimony that the Plaintiff knew of the alleged worn condition of the floormat's rubber edge before her fall. The question of whether conditions are known and obvious is generally a question for the jury unless reasonable minds could not differ. The Court distinguished this case from the situation in *Stevenson v. Onhuoha, M.D., et al*, 2022-C-1218 (Leh. Cty. Con. Pls. Dec. 5, 2023), which involved a functioning trash can located against a wall in an examination room. The Court reasoned that *Stevenson's* facts were materially different from a floormat with an allegedly worn rubber edge located in the immediate proximity to the entrance doors of a facility.

C. THREE HOURS WAS CONSIDERED INSUFFICIENT TIME FOR CONSTRUCTIVE NOTICE IN A PREMISES LIABILITY CASE

In the case of *Melvin v. Sellani*, No. 1234 MDA 2024, 2025 Pa. Super. Unpub. LEXIS 3330 ((Pa. Super. 2025), the Superior Court of Pennsylvania affirmed a trial court's order granting summary judgment in favor of Appellees, Peter Sellani and 240-242 Philadelphia Ave, LLC, regarding a negligence claim. The dispute arose from an incident on January 17, 2018, when Appellant, Rhonda Melvin, a tenant at the Appellees' apartment complex in West Pittston, Luzerne County, slipped and fell on a sidewalk on the property. Melvin testified that three to five inches of snow had accumulated during the day; it was snowing when she arrived at work at 6:30 a.m. and had stopped by the time she left at 3:00 p.m. After returning home and walking from her car to her apartment without issue, she walked back outside shortly thereafter and fell on the sidewalk, which she described as covered in snow and ice, suffering a fractured ankle. Sellani, the property manager, testified that he began snow removal at 9:30 a.m. amidst heavy snowfall and was still working on the premises at the time of the fall, though he had not yet salted the sidewalks.

Melvin filed a complaint in August 2019, alleging negligence due to the failure to remove the accumulated snow promptly. Following discovery, the trial court granted the Appellees' motion for summary judgment, prompting Melvin's appeal in which she presented two arguments: that she had produced sufficient evidence to survive summary judgment under the "hills and ridges" doctrine, and that the trial court violated the *Nanty-Glo* rule by relying on oral testimony to grant the motion. Melvin contended that genuine issues of material fact existed regarding whether the Appellees allowed dangerous ridges of snow to accumulate and whether they failed to act within a reasonable time. She relied on photographs of the scene to demonstrate the obstruction and on Sellani's testimony regarding "chunks of snow" to establish the severity of the conditions.

The Superior Court held that summary judgment was appropriate because Melvin failed to establish the necessary elements to overcome the protection afforded to landowners by the hills and ridges doctrine. The Court reasoned that the photographs Melvin submitted did not create a material issue of fact because she admitted she did not know if they were taken on the day of the accident or the following day. Similarly, the Court found Sellani's testimony regarding "big chunks of snow" irrelevant to the specific hazard alleged, as he was describing conditions in the street rather than the sidewalk where Melvin fell. Furthermore, the Court determined Melvin failed to prove an unreasonable delay in snow removal; even under a hypothetical scenario where the snow stopped at 6:30 a.m. and cleanup began at 9:30 a.m., the Court noted she cited no law establishing that such a three-hour delay is unreasonable. Finally, the Court rejected the *Nanty-Glo* argument, explaining that the trial court did not rely on the Appellees' oral testimony to grant judgment, but rather ruled against Melvin

because she failed to produce sufficient evidence to support the essential elements of her own cause of action.

D. SUPERIOR COURT REVERSED SUMMARY JUDGMENT, FINDING THAT A BUSINESS COULD BE LIABLE FOR NEGLIGENT SECURITY EVEN FOR AN OFF-PREMISES ATTACK

In *Borth v. Alpha Century Sec., Inc.*, No. 2044 EDA 2022, 2025 Pa. Super. Unpub. LEXIS 1988 (Aug. 1, 2025), the Pennsylvania Superior Court reversed a grant of summary judgment in a negligent security case. The factual background involved Patricia Borth, a customer at a Rite Aid store, who was stalked by an individual, Albert Geiger, while inside the store. After Ms. Borth left the store, Geiger followed her for a city block and then brutally beat and robbed her, causing injuries from which she later died. The security guard, an employee of Alpha Century, a subcontractor for Rite Aid's security provider, noted Geiger's suspicious behavior but believed his duty ended once the customer left the store. Rite Aid and the security companies moved for summary judgment, arguing they had no duty to protect Ms. Borth once she was off their property. The central issues on appeal were whether the attack was foreseeable as a matter of law, whether the duty to protect was extinguished when she left the premises, and whether the criminal act was a superseding cause.

The Court's holding was that while a landowner's duty to protect invitees does not extend to areas off the premises, the Defendants could still be held liable for a breach of duty that occurred *on* the property if that breach was a substantial factor in causing the harm that occurred later. The Court concluded that genuine issues of material fact existed regarding the Defendants' negligence. The Court reversed the orders granting summary judgment and remanded the case to the trial Court for further proceedings.

The rationale for the Court's decision centered on the duty of a business owner to its invitees under Section 344 of the Restatement (Second) of Torts, which obligates a business to take reasonable precautions against the foreseeable harmful acts of third persons. The Court noted that Rite Aid's own "Crimecast Evaluation" rated the store as having a very high risk of criminal activity. Despite this known risk, the security guard received no training on how to handle suspicious persons, and both Rite Aid and its security provider failed to adequately hire, train, and supervise security personnel, as evidenced by deposition testimony and expert reports. The Court reasoned that a jury could find that the failure to act on the suspicious behavior while Ms. Borth was still on the premises—by, for example, warning her or offering an escort—was a breach of duty. This breach, the Court determined, could be considered a substantial factor in the attack, making the harm legally foreseeable and preventing a determination of no liability as a matter of law. The Court also reversed the dismissal of the punitive damages claim, concluding that it would be up to the factfinder to determine if the conduct was outrageous and reckless.

V. IMPORTANT DEVELOPMENTS IN MEDICAL MALPRACTICE LAW

A. *A MEDICAL CARE PROVIDER UNDERTOOK A DUTY AND CAN BE LIABLE FOR MALPRACTICE EVEN WHERE THE PROVIDER NEVER MET THE PATIENT NOR FORMALLY ESTABLISHED THE PHYSICIAN/PATIENT RELATIONSHIP*

In the case of *Munoz v. Child.'s Hosp. of Phila.*, No. 1388 EDA 2024, 2025 Pa. Super. Unpub. LEXIS 1395 (Pa. Super. 2025), the Pennsylvania Superior Court affirmed the judgment entered by the Court of Common Pleas of Philadelphia County, which awarded $11,595,157.67 to the Munoz family. This appeal followed a new jury trial where the jury found both The Children's Hospital of Philadelphia ("CHOP") and other Einstein defendants negligent, apportioning 67% of the liability to CHOP, resulting in a verdict of $9,380,000.00 against CHOP, with additional delay damages.

The factual background of the case begins on June 7, 2015, when four-year-old Samuel Munoz ("Decedent") was brought to Einstein Medical Center - Elkins Park ("Einstein-Elkins Park") with a high fever and swollen lip, diagnosed as a herpes lesion and discharged. The next day, due to persistent fever and shortness of breath, he returned with abnormal vital signs. Dr. Steven J. Parrillo diagnosed pneumonia after reviewing X-ray results and initiated treatment. Dr. Parrillo then contacted CHOP for assistance, characterizing Decedent's care as an emergency. Dr. Matthew Taylor, a pediatric intensive care fellow and medical command physician at CHOP's Pediatric Intensive Care Unit ("PICU"), concurred with the pneumonia diagnosis and directed Dr. Parrillo to modify the antibiotic regimen, add an antiviral medication, and administer saline. A patient chart was subsequently opened for Decedent within the CHOP PICU, and CHOP was asked to transport him since Einstein-Elkins Park lacked a transport team and a pediatrics department. Dr. Parrillo indicated he did not believe intubation would be necessary, but that he could handle it if it became so. CHOP dispatched a critical care transport team consisting of two nurses, Heather Maerten and Donna Galvin Hill, who were trained in pediatric intubations under physician supervision, but no physician or intensivist accompanied them. While the team was en route, Decedent's condition rapidly deteriorated. Upon the team's arrival, Nurse Maerten observed that Decedent had turned "blue" from decreased oxygen levels. Dr. Parrillo made two unsuccessful intubation attempts, causing significant bleeding. Decedent then went into cardiac arrest, and CPR was initiated. The CHOP nurses did not participate in the intubation attempts but later offered a King's Airway device, which Dr. Parrillo successfully placed. Decedent's pulse returned, and CPR was discontinued. However, Decedent again entered cardiac arrest, and despite the arrival of two Einstein anesthesiologists who successfully placed an endotracheal tube, Decedent did not improve and was pronounced dead at 7:36 p.m. He was never transported to CHOP.

The primary legal issues on appeal revolved around whether the trial Court erred in denying CHOP's request for judgment notwithstanding the verdict (JNOV). Specifically, CHOP questioned whether the Munoz family had proven that one or more CHOP employees owed Samuel Munoz a legal duty that was breached and caused harm, thereby failing to establish vicarious liability. Additionally, CHOP argued that the federal Emergency Medical Treatment and Labor Act ("EMTALA") preempted state law duties, placing the duty to stabilize the patient exclusively on Einstein, the sending hospital, prior to transport. CHOP also contended that the trial Court abused its discretion in denying JNOV on the wrongful death claim due to a lack of evidence regarding pecuniary losses and that the Court erred in denying a new trial given that the overwhelming evidence allegedly showed no CHOP agent or employee owed a duty that was breached and caused harm.

The Appellees, the Munoz family, asserted that CHOP was responsible for the actions and inactions of its agents who knew or should have known of Decedent's critical illness and need for specialized pediatric intensivist care, which was unavailable at Einstein-Elkins Park. They alleged that CHOP was negligent in dispatching a critical care team without a PICU physician, which "removed any chance" of Decedent receiving CHOP's pediatric intubation expertise. The Munoz family presented expert testimony from Dr. Ronald Paynter, who opined that CHOP became involved in Decedent's care by agreeing to assist and transport him, opening a chart in their PICU, and modifying treatments. Dr. Paynter further stated that CHOP and Dr. Taylor deviated from the standard of care by failing to send a physician on the transport team for a critically ill child, especially considering CHOP's internal policy suggesting a physician for unstable patients or those with potential instability during transport. He also criticized CHOP Nurse Galvin Hill for not participating in the intubation attempts despite her experience. The Appellees maintained that their claims were not preempted by EMTALA.

Conversely, the Appellant, CHOP, moved for a compulsory nonsuit, arguing a failure to establish a corporate liability claim and asserting that the Appellees' claims were preempted by EMTALA. In their post-trial motions and on appeal, CHOP sought JNOV, a new trial, and/or remittitur, contending that the Munoz family failed to prove that CHOP employees owed Samuel a legal duty or that CHOP could be held vicariously liable. CHOP's experts (Dr. Justin Lockman and Dr. Monica Kleinman) argued that Dr. Taylor was not required to staff the transport team with a physician because Decedent did not show signs of instability when transport was requested, only "abnormal" vital signs, and that he responded to interventions. They also asserted that Nurse Galvin Hill appropriately deferred to Dr. Parrillo for intubation attempts. CHOP further claimed it did not establish a physician/patient relationship merely by agreeing to transport Decedent or because Decedent was never placed in CHOP's ambulance.

The Pennsylvania Superior Court ultimately affirmed the trial Court's denial of CHOP's post-trial motions, including the request for JNOV and a new

trial. The Court's rationale was primarily rooted in the finding that sufficient evidence existed for the jury to conclude that CHOP personnel owed a duty to Decedent. The Court applied the Restatement (Second) of Torts, § 323, which outlines liability for failure to exercise reasonable care when one undertakes to render services necessary for another's protection, if that failure increases the risk of harm or the harm is suffered due to reliance on the undertaking. The Superior Court noted that in a previous appeal (Munoz I), it had already found "ample evidence to demonstrate that CHOP undertook and provided health care services to [Decedent]" through its agents' actions. It further stated that Appellees presented expert testimony showing that CHOP's agents' "actions, or lack thereof, increased the risk of harm to [Decedent]." The Court reiterated that, when viewing the record in the light most favorable to Appellees, it could not determine that "the factfinder could not reasonably conclude that the essential elements of the cause of action were established." Regarding EMTALA, the Court in Munoz I had previously determined that the Appellees' claims were not preempted by the federal statute. Lastly, the Court noted that CHOP had only properly preserved the argument regarding the duty of care for JNOV and did not address CHOP's claims that Appellees failed to establish vicarious liability or negligence of CHOP's agents, as these arguments were not properly preserved at trial beyond the initial compulsory nonsuit motion limited to the duty of care. Thus, the trial Court's finding of sufficient evidence for the jury to conclude that CHOP personnel owed a duty to Decedent was upheld.

B. THE DELAWARE REQUIREMENT FOR AN AFFIDAVIT OF MERIT IN A MEDICAL MALPRACTICE ACTION WAS INAPPLICABLE IN FEDERAL COURT UNDER THE ERIE DOCTRINE

The case of *Berk v. Choy*, Civil Action No. 22-1506-RGA, 2023 U.S. Dist. LEXIS 58927 (D. Del. Apr. 4, 2023) arose from a medical malpractice lawsuit filed by Harold Berk against Dr. Wilson Choy and Beebe Medical Center. The factual background involved a dispute over medical care Berk received in Delaware for a fractured ankle; Berk alleged that hospital staff further injured him while fitting a protective boot and that Dr. Choy failed to provide appropriate follow-up care, leading to a severe deformity. Because the parties were citizens of different states, Berk filed his negligence claim in federal district court under diversity jurisdiction. However, Berk failed to comply with Delaware Code § 6853, a state law requiring that medical malpractice complaints be accompanied by an "affidavit of merit" from a medical professional attesting to the grounds for the claim. Although Berk requested an extension, he was unable to secure an expert affidavit in time and instead submitted his medical records. The District Court dismissed the case for failure to comply with the state requirement, and the Third Circuit affirmed, ruling that the Delaware law was a substantive requirement that must be applied in federal court under the *Erie* doctrine.

The central legal issue before the Supreme Court was whether Delaware's affidavit of merit requirement applies in federal court or if it is displaced by the

Federal Rules of Civil Procedure. Berk argued that the state law was a procedural hurdle that conflicted with the simplified pleading standards of the Federal Rules. The defendants countered that the requirement was a substantive precondition to filing a lawsuit and that Federal Rule 11 specifically allows for rules or statutes to require affidavits. They further suggested that even if the law could not be enforced exactly as written, federal courts could use their inherent authority to require the affidavit at an early stage of litigation to prevent meritless suits and rising insurance costs.

The Supreme Court, in an opinion delivered by Justice Barrett, held that Delaware's affidavit law does not apply in federal court because it is displaced by Federal Rule of Civil Procedure 8. The Court's rationale followed the framework established in *Shady Grove*, which dictates that if a Federal Rule "answers the same question" as a state law and is a valid exercise of the Rules Enabling Act, the Federal Rule must govern. The Court determined that Rule 8(a)(2) answers the question of what information a plaintiff must provide regarding the merits of a claim at the outset of litigation: "a short and plain statement of the claim showing that the pleader is entitled to relief." By specifying that only a statement is required, the Court reasoned that Rule 8 implicitly excludes the necessity of providing evidence, such as an expert affidavit, at the pleading stage. Furthermore, the Court noted that Rule 12(b)(6) provides the exclusive merit-based ground for dismissal at the start of a case, and Rule 56 provides the proper mechanism for testing a plaintiff's evidence through summary judgment after discovery.

The Court further rejected the defendants' arguments regarding Rule 11, clarifying that the rule's reference to affidavits applies to representations by parties or attorneys, not third-party experts. Addressing the Rules Enabling Act, the Court reaffirmed that Rule 8 is valid because it "really regulates procedure" by governing the manner in which rights are enforced rather than the substance of the rights themselves. Justice Jackson concurred in the judgment but argued that the conflict was more specifically rooted in Rule 3, which defines how an action is commenced, and Rule 12, which limits the materials a court can consider when ruling on a motion to dismiss. Despite these internal disagreements over which specific rule applied, the Court was nearly unanimous in concluding that federal pleading standards cannot be heightened by state-law evidentiary requirements.

C. CORPORATE NEGLIGENCE IS A VIABLE CLAIM AGAINST A PHYSICIAN'S GROUP

In *Leber v. Frattali*, No. 2023 Pa. Dist. & Cnty. 1442 (Pa. C.P. Lackawanna June 30, 2025), the Court addressed a wrongful death and survival action filed by Karen M. Leber following the death of her husband, Frederic R. Leber. After undergoing a tonsillectomy and radical neck dissection performed by Dr. Mark A. Frattali, Mr. Leber developed a massive pulmonary embolism and

passed away. Plaintiff alleges that this was a result of the Defendants', including Dr. Frattali and his associated physician groups (Delta Medix, P.C., and Lehigh Valley Physician Group-Delta Medix), failure to conduct a proper Venous Thromboembolism (VTE) risk assessment and provide necessary prophylaxis. The physician group Defendants moved for partial summary judgment, arguing that the claim of corporate negligence against them should be dismissed. This raised the specific issue of whether the legal doctrine of corporate negligence, which holds healthcare institutions directly liable for patient care failures, can be applied to a physician's practice group.

The Court held that the doctrine of corporate negligence can indeed be extended to physician practice groups. Consequently, it denied the Defendants' motion for partial summary judgment on this issue. The Court's rationale was grounded in the evolution of Pennsylvania law, particularly the Supreme Court of Pennsylvania's decision in *Scampone v. Highland Park Care Ctr., LLC*. The Defendants had argued that corporate negligence does not apply to physician groups, relying on a prior Superior Court case, *Sutherland v. Monongahela Valley Hosp.*, which limited the doctrine to institutions acting as "comprehensive health centers." However, the Court rejected this argument, noting that the Pennsylvania Supreme Court's later decision in *Scampone* explicitly rejected the narrow analysis used in *Sutherland*.

The *Scampone* decision established a new standard, clarifying that the application of corporate negligence is not determined by the type or quantity of services a healthcare entity provides. Instead, the key to determining whether a duty exists is the specific relationship between the patient and the corporate Defendant. According to the Court, *Scampone* directs lower Courts to ascertain if a duty of care exists by applying two primary tests: The Restatement (Second) of Torts § 323, which applies to any party undertaking to render necessary services for another's protection, and the *Althaus* factors, which examine the parties' relationship, the foreseeability of harm, and the public interest. The Court concluded that because the Defendants failed to engage with the controlling legal standard from *Scampone* and instead relied on the rejected reasoning of *Sutherland*, their motion must be denied.

D. THE MENTAL HEALTH PROCEDURES ACT PROVIDES IMMUNITY AGAINST ORDINARY NEGLIGENCE CLAIMS FOR THE MEDICAL TREATMENT OF PHYSICAL AILMENTS, SUCH AS PRESSURE ULCERS, WHEN PROVIDED TO AN INVOLUNTARILY COMMITTED PATIENT, BECAUSE SUCH CARE IS CONSIDERED COINCIDENT TO THE PATIENT'S MENTAL HEALTH TREATMENT

In the Supreme Court of Pennsylvania addressed whether the immunity provisions of the Mental Health Procedures Act (MHPA) extend to medical care provided for physical ailments unrelated to a patient's specific mental diagnosis in

Wunderly v. Saint Luke's Hosp. of Bethlehem, 345 A.3d 692 (Pa. 2025). The case arose after the decedent, Kenneth E. Wunderly, was involuntarily committed to St. Luke's Hospital for aggression related to dementia. At the time of his admission, the decedent suffered from Stage I pressure ulcers, which allegedly deteriorated significantly during his confinement, evolving into unstageable wounds and deep tissue injuries before his transfer to another facility and subsequent death. The appellant, the executrix of the decedent's estate, filed a negligence and corporate negligence action, arguing that the hospital failed to provide adequate wound care, specifically the offloading of pressure. The hospital invoked the MHPA's immunity provision, which shields mental health providers from civil liability for treatment decisions absent a showing of willful misconduct or gross negligence. The trial court granted judgment on the pleadings in favor of the hospital, finding the care immune, a decision the Superior Court affirmed.

The central legal issue before the Supreme Court was the scope of the term "treated" within Section 114 of the MHPA. specifically whether the treatment of the decedent's physical pressure ulcers constituted "treatment" under the Act, thereby triggering the heightened liability standard. The appellant argued that the MHPA immunity should not apply because the treatment of bedsores was entirely distinct from the decedent's mental health care. She contended that offloading pressure on a patient's body was a medical intervention that did not depend on, arise out of, or aid in the recovery from the decedent's mental illness. By the appellant's reasoning, because there was no direct causal connection between the physical injury and the mental condition, the hospital should be held to the standard of ordinary negligence rather than the gross negligence standard required by the MHPA. Conversely, St. Luke's argued that the statutory definition of "treatment" is broad, encompassing not just psychiatric intervention but also "adequate treatment" including medical care necessary to maintain decent, safe, and healthful living conditions. Relying on the precedent set in *Allen v. Montgomery Hospital*, the hospital asserted that the care provided for the bedsores was "coincident" to the mental health treatment and therefore protected.

The Supreme Court of Pennsylvania affirmed the lower courts' decisions, holding that the hospital's treatment of the decedent's pressure ulcers fell within the scope of the MHPA's immunity provision. Consequently, because the appellant had only alleged ordinary negligence rather than willful misconduct or gross negligence, the claims were barred. In its rationale, the Court rejected the appellant's argument that a direct link between the physical ailment and the mental illness is required for immunity to attach. Relying on the statutory definitions in Section 104 of the MHPA, the Court determined that the legislature intended a broad interpretation of "treatment" that includes medical care "coincident" to mental health services. The Court reasoned that providing care for foreseeable physical complications, such as pressure ulcers in an elderly patient involuntarily committed for dementia, is essential to maintaining "decent, safe and healthful living conditions" and facilitating recovery. The Court emphasized

that narrowing the scope of immunity to exclude such coincident medical care would contravene the purpose of the MHPA by potentially discouraging medical providers from accepting and treating mentally ill patients due to fear of increased liability. Therefore, the care provided for the decedent's physical wounds was inextricably tied to his overall inpatient mental health treatment, entitling the hospital to statutory immunity.

VI. IMPORTANT DEVELOPMENTS IN AUTO LAW

A. IT WAS BAD FAITH AND A VIOLATION OF THE UTPCLPL FOR THE UIM CARRIER TO ACTIVELY INTERFERE WITH THE THIRD-PARTY LIABILITY CLAIM TO PRECLUDE UIM COVERAGE

In *Winner v. Progressive Advanced Ins. Co.*, 345 A.3d 750 (Pa. Super. 2025), Plaintiff filed a bad faith and Unfair Trade Practices and Consumer Protection Law ("UTPCPL" claims against Progressive Insurance Company. Plaintiff alleged that he was negotiating a settlement with counsel for the tortfeasor when the UIM adjuster from Progressive called defense counsel to inform counsel of a subsequent accident involving plaintiff. Plaintiff's counsel alleged that this conduct was intended to eliminate Progressive's liability for UIM benefits and thus constituted bad faith and a violation of the UTPCPL.

Plaintiff also filed the lawsuit in Philadelphia County. Progressive filed Preliminary Objections claiming that there was no cause of action for bad faith or violation of the UTPCPL under these circumstances. Progressive also claimed that venue was improper in Philadelphia County because the UIM policy provided that all actions must be filed in the County where "the insured resides" and Plaintiff resided in Chester County. Plaintiff responded to the first preliminary objection by arguing that the claims are actionable. He responded to the second by arguing that the bad faith and UTPCLPL claims are "extra-contractual."

The Superior Court agreed with Plaintiff with respect to the first preliminary objection, but it disagreed on the second. The court held with respect to the second preliminary objection that the bad faith and UTPCPL claims arose out of the UIM contract. According to the Court: "Winner's contract and tort actions in the complaint fall within this provision, because they hinge on the fact that Winner should be covered under Part III of the insurance policy, and that Progressive, through its adjusters, actively worked to not cover him pursuant to Part III. Given the direct relationship between Winner's UIM claim and tort claims, he should litigate his tort claims in the same forum and same proceeding as his UIM claim."

B. THE COURT HELD THAT AN ACCIDENTAL FATAL SHOOTING BETWEEN TWO VEHICLES TRIGGERED UNDERINSURED MOTORIST (UIM) COVERAGE BECAUSE THE PENNSYLVANIA MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW (MVFRL)

MANDATES A "BUT FOR" CAUSATION STANDARD—SUPERSEDING THE POLICY'S STRICTER PROXIMATE CAUSE LANGUAGE—THAT IS SATISFIED WHEN A VEHICLE IS USED TO TRANSPORT A FIREARM

In the case of *Allmerica Fin. Ben. Ins. Co. v. Hunt*, No. 2:24-cv-02767, 2025 LX 534515 (E.D. Pa. Dec. 15, 2025), the matter arose from a tragic incident on March 25, 2022, in Upper Darby, Pennsylvania, involving two strangers stopped side-by-side at a red light. James Hunt was operating a company van in the course of his employment, and Lloyd Amarsingh was driving his personal sedan. While waiting for the light to change, Amarsingh, who was reclined in his seat listening to music, retrieved a firearm from his glove compartment to unload it before arriving home to his children. The weapon accidentally discharged, sending a bullet through Amarsingh's rear window and into Hunt's van, striking Hunt in the temple and killing him. Following Amarsingh's guilty plea to involuntary manslaughter and the Hunts' settlement with Amarsingh's liability insurer, Hunt's estate sought underinsured motorist (UIM) benefits from Allmerica Financial Benefit Insurance Company, the insurer of the work van. Allmerica filed a motion for judgment on the pleadings, seeking a declaration that they were not obligated to pay because the death did not result from the ownership, maintenance, or use of a motor vehicle.

The central legal issue was the interpretation of the causation standard required to trigger UIM coverage. Allmerica argued that the specific language of their policy required that damages "result from" the use of a vehicle, a phrase they interpreted as requiring proximate causation. They contended that a gunshot is an intervening act unrelated to the operation of a car, rendering the vehicle merely the "situs" of the injury rather than the cause. To support this, Allmerica cited Pennsylvania case law where coverage was denied for shootings involving vehicles, arguing that UIM benefits are reserved for "vehicle-caused" accidents. Conversely, the Hunts argued that the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) mandates a broader "arising out of" standard. They asserted that under controlling Third Circuit precedent (Allstate v. Squires), this statutory language requires only "but for" causation, not proximate causation, and that Allmerica's stricter policy language was void for conflicting with the statute.

Judge Gail A. Weilheimer denied Allmerica's motion, ruling that the Hunts effectively prevailed as a matter of law. The Court agreed with the Hunts that the MVFRL's "arising out of" language supersedes the policy's stricter "resulting from" language. Consequently, the Court applied the "but for" causation standard. In doing so, the Court distinguished the line of cases cited by Allmerica—such as Bakaric and Day—noting that those denials of coverage involved intentional acts (like road rage or domestic disputes) or occurred while vehicles were parked and not in use. The Court emphasized that the incident in question involved an accidental discharge while both vehicles were actively

traveling on the roadway, distinguishing it from cases where a car was merely a stationary container for a crime.

In its rationale, the Court applied a two-pronged test derived from other jurisdictions to determine if the "but for" standard was met: (1) whether the vehicle was regularly used to transport the firearm, and (2) whether the discharge was the result of negligent, unintentional conduct. The Court found that Amarsingh admittedly used his vehicle to transport his firearm to and from work, and that attempting to unload a gun while operating a vehicle at a traffic light constituted negligent conduct. Drawing a parallel to Squires, where a box falling from a truck was deemed a consequence of using a vehicle to transport cargo, the Court viewed the transport of the gun as a use of the vehicle. Therefore, the Court concluded that "but for" Amarsingh's use of the vehicle to transport himself and his weapon, the accident would not have occurred. The Court noted that in close insurance cases, public policy favors the insured.

C. ESTABLISHING THAT PLAINTIFF ELECTED LIMITED TORT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT BEARS THE BURDEN TO ESTABLISH

In *Rogers v. Blair*, No. 24-1534, 2025 U.S. Dist. LEXIS 143349 (E.D. Pa. July 28, 2025), Plaintiff claimed that he sustained injuries from a car accident in November 2023, when he was rear-ended by Defendant Blair, who was driving a vehicle owned by Defendant Lennox International, Inc. Relevantly, Plaintiff filed a motion in limine to have him deemed full tort as a matter of law.

In his motion, Plaintiff argued that Defendants had not presented any evidence of a signed limited tort election form and should be precluded from arguing that he had limited tort. Defendants argued that they should be permitted to present a witness and documentation to demonstrate that the Plaintiff had chosen the limited tort option.

Under the Motor Vehicle Financial Responsibility Law, within forty-five days of coverage, insurers must notify the insured of two types of insurance options: namely, full tort and limited tort, and explain the legal effects and cost differences of the options. A motorist who wishes to choose the limited tort option must sign an election form, or he will be deemed to have chosen the full tort coverage.

The Court first noted that there was a clear factual dispute as to whether Plaintiff executed a limited tort election form or chose the default full tort coverage. Plaintiff testified that he was unsure of which coverage he elected. The Court noted that the burden of proving limited tort election falls on the Defendant, as it is an affirmative defense.

Plaintiff's motion was denied on other grounds.

VII. IMPORTANT DEVELOPMENTS IN PRODUCTS LIABILITY LAW

A. COMPANY THAT PURCHASED ASSETS BUT NOT LIABILITIES OF CORPORATION WAS STRICTLY LIABLE TO PLAINTIFF AS A SUCCESSOR CORPORATION UNDER THE PRODUCT LINE EXCEPTION TO NON-SUCCESSOR LIABILITY IT WAS BAD FAITH AND A VIOLATION OF THE UTPCLPL FOR

In *Burney v. Loews Hotel*, 2026 Pa. Super. LEXIS 117 (Pa. Super. 2026), plaintiff fell on a defective cable protector at a Philadelphia hotel conference on September 26, 2014, suffering permanent ankle injury. The cable protector was manufactured by Advanced Technologies Associates (IAT) with a known defect where the top layer was shorter than the bottom layer. Checkers manufactured the cable protectors under its "Firefly" brand. In April 2015, Checkers purchased IAT's cable protector business for $160,000 plus earned payouts and all the Firefly brand assets including inventory, equipment, customer lists, intellectual property, molds, patents and trademarks but did not purchase ay of Firefly's or IAT's liabilities. IAT remained in business until at least 2018 but had $558,888 in indebtedness. Plaintiff sued Checkers in strict liability, claiming that was strictly liable as a successor corporation under the product line exception to successor-non liability. Defendant argued that it could not be held liable as a successor because it did not purchase and of Checker's liabilities. Furthermore, ATI did not go out of business after the asset purchase. The trial court held that Checkers was a successor. The case went to trial in Philadelphia County and the jury awarded plaintiff $18,111,250. The trial court molded the verdict to $6,037,083.33 on the basis that the verdict was excessive. Checkers appealed.

Checkers argued that generally, when one corporation sells or transfers all of its assets to a successor corporation, the successor corporation does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets. However, there are several well-recognized exceptions to the general rule regarding a successor corporation's non-liability following an asset purchase, including: (1) the successor corporation expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a consolidation or merger; (3) the successor corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability.

According to Checkers, none of the exceptions applied. However, the Superior Court held that in *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106 (Pa. Super. 1981, the Pennsylvania Superior Court adopted another exception to the general rule regarding successor liability known as the "product line exception."

According to the Court, under the product line exception, where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same

manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units in the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

According to the Court, the *Dawejko* Court established this exception with a flexible consideration of factors including successor's acquisition of goodwill, continuation as ongoing enterprise, maintenance of same products/clients, exploitation of established reputation, virtual destruction of plaintiff's remedies against original manufacturer, and successor's ability to assume risk-spreading role. *Schmidt v. Boardman Co.*, 11 A.3d 924 (Pa. 2011) clarified that no *Dawejko* factors are mandatory.

The Court then court applied the flexible *Dawejko* standard, finding sufficient evidence supported the jury's determination that multiple factors favored applying the product line exception. While Checkers Industrial Products, LLC argued Industrial Advanced Technologies, Inc. (IAT) remained viable, the jury could reasonably infer from IAT's substantial indebtedness and inability to pay existing debts that the Burnleys' remedies were virtually destroyed. The court emphasized that no single factor is mandatory and the jury properly weighed all relevant considerations.

Accordingly, the Court affirmed the trial court on this issue.

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