

# CIVIL LITIGATION UPDATE 2019

MOTOR VEHICLE LAW UPDATE

A large red speech bubble graphic with a white outline, pointing downwards. It contains the text 'THIRD PARTY CLAIMS' and 'GOVERNMENTAL IMMUNITY'.

# THIRD PARTY CLAIMS

GOVERNMENTAL IMMUNITY

# MOTOR VEHICLE EXCEPTION

- **Balentine v. Chester Water Authority**, 191 A.3d 799 (Pa. 2018)
- The question at issue was whether under the motor vehicle exception to governmental immunity movement of a municipal vehicle was a prerequisite to the application of the exception.

# MOTOR VEHICLE EXCEPTION

## Balentine v. Chester Water Authority,

191 A.3d 799 (Pa. 2018)

- **Factual Background:** A private contractor was hired to repair municipal water lines. The water lines were on a two lane road, with one lane in each direction, and no parking lanes. A municipal employee drove to the site and parked on the street, activated the flashing four way lights and the amber roof light and exited the vehicle. The municipal vehicle was struck by an approaching motorist and pushed into the contractor who sustained fatal injuries.

# MOTOR VEHICLE EXCEPTION

## **Balentine v. Chester Water Authority,**

191 A.3d 799 (Pa. 2018)

- **Commonwealth Court:** Found that since the municipal vehicle was no longer “in operation” when the accident occurred because it was parked.

# MOTOR VEHICLE EXCEPTION

## Balentine v. Chester Water Authority,

191 A.3d 799 (Pa. 2018)

- **Supreme Court:** Granted review on the issue of whether involuntary movement of a vehicle can be “operation” for purposes of the motor vehicle exception to governmental immunity.
- The term operation reflects a continuum of activity ... “a series of decisions and actions, taken together, which transport the individual from one place to another the decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off... are all parts of ‘operation’ of a vehicle.

# REAL ESTATE EXCEPTION

## **Cagey v. PennDOT,**

179 A.3d 458 (Pa. 2018)

- Explores the viability of claims against PennDOT arising from alleged negligent and dangerous design and placement of guardrails installed on Commonwealth real estate.

# REAL ESTATE EXCEPTION

## **Cagey v. PennDOT,**

179 A.3d 458 (Pa. 2018)

- **Factual Background:** Plaintiff was involved in a single vehicle accident in which her vehicle encountered snow and ice and traveled off the roadway striking the guardrail. The guardrail penetrated the side of the vehicle causing extensive injuries.

# REAL ESTATE EXCEPTION

## **Cagey v. PennDOT,**

179 A.3d 458 (Pa. 2018)

**Supreme Court:** Three statutory requirements:

1. The injury must have resulted from a “dangerous condition.”
2. The dangerous condition must be a condition ”of Commonwealth agency real estate.”
3. The damages must be recoverable under common law “if the injury were caused by a person not having available the defense of sovereign immunity.

# REAL ESTATE EXCEPTION

## **Cagey v. PennDOT,**

179 A.3d 458 (Pa. 2018)

- **Supreme Court:** Distinguished the claims from *Dean*:
  - *Dean* held that a “dangerous condition had to be an artificial condition or defect of the land itself, as opposed to the absence of such a condition.
  - Rejects PennDOT’s argument that *Dean* required that the artificial condition make travel “on the roadway” dangerous.
  - Limits *Dean* to the facts there, where PennDOT failed to install a guardrail.



This Photo by Unknown author is licensed under [CC BY-SA](#).

# SUBROGATION

- **Pennsylvania State Police v. WCAB (Bushta)**, 184 A.3d 958 (Pa.2018)
- **Supreme Court**: No right of subrogation for Heart and Lung Act (HLA) benefits paid in connection with injuries arising from motor vehicle accidents including where an injured employee is entitled to concurrent benefits from the Workers' Compensation Act (WCA).

# WORKERS' COMPENSATION SUBROGATION

- **Hartford Ins. Group v. Kamara**, 197 A.3d 199 (Pa.2018)
- Whether a workers' compensation insurer may file a third party action against alleged tortfeasors on behalf of an injured employee did not independently sue the tortfeasors, did not join in the insurer's action and did not assign her cause of action to the insurer.

# WORKERS' COMPENSATION SUBROGATION

- **Hartford Ins. Group v. Kamara**, 197 A.3d 199 (Pa.2018)
- **Supreme Court**: Absent the injured employee's assignment or voluntary participation as a party plaintiff, the insurer may not enforce its Section 319 right to subrogation by filing an action directly against the tortfeasors.

# PUNITIVE DAMAGES

- **CELL PHONE USE – COMMERCIAL VEHICLE**
- **Ehler v. Old Dominion Freight Line, et al** - Lebanon County Court of Common Pleas, August 30, 2018.
- **Pennsylvania Distracted Driving Law Sections 75 Pa.C.S.A. § 1621 and 1622.**
- Overruled defendants' Preliminary Objection on the punitive damage claim.

# PUNITIVE DAMAGES

- **CELL PHONE USE - PRIVATE PASSENGER VEHICLE**
- **Manning v. Barber** - Cumberland County Court of Common Pleas (July 8, 2018)
- CCP granted preliminary objections and struck averments of recklessness based on alleged distraction arising from use of cell phone at the time of the accident.

# FUTURE MEDICAL EXPENSE

- **REPRICING UNDER ACT 6**
- **Farese v. Robinson** - Philadelphia County Court of Common Pleas, September 6, 2018.
- **Factual Background:** Plaintiff was rear ended, and alleged serious personal injuries including a concussion with resultant post-concussion syndrome and multiple disc herniations. A jury returned a verdict in excess of \$2.5m.

# FUTURE MEDICAL EXPENSE

- **REPRICING UNDER ACT 6**
- **Farese v. Robinson** - Philadelphia County Court of Common Pleas, September 6, 2018.
- **Post-trial Motions**: Challenged the introduction of evidence regarding future medical costs without reducing the costs pursuant to § 1797 of MVFRL.

# FUTURE MEDICAL EXPENSE

- **REPRICING UNDER ACT 6**

- **Farese v. Robinson** -

- Rejected reliance on Pittsburgh Neurosurgery Associates v. Danner, 733 A.2d 1279 (Pa.Super.1999) - extended repricing to past medical benefits to be paid by tortfeasor's insurance company.
- Applied Moorhead v. Crozer Chester Medical Center, 765 A.2d 786 (Pa.2011) - when a plaintiff "will continue to incur expenses for medical services, it is appropriate for the factfinder to determine the amount of damages with will compensate the plaintiff for those expenses are 'reasonably necessary to be incurred.'"
- Looked to testimony of life care expert that the charges were based on usual and customary charges.

# ALLEGATIONS OF RECKLESSNESS

- **NO PUNITIVE DAMAGES CLAIM**
- **Nolen v. Esken** - Northampton County Court of Common Pleas (March 28, 2018)
- Found no prejudice to defendant related to allegations of recklessness where there was no claim for punitive damages.

# UBER/LYFT

- **PERSONAL INJURY CLAIMS**
- **Fusco v. Uber Technologies, Inc.**, 2018 WL 3618232 (July 27, 2018)
- **Factual Background:** Plaintiff ordered an Uber from a party in Philadelphia to his home in southern New Jersey. The Uber app does not disclose the destination to the driver until the passenger is in the vehicle. When the Uber driver learned the destination he asked Plaintiff to exit the car, Plaintiff declined, and the Uber driver dragged him from the vehicle and assaulted him leaving him unconscious and bleeding.

# UBER/LYFT

- **Fusco v. Uber Technologies, Inc.**, 2018 WL 3618232 (July 27, 2018)
- Causes of Action Alleged against UBER:
  1. Negligent hiring
  2. Fraud and related misrepresentation
  3. Vicarious liability based on respondeat superior

A large red speech bubble graphic with a white outline, pointing downwards. The text "FIRST PARTY CLAIMS" is centered inside the bubble in white, uppercase letters. The background features faint, overlapping concentric circles and dashed lines in light gray.

# FIRST PARTY CLAIMS

# COMPELLING MEDICAL EXAMINATIONS

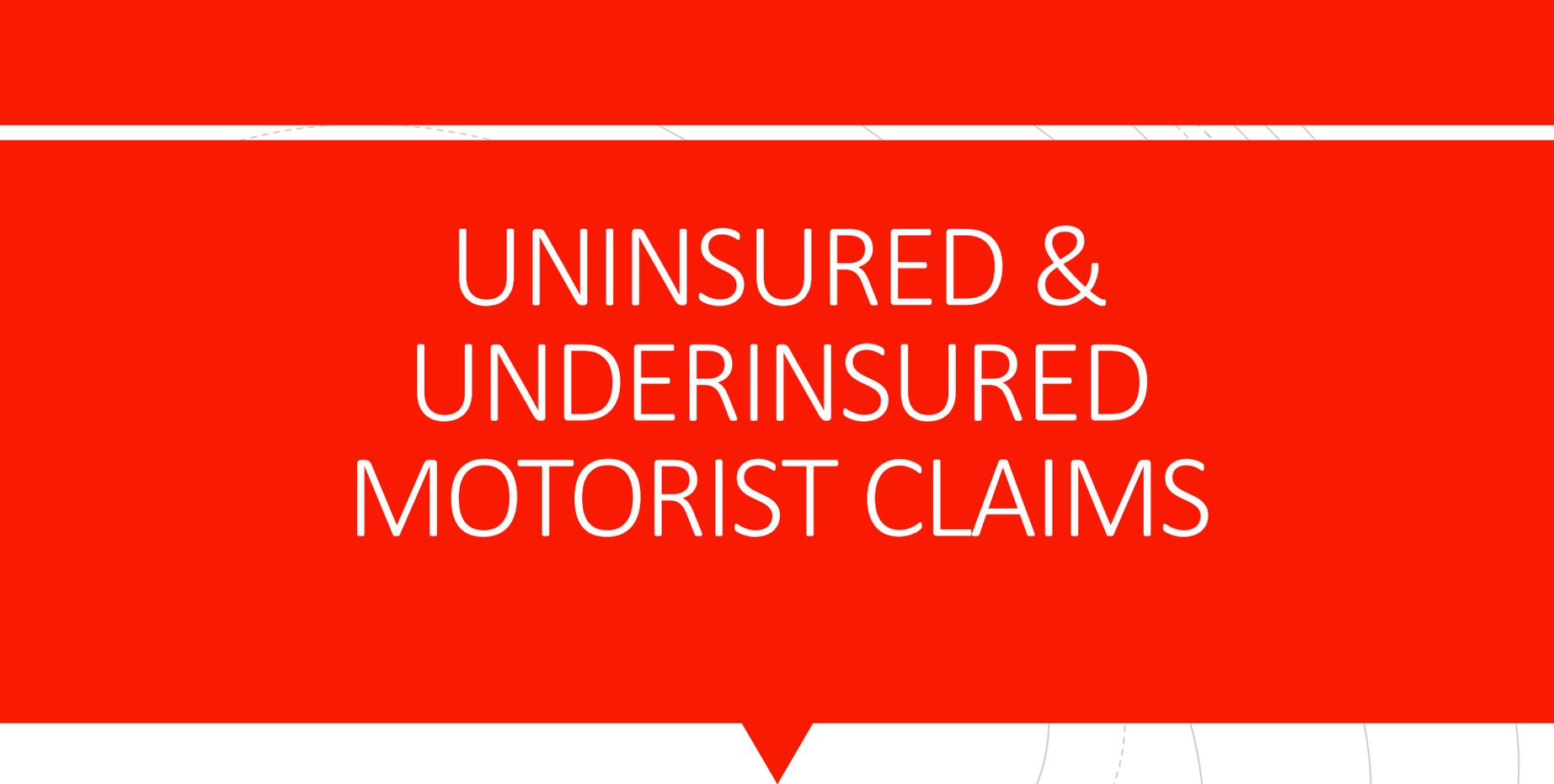
- **Supreme Court**: Granted a Petition for Certification of Question of Law
- Whether, under Pennsylvania law, a contractual provision in a motor vehicle insurance policy that requires an insured to submit to an independent medical examination by a physician selected by the insurer, when and as often as the insurer may reasonable require, as a condition precedent to the payment of first party medical benefits under that policy conflicts with the MVFRL, 75 Pa.C.S. § 1796(a), and is therefore void as against public policy.

# MVFRL REMEDIES V. BAD FAITH

- **Barnard v. Liberty Mutual Insurance Corporation**, 2018 WL 6537149 (November 19, 2018)
- Exception to General Rule: The "provisions in § 1797 do not preempt a bad faith claim brought under § 8371 when the insurer's conduct falls outside the scope of § 1797, and involves a bad faith abuse of the process challenging more than just the insurer's denial of first party" benefits.

# CHIROPRACTIC SUPPORT STAFF

- **State Farm Mut. Auto. Ins. Co., et al v. Cavoto, et al, 2018 WL 5023614 (Pa.Super.)**
- Held that chiropractor was not entitled to payment of first party medical benefits for therapeutic procedures, including massage, therapy and therapeutic exercised delegated to an performed by chiropractic support staff without special licenses or certifications.

A large red speech bubble graphic with a white outline, pointing downwards. The text is centered within the bubble. The background features faint, overlapping concentric circles and dashed lines in light gray.

UNINSURED &  
UNDERINSURED  
MOTORIST CLAIMS

# HOUSEHOLD EXCLUSION

- **Gallagher v. GEICO Indemnity Company**, 2019 WL 290122 (Pa. Jan. 23, 2019)
- **Supreme Court**: Held that the household exclusion violates the MVFRL "as it acts as a *de facto* waiver of stacked coverage provided for in the MVFRL, despite the indisputable reality that [the insured] did not sign the statutorily prescribed UIM coverage waiver form."

# HOUSEHOLD EXCLUSION

- **Gallagher v. GEICO Indemnity Company**, 2019 WL 290122 (Pa. Jan. 23, 2019)
- **Factual Background**: Plaintiff was involved in an accident while operating his motorcycle. He also owned two (2) cars that were insured under a separate insurance policy. The auto policy had stacked UM/UIM coverage. After recovering from the tortfeasor and the UIM limits under the motorcycle policy, plaintiff made a claim for recovery under his auto policy. GEICO denied the claim based on the household exclusion.

# UM/UIM REJECTION FORMS

- **Bielec v. Am. Int'l Grp. Ins.**, 2017 WL 6594061 (Pa.Super. December 26, 2017), reargument denied 181 A.3d 1270 (February 21, 2018)
- **King v. U.S. Xpress, Inc.**, 740 Fed.Appx. 230 (July 11, 2018)
- **Rarick v. Federated Serv. Ins. Co.**, 325 F.Supp. 3d 590 (July 10, 2018)
- **Elizaire v. Travelers Companies**, 2017 WL 6406457 (E.D. Pa.)(December 14, 2017)

# STACKING WAIVER/REJECTION

- **ADDITION OF NEW VEHICLE**
- **Newhook v. Erie Ins. Exchange**, 2018 WL 1939814 (Pa.Super.) (April 25, 2018)

# STACKING WAIVER/REJECTION

- **INCREASE IN UM/UIM LIMITS**
- **Supreme Court:** If an insured under a policy of insurance subject to the Pennsylvania MVFRL has waived stacking but later secures an increase in the limits of her UIM coverage on her existing policy, must her insurance carrier obtain a separate waiver of her right to stack the coverage or does a prior waiver of the right to stack the coverage remain in effect?

# RELEASED PARTIES ON VERDICT SLIP

- **Baum v. Metropolitan Property & Casualty Insurance Company**, 2018 WL 3586848

# MAINTENANCE OR USE OF A MOTOR VEHICLE

- **Eberhardinger v. City of York, et al**, 341 F.Supp. 3d 420 (M.D.Pa.) (September 18, 2018)

# KOKEN ISSUES

Sever & Stay  
Consolidation

- Denied:

1. Albright v. Erie Insurance Exchange, Luzerne County (October 15, 2018)
2. Leone v. Ellingberg and Allstate, Philadelphia County (November 5, 2018)

- Granted:

1. Denisco v. USAA, Luzerne County (May 21, 2018)
2. McLaughlin v. State Auto Property and Casualty Co., Luzerne County (August 29, 2018)
3. Stoots v. Mutual Benefit, Allegheny County (December 7, 2018)

# KOKEN ISSUES

Evidence of  
Insurance

- **Schmerling v. LM General Insurance**, 2018 WL 5848991 (E.D.Pa.) (November 8, 2018)
- **Phillips v. National General Assurance Company**, Susquehanna County (November 18, 2018)