

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Atlantic States Insurance Company v.
Anthony Fornicoia, as Administrator for the Estate of Charles Fornicoia, Deceased**

Motion for Summary Judgment—Underinsured Motorist Benefits

1. Where one is determined to be an insured driver under the liability provisions of a motor vehicle insurance policy, the same individual in the same vehicular accident cannot be deemed to be the “owner or driver” of an underinsured motor vehicle.
2. It is contrary to any rational approach to contract construction to find that a driver may simultaneously be defined as “insured” and “underinsured” within the same comprehensive motor vehicle insurance policy and for the same occurrence.
3. Employee injured in motor vehicle accident where vehicle was driven by fellow employee could not recover pursuant to underinsured provisions of motor vehicle policy issued to employer, since driver cannot have dual identity of “insured driver” under the liability provisions of the policy and “owner or driver of an underinsured motor vehicle.”
4. Court will not set aside a valid, unambiguous exclusionary term in an insurance policy absent proof of a dominant public policy that would justify a judicial modification of the insurance contract.
5. Plaintiff failed to present compelling evidence that public policy favoring compensation for injured victims of drunk driving required court to disregard proscription of recovery of both underinsured motorist benefits and liability benefits by the same claimant under the same contract for the same incident.

(Laura A. Meaden)

Scott Millhouse for Atlantic States Insurance Company.

John Newborg for Anthony Fornicoia.

No. GD 07-002436. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

McCarthy, J., July 20, 2009—This matter entails a declaratory judgment action and motion for summary judgment¹ brought by Atlantic States Insurance Company as a business auto insurer for Northeast Networking Systems, the employer of Charles Fornicoia and Clinton Boyd as well as a motion for judgment on the pleadings brought by Anthony Fornicoia, as Administrator for the Estate of Charles Fornicoia, Deceased. The parties have stipulated that there are no factual disputes for this Court or a jury to decide.

At issue is whether Charles Fornicoia is entitled to recover for injuries under the underinsured motorist benefits aspect of the policy provided by Atlantic on a Northeast Networking Systems van. Fornicoia, a Northeast employee, suffered severe injuries when that van, in which he was a passenger, crashed into a tree. Another Northeast employee, Boyd, was operating the Northeast van at the time of the accident. While driving the van Boyd was under the influence of alcohol.

Fornicoia applied for and received worker compensation benefits for the disabilities resulting from the accident. Boyd was denied benefits, it having been determined in the course of worker compensation proceedings that his intoxication placed him outside the scope and course of his employment with Northeast the time of the accident.

Fornicoia pursued Boyd and Northeast civilly to recover damages for injuries sustained in the accident. A tort action was filed in the Circuit Court of Volusia County, Florida, where Fornicoia resided. Northeast undertook Boyd’s defense in that Florida action, subject to a reservation of rights and the outcome of a declaratory judgment action initiated in Allegheny County, Pennsylvania, by Atlantic at GD 03-000335. In its declaratory judgment complaint in that prior litigation, Atlantic asserted, among other things, that the determination by a worker compensation referee that *Fornicoia* had been within the scope of his employment at the time of the accident triggered coverage exclusions stated under the policy supplied by Atlantic to Northeast. Atlantic eventually prevailed in its efforts; the Pennsylvania Superior Court held that an exclusion under the Atlantic policy barred coverage of Boyd by Atlantic. Consequently, Atlantic was neither responsible for defending Boyd in the Florida litigation and nor responsible for paying any verdict in favor of Fornicoia and against Boyd. *Atlantic States Insurance Company v. Northeast Networking Systems, Inc. Clinton Boyd and Charles Fornicoia*, 2006 Pa.Super. 22, 893 A.2d 741(2006); appeal denied 590 Pa. 654, 911 A.2d 932 (2006).

A point not successfully pursued by Atlantic on appeal was whether Boyd’s intoxication while operating the Northeast van caused him to be excluded from coverage under the Atlantic policy insuring the van. Atlantic argued on appeal that Boyd was not a “permissive user” of the vehicle according to the policy because he knowingly violated a company policy by driving a company vehicle after consuming alcohol. Because Atlantic did not include that issue in its 1925(b) statement, the Superior Court considered it waived.

Atlantic’s 1925(b) statement did raise the issue of whether the trial court had erred when it determined that 75 Pa.C.S.A. § 1724², as a matter of law, defeated any claim by Atlantic that Boyd, because he had imbibed alcohol, forfeited authority to operate the company vehicle. The Superior Court considered that properly preserved issue and, in doing so, indirectly approached the question of Boyd’s status as a permissive user of the Northeast van. The trial court had found Boyd to have been a permissive user of the van and concluded, therefore, that Boyd was an insured under the Atlantic policy at the time of the accident. (Friedman, J., Opinion at 8). The Superior Court agreed. In doing so, the appellate court adopted the public policy rationale set forth in the analogous matter of *Donegal Mutual Insurance Company v. Long*, 387 Pa.Super. 574, 564 A.2d 937 (1989) affirmed 597 A.2d 1124, 528 Pa. 295. *Donegal*, extending application of the public policy expressed in the Pennsylvania Motor Vehicle Financial Responsibility Law, declared a provision of an automobile rental agreement which denied insurance coverage for liability arising from operation of vehicle while under influence of alcohol or drugs invalid as against public policy. The *Donegal* Court stated:

...owners of licensed vehicles in this Commonwealth must maintain a financial responsibility so that victims of motor vehicle accidents will have recourse. That responsibility cannot be curtailed by a clause in a rental agreement denying coverage when liability arises when the driver is under the influence of alcohol or drugs. The public policy of this Commonwealth on this matter, as clear in 1985 as it is today, most definitely outweighs the enforcement of the exclusion clause.

Although Boyd's intoxication resulted in an administrative determination that he had been outside the scope of employment at the time of the accident for purposes of worker compensation eligibility, the Superior Court, as had the trial court, nonetheless deemed Boyd to have operated the Northeast van with the permission of Northeast and to have therefore been insured under the Atlantic liability policy at the time of the accident. Public policy, as expressed through the MVFRL, declared that Boyd's consumption of alcohol and intoxication could not be used as a basis on which to exclude him as an insured permissive user under the policy issued by Atlantic. The ironic consequence of that finding that Boyd had been a permissive user, which had been opposed by Atlantic, was that it yielded the result ultimately sought by Atlantic. The policy furnished by Atlantic explicitly excluded from its liability coverage "[b]odily injury to any fellow employee of the insured arising out of and in the course of the fellow employee's employment." Boyd's status as an insured under the Atlantic policy effectively barred the claim of his fellow employee, Fornicoia, under the liability provisions of that policy.

In this matter the Administrator for the Estate of Charles Fornicoia³ pursues a further claim, an underinsurance claim under the Atlantic policy, asserting that public policy and pertinent case law compel a finding that the underinsurance benefits of the Atlantic policy are available to Fornicoia.

As to underinsured claims, the policy provides, in pertinent part:

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us," and "our" refer to the Company providing this insurance.

Business Auto Coverage Form, CA 00 01 12 93 p.1

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of an "underinsured motor vehicle."

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

3. "Underinsured motor vehicle" means a vehicle for which the sum of all liability bonds or policies that apply at the time of an "accident" do not provide at least the amount an "insured" is legally entitled to recover as damages.

However, an "underinsured motor vehicle" does not include any vehicle:

...

d. Owned or furnished for the regular use of you or any "family member";

e. For which liability coverage is provided under the LIABILITY COVERAGE section of this policy.

Business Auto Coverage Form, CAD 21 93 10 93, pp.1, 3 (Underinsured Endorsement)

Fornicoia argues that he must, and does, satisfy four conditions essential to recovery under the underinsurance provisions of the Atlantic policy: (1) he must be an insured under the policy; (2) his injuries were caused by an automobile accident; (3) his injuries were caused by the owner of an underinsured vehicle; and (4) he is entitled to recover from the driver of the van. The 1925(b) statement asserts that the failure of this court to find any of the four conditions has been satisfied under the undisputed facts of this case constitutes error.

Fornicoia's 1925(b) statement of matters complained of on appeal is obscure, particularly in its statement of the fourth condition. Presumably, the fourth condition—that Fornicoia is entitled to recover damages from the driver of the van—refers to Atlantic's contention that the civil immunity provisions of the Pennsylvania Workers' Compensation Act bar Fornicoia from recovering damages in a civil action against either the employer/owner of the van or a co-employee who operated the van in furtherance of the employer's business. In answering that contention during argument, Fornicoia drew upon *Warner v. Continental/CNA Insurance Companies*, 455 Pa.Super. 295, 688 A.2d 177 (1996), appeal denied 548 Pa. 660, 698 A.2d 68 (1997), which held that employee injured in a vehicle that is owned by his employer and insured under a policy obtained by the employer is not precluded from recovering underinsured motorist benefits otherwise available under the express terms of the policy solely as a result of the exclusivity provisions of the Workmen's Compensation Act. Similarly, the Superior Court, in *Boris v. Liberty Mutual Insurance Co.*, 356 Pa.Super. 532, 515 A.2d 21 (1986), had earlier found that employer immunity under the worker compensation act was unavailable to the employer's motor vehicle insurer as a defense in an action for underinsured motorist benefits. Subsequent to *Warner*, the Superior Court declared unenforceable the provisions of an employer's automobile insurance policy that expressly excluded underinsured motorist coverage for injuries covered by workers' compensation. *Herman Harper v. Providence Washington Insurance Company*, 753 A.2d 282, 2000 Pa.Super. 156 (2000) In arriving at that conclusion, the Superior Court found the case of *Gardner v. Erie Insurance Co.*, 555 Pa. 59, 722 A.2d 1041 (1999) dispositive. In *Gardner*, the Pennsylvania Supreme Court held that an employee who is receiving worker's compensation benefits for injuries sustained in an automobile accident involving a co-employee's vehicle and arising out of wrongful third-party conduct is not precluded by the Worker's Compensation Act from seeking uninsured motorist benefits from a co-employee's insurance carrier despite the co-employee's immunity from suit.

Warner offered the rationale that:

...the workmen's Compensation Act was enacted to provide an efficient means of compensating aggrieved workers without litigating the issue of employer negligence. Recovery under the Act is a complete replacement for suit against the employer; the employee receives the statutory recompense for his work-related injury, and may not then seek to litigate those same damages. See generally *U.S. v. Demko*, 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966); 42 Pennsylvania Law Encyclopedia 1(1975). Further, the Act specifically provides that the employer's insurance carrier shall enjoy the same freedom from suit as does the employer itself. 77 P.S. § 501. This is entirely logical as it relates to the carrier of no-fault insurance benefits, for such coverage ultimately results in litigation of the employer's negli-

gence despite the fact that the employer was not sued directly by the employee.

However, the employer's freedom from suit under the workmen's Compensation Act does not logically extend to the carrier of uninsured motorist benefits. The injured employee who seeks such coverage asserts only that he was injured at the hands of some third party who was not adequately insured. The employer cannot be implicated in such wrongdoing in the slightest.

455 Pa.Super. 308; 688 A.2d 184

The question addressed in *Warner* was whether an injured employee may successfully claim underinsured benefits under an employer's motor vehicle insurance policy where the sole basis proffered for exclusion of employees injured in the course of employment from coverage under that policy is the compensability of those same injuries under the worker's Compensation Act and the exclusivity provisions of that act. *Warner* answered in the affirmative.

The circumstance not confronted either in *Warner* or in related cases, but significant in this dispute, is a prior judicial determination that benefits under the employer's liability coverage were unavailable to the injured employee precisely because "the bodily injury [to the employee] was a result of the insured's action." *Atlantic States Insurance Company*, 893 A.2d at 749 (emphasis added) Decisional authority to the effect that neither the Workers' Compensation Act nor policy language that mimics the immunity provisions of that law will deny underinsurance benefits to an employee injured in a job-related motor vehicle accident does not inform the controversy in this case. The question of whether the tort immunity of a co-employee means that the injured employee is not "legally entitled to recover" from the co-employee and therefore, as a contractual matter, may not recover pursuant to an underinsured motorist benefits policy provision that restricts underinsurance benefits, as does the Atlantic policy, to "sums the insured is legally entitled to recover as damages" is not directly presented here. The question is, instead, whether, having been determined to be an insured driver under the liability provisions of a motor vehicle insurance policy, the same individual may be deemed, in that same single-vehicle accident, to have also been "the owner or driver of an underinsured motor vehicle." This court decided that such dual identity cannot occur and, on that basis, decided that Fornicoia is not entitled to recover from the driver of the van under the underinsurance provisions of the Atlantic policy.

It seems contrary to any rational approach to contract construction to find that a driver may simultaneously be defined as insured and underinsured within the same comprehensive motor vehicle insurance policy and for the same occurrence. And, indeed, the Atlantic policy provides against such a construction by stating, at F.3 (e) of the underinsurance endorsement that:

...an "underinsured motor vehicle" does not include any vehicle:

...

e. For which liability coverage is provided under the LIABILITY COVERAGE section of this policy.

Fornicoia urges, however, that because public policy favors compensation of injured victims of drunk driving, the Atlantic policy should be construed in the manner necessary to provide coverage in this instance. Invocations of public policy as a basis on which to disregard the proscription of recovery of both underinsured motorist benefits and liability benefits by the same claimant under same contract for the same incident have not been found persuasive. *See, Allstate Insurance Company v. Leiter*, 306 F.Supp.2d 488 (M.D. Pa. 2004)⁴ Moreover, Fornicoia cannot point to any compelling affirmation of a public policy that would render the exclusion such as that contained in F.3 (e) of the underinsurance endorsement of the Atlantic policy unenforceable in the same manner that the MVFRL renders policy exclusions that negate coverage for drinking and driving unenforceable. Fornicoia does not necessarily argue that the Atlantic exclusion is *per se* unenforceable, but seems to argue only that the exclusion should not apply to deny benefits to a victim of a drunk-driving accident. No authority is provided in support of an argument that application of an otherwise valid exclusionary provision must be suspended in underinsurance claims involving drunk driving.

Fornicoia seeks to have unambiguous exclusionary terms set aside. Again, in the absence of proof of a dominant public policy that would justify a judicial modification of the insurance contract, that cannot be done:

In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts...contrary to public policy. The courts must be content to await legislative action.

Burstein v. Prudential Property & Casualty Ins. Co., 570 Pa. 177, 809 A.2d 204, 207 (2002), quoting *Eichelman v. Nationwide Ins. Co.*, 551 Pa. 558, 711 A.2d 1006, 1008 (1998).

Rather, the plain meaning of the insurance contract must be enforced:

The primary goal of insurance policy interpretation is to ascertain the intent of the parties as manifested in the words of the policy itself. When policy language is unambiguous, we give effect to that language. When, on the other hand, policy language is ambiguous, we will construe the language in favor of the insured given that the insurer drafts the policy and controls the scope of coverage.

Millers Capital Insurance Company v. Gambone Brothers, 941 A.2d 706, 712 (Pa.Super. 2007) appeal denied 963 A.2d 471 (Pa. 2008), citing *Kvaerner Metals Division of Kvaerner of United States, Inc. v. Commercial Union Insurance Co., et al.*, 589 Pa. 317, 908 A.2d 888 (2006).

The plain language of the exclusionary clause contained in F.3 (e) of the underinsurance endorsement of the Atlantic policy precludes recovery by Fornicoia.

Fornicoia asserts that, because his injuries were caused by the owner of an underinsured vehicle, this court erred in granting summary judgment to Atlantic. According to Fornicoia, a condition to be satisfied in order to receive underinsurance benefits under the Atlantic policy is that the injuries for which the claim is made "were caused by the owner of an underinsured motor vehicle." Having successfully pursued Boyd through the Florida litigation and having received the proceeds of an automobile liability policy held by Boyd on a vehicle owned by him, which proceeds were inadequate to compensate Fornicoia fully, Fornicoia submits that Boyd is the owner of an underinsured vehicle and, because Boyd caused the accident that injured Fornicoia the stated condi-

tion for underinsurance coverage under the Atlantic policy is met.

Fornicoia grossly misreads the qualifying criteria of the underinsurance endorsement of the Atlantic policy. The facts that Boyd was the owner of an underinsured private vehicle and that Boyd caused the accident that injured Fornicoia do not satisfy the conditions of the underinsurance endorsement. The Atlantic policy does not require merely ownership of an underinsured vehicle, but requires, more pointedly, that “[t]he owner’s...liability must result from the ownership...of an underinsured vehicle.” Of course, mere ownership of an underinsured vehicle does not establish liability for damages. Injurious conduct associated with the ownership—or use or maintenance—of an underinsured vehicle is the source component of any liability for damages and is an indispensable catalyst to coverage under the underinsured provisions of the Atlantic policy.

The liability of Boyd to Fornicoia resulted from his negligent operation of the Northeast van, a vehicle for which the Atlantic policy provided liability coverage. No liability resulted from Boyd’s ownership of—or use or maintenance of—his own underinsured vehicle. The scenario in which an underinsurance claim may legitimately arise is fully described in *Kelly v. Nationwide Ins. Co.*, 414 Pa.Super. 6, 606 A.2d 470, 474 (1992), quoting in large part from *Wolgemuth v. Harleysville Mutual, Ins. Co.*, 370 Pa.Super. 51, 535 A.2d 1145, 1149 (1988):

[t]he purpose of underinsurance motorist coverage is to protect the insured (and his additional insureds) from the risk that a negligent driver of another vehicle will cause injury to the insured (or his additional insureds) and will have inadequate liability coverage to compensate for the injuries caused by his negligence.... The language of the statute itself suggests that underinsurance motorist coverage requires the existence of at least two applicable policies of motor vehicle insurance. See 75 Pa.C.S.A. § 1731(c). Thus, the statute contemplated one policy applicable to the vehicle at fault in causing the injury to the claimant and which is the source of liability coverage (which is ultimately insufficient to fully compensate the victim), and a second policy, under which the injured claimant is either an insured or a covered person. It is the second policy which the statute contemplates as the source of underinsured motorist coverage, where the *liability coverage* provided by the first policy of insurance is insufficient to fully compensate the claimant for his injuries.

[Emphasis added]

That is the scenario contemplated under the terms of the Atlantic policy and expressed in the conditions of eligibility for underinsurance coverage under that policy Fornicoia posits his underinsurance claim upon a precisely contrary scenario. For that reason, and on the basis of all of the foregoing, this court granted Atlantic’s motion for summary judgment and denied Fornicoia’s motion for judgment on the pleadings.

BY THE COURT:
/s/McCarthy, J.

Dated: July 20, 2009

¹ Atlantic initiated the case on February 2, 2007 through a Praecipe for Writ of Summons at GD 07-002436. Thereafter, on May 23, 2007, Atlantic filed a Complaint for Declaratory Judgment at GD 07-010685. Fornicoia answered that Complaint, filing its Answer at GD 07-002436 and, on April 21, 2008, filed its Motion for Judgment on the Pleadings at that same case number. Thereafter, Atlantic filed a Motion for Summary Judgment at the same GD 07-002436 number. On April 23, 2009, upon joint motion of the parties, the cases were consolidated for all purposes at GD 07-002436 and, at argument, proceeded on the Motion for Summary Judgment and Motion for Judgment on the Pleadings.

² Because there is no exclusion in the Atlantic policy that negates coverage for drinking and driving, 75 Pa.C.S.A. § 1724, which prohibits such exclusions was not directly controlling. The Superior Court determined, however, that a Northeast policy against drinking and driving, if enforced in a manner that resulted in Boyd not being deemed a permissive user, would bring about the very result legislated against in §1724.

³ Charles Fornicoia passed away due to causes unrelated to the accident.

⁴ Specifically, the District Court found: “[W]here Defendant is attempting to recover UIM and liability coverage under the same policy for a single car accident involving a single tortfeasor, we hold that the dual recovery exclusion within the Allstate policy does not violate the public policy of the [Pennsylvania Motor Vehicle Responsibility Law].” 306 F.Supp.2d at 493.

Randall Vernon and Kathleen Vernon, his wife v. Erie Insurance Exchange

Uninsured Motorist Policy Dispute—Bad Faith Failure to Pay UIM Benefits—Post-Koken Litigation of UIM Dispute—Collateral Orders

1. Plaintiffs were injured in a motor vehicle collision and sought underinsured motorist benefits under their policy with Erie. Plaintiffs instituted a claim against Erie for breach of contract for failure to pay UIM benefits, statutory bad faith, and loss of consortium. Litigation was instituted pursuant to the *Koken* ruling that the Insurance Department does not have the authority to require mandatory binding arbitration for uninsured and underinsured motorist claims.

2. The trial court refused to grant the insurer’s motion to sever the contract claim from the bad faith claim, and to stay discovery on the bad faith claim.

3. In the litigation of case sounding in contract claim for refusal to pay underinsured benefits as well as a statutory bad faith claim, a trial court’s denial of an insurer’s motion to Sever and Stay a Statutory Bad Faith Claim is an interlocutory order, and does

not qualify as an appealable collateral order pursuant to Pa.R.A.P. 313.

(Elizabeth F. Collura)

Thomas E. Crenney and James T. Tarlman for Plaintiffs.

Roger Puz and William R. Haushalter for Defendant.

No. GD 08-10406. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., August 3, 2009—On June 23, 2007, Plaintiffs Randall and Kathleen Vernon were injured while passengers in an automobile that was struck by another vehicle. Plaintiffs were insured by Defendant Erie Insurance Exchange with Underinsured Motorist Policy (“UIM”) coverage. On May 29, 2008, Plaintiffs instituted a civil action against Defendant for breach of contract for failure to pay UIM benefits, bad faith pursuant to 42 Pa.C.S. §8371 for failure to make a reasonable offer to settle the case, and loss of consortium. This case is among the first post-*Koken* policy cases to reach this stage in Allegheny County.¹

Defendant filed a motion to stay discovery on the bad faith claim and bifurcate the breach of contract and bad faith cases. On September 8, 2008, the Honorable R. Stanton Wettick, Jr. denied that motion, stating that “at this stage of these proceedings Erie has not shown why it will be significantly prejudiced unless I bifurcate and stay discovery.”

On February 20, 2009, Judge Wettick heard Plaintiffs’ motion to compel the deposition of Defendant’s adjuster. Judge Wettick ruled that Defendant shall produce requested documents or raise objections within twenty days. On March 13, 2009, Judge Wettick granted Defendant’s request for an additional five days to comply with that order.

After pleadings were closed, the case was scheduled for trial on September 15, 2009. On May 29, 2009, the parties appeared before me on Plaintiff’s motion to compel and Defendant’s renewed motion to bifurcate. After consultation with Judge Wettick, on June 1, 2009, I denied Plaintiff’s motion to compel without prejudice and I denied Defendant’s motion to bifurcate ruling that “[i]mmediately upon termination of the UIM case, either by settlement or the case being sent to the jury, Defendant must provide to Plaintiffs all the items in the privilege log. The bad faith claim will be tried immediately upon the UIM case being sent to the jury, or on the scheduled trial date if the UIM case is settled, unless Plaintiffs within 20 days of this Order file a Motion to Bifurcate.” On July 1, 2009, Defendant filed a Notice of Appeal to the Superior Court from my order of June 1, 2009.

On July 13, 2009, the parties appeared before me on Defendant’s petition for certification of my June 1, 2009 order pursuant to 42 Pa.C.S. §702(b) as an interlocutory appeal by permission. I denied that motion. On July 28, 2009, Defendant’s filed a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Civil Procedure 1925(b).

This case is analogous to the recent decision of the Superior Court in *Gunn v. Automobile Insurance Company of Hartford, Connecticut*, 971 A.2d 505 (Pa.Super. 2009). In *Gunn*, the Superior Court held that the trial court’s denial of Defendant’s motion to Sever and Stay a Statutory Bad Faith claim “does not qualify as an appealable collateral order pursuant to Pa.R.A.P. 313” and therefore the Superior Court has no jurisdiction to review it and the appeal should be quashed. As the underlying motions in question in *Gunn* and this case are the same, the Superior Court should quash this appeal as interlocutory.

Strassburger, A.J.

August 3, 2009

¹ “In December 2005, in what is commonly referred to as the *Koken* case (*Ins. Federation of Pennsylvania, Inc. v. Department of Ins.*, 585 Pa. 630, 889 A.2d 550), the Pennsylvania Supreme Court ruled that the insurance Department did not have authority to require mandatory binding arbitration for UM and UIM claims. Insurance policies containing the mandatory arbitration provisions are being phased out and replaced with policies that do not mandate arbitration. Consequently, the trial courts of Pennsylvania will begin to frequently encounter complaints which raise both UIM and bad faith claims.” *Gunn v. Auto. Ins. Co. of Hartford, Conn.*, 971 A.2d 505, 508 fn. 1 (Pa.Super. 2009), citing Trial Court Opinion 7/25/2008, at 2.

Carl E. Patrick and Bridget Patrick v. Janice E. Grimm

Motion to Enforce Settlement Agreement

1. If parties orally agree to all of the terms of a contract between them and mutually expect the imminent drafting of a written contract reflecting their understanding, the oral contract may be enforceable.

2. Court will reject the plaintiffs’ attempt to introduce a new term into the final settlement agreement that conflicts with the understanding reached during the settlement conference and with the claim made in plaintiffs’ amended complaint.

3. Court will grant motion to enforce settlement agreement where written agreement tendered to the parties reflects all the terms agreed to by the parties during settlement conference.

(Laura A. Meaden)

Michael Fives for Plaintiffs.

David J. Montgomery for Janice E. Grimm.

Lawrence Baumiller for the City of Pittsburgh.

No. GD 06-27082. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., September 8, 2009—Before this Court is a Motion to Enforce Settlement Agreement filed by Janice Grimm. On August 5, 2008, the parties, including Bridget Patrick and her counsel, Thomas Earhart, Esquire, Janice Grimm and her counsel, David J. Montgomery, Esquire, and Assistant City Solicitor, Lawrence Baumiller, Esquire, participated in a settlement conference with this Court.

It is the finding of this court that during the settlement conference, the parties and their counsel met with the Court both together and separately. Over the course of these meetings with the Court, counsel and the parties negotiated and finalized the terms of a Settlement Agreement. Among the negotiated terms was Mrs. Patrick's insistence that they be granted access to the alley on trash pick-up day. After consultation with counsel, Mrs. Grimm agreed to this negotiating point and with both parties present, counsel then represented to the Court that the terms of the settlement were final.

The parties agreed that Mrs. Grimm's counsel would reduce the terms of the Settlement Agreement to a written agreement and would circulate it to Mrs. Patrick's counsel for his review and comment. On August 12, 2008, counsel for Mrs. Grimm mailed the written Settlement Agreement to the Patricks' counsel. On September 4, 2008, the Patricks' counsel sent an e-mail stating that, "My client and I are still discussing an appropriate response to your draft consent agreement. Your continued patience is appreciated." On or about September 17, 2008, the Court requested a copy of the draft Settlement Agreement. Patricks' counsel assured the Court's clerk that he had "spoken with my client regarding possible changes in wording, not substance." On Friday, September 19, 2008, Patricks' counsel sent an e-mail to Grimm's counsel stating "My client needs access to the fenced in area as soon as possible to permit a private surveyor to complete a survey for us. The survey is needed to facilitate my client's written response to your proposed Settlement Agreement." On September 22, 2008, counsel for the Patricks' and Grimm met to discuss the Settlement Agreement and, for the first time, Patricks' counsel stated that Mrs. Patrick contended that the purported easement extended along the entire western side of the Grimm property—from Sarah Street to Larkin Street. This new claim conflicts with everyone's understanding at the settlement conference that the purported easement ran in a westerly direction along the three-foot wide sidewalk that travels behind the rear of the Grimm's house to the Patrick's property and had been obstructed by the fence erected by Grimm. Indeed, this new claim about the location of the easement conflicts with the Patrick's Amended Complaint, filed on February 21, 2007, that asserts that the easement was located across the three-foot alleyway that travels behind the rear of the Grimm house.

Preliminary negotiations do not constitute a contract. "However, if the parties orally agree to all of the terms of a contract between them and mutually expect the imminent drafting of a written contract reflecting their previous understanding, the oral contract may be enforceable." *Kazanjian v. New England Petroleum Corp.*, 480 A.2d 1153, 1157 (Pa.Super. 1984). It is this Court's findings that the written Settlement Agreement reflects the understanding of the parties and sets forth all of the terms agreed to by the parties during the August 4, 2008 settlement conference. Therefore, the Motion to Enforce Settlement Agreement is GRANTED.

ORDER OF COURT

AND NOW, this 17th day of September, 2009, upon consideration of Janice E. Grimm's Motion to Enforce Settlement Agreement, it is hereby ORDERED that the motion be, and hereby is, GRANTED. Accordingly, Carl and Bridget Patrick are bound by the terms of the Settlement Agreement attached to this Order, which memorializes that parties' agreement to settle this lawsuit.

BY THE COURT:
/s/James, J.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release is entered into this ___ day of August, 2008, by and among Janice E. Grimm ("Grimm") and Carl E. Patrick and Bridget Patrick (collectively, the "Patricks").

RECITALS

WHEREAS, Grimm is the record owner of 2214 Sarah Street, Pittsburgh, Pennsylvania;

WHEREAS, the Patricks are the record owners of 2219 Larkins Way (double check) and 2216 Sarah Street, Pittsburgh, Pennsylvania (collectively, the "Patrick Properties");

WHEREAS, Ms. Patrick operates 2219 Larkins Way as a rental property with tenants on the first and second floors;

WHEREAS, the Patrick Properties border the Grimm Property;

WHEREAS, the parties dispute the existence, scope, and location of an easement across the Grimm Property for the benefit of the Patrick Properties;

WHEREAS, in or about 2004, Grimm obtained a building permit (the "Building Permit") and constructed a fence (the "Fence") obstructing the Patricks' access to a three foot wide alley way crossing over 2214 Sarah Street and terminating at Sarah Street (the "Alley");

WHEREAS, the Patricks contend that the City of Pittsburgh erred in issuing the Building Permit and that the Fence unlawfully obstructs the easement and has filed zoning appeals at SA No. 07-001395 and SA No. 07-001344 (the "Zoning Appeals");

WHEREAS, the Patricks have also filed an action with the Court of Common Pleas, captioned, *Grimm v. Patrick*, GD No. 06-027082 (the "Quiet Title Action"), to establish their right to an easement over the Alley;

WHEREAS, Grimm has filed a counterclaim to the Quiet Title Action;

NOW, THEREFORE, in consideration of the covenants hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties to the Zoning Appeals and Quiet Title Action agree as follows:

1. **Replacement of the Fence.** Within 60 days of the date of this agreement, Grimm agrees to replace the Fence with a locked gate.
2. **Possession of the Key(s).** One key to the locked gate shall be held by the Patricks and one key shall be held by Grimm.
3. **Use of the Alley.** The Patricks (and their tenants) may use the gate and the Alley as a way of accessing 2219 Larkins way for the purpose of moving large furniture and other objects not capable of being moved through the current entrance from Larkins way as depicted on Exhibit A.
4. **Garbage day access.** The residents of 2219 Larkins way may also use the Alley on the day of the week for designated for garbage pick-up on Sarah Street for the limited purpose of transporting garbage to Sarah Street for pick-up.
5. **Notice.** The Patricks must give Grimm at least twenty-four hours advanced written notice before using the Alley for the purposes described in the preceding paragraph.
6. **Form and content of Notice.** The Notice described in the preceding paragraph must set forth the anticipated time and purpose of the requested access to the Alley.
7. **Delivery of the Notice.** The Notice described in the preceding paragraph must be delivered to the mailbox at 2214 Sarah Street.
8. **Contingency in the event that the Larkins Way Access is lost.** If through no fault or behavior of the Patricks or their agents or assigns, the Larkins Way access is lost or declared to be unlawful,
9. **Dismissal of the Quiet Title Action.** Within five days of the date of this agreement, the parties shall notify the Court of Common Pleas that they consent to the dismissal of the Quiet Title Action.
10. **Withdrawal of the Zoning Appeals.** Within five days of the date of this agreement, the Patricks shall notify the Court of Common Pleas that they consent to the dismissal of the Zoning Appeals.
11. **Release by the Patricks** – The Patricks and their successors, agents and assigns, ABSOLUTELY AND IRREVOCABLY RELEASE, ACQUIT, FOREVER DISCHARGE Grimm and her predecessors, successors, representatives, and agents, and their heirs, successors, and assigns from any and all claims, demands, rights, causes of action, damages, losses, suits, judgments, penalties, liens, attorneys' fees, and expenses of any nature whatsoever which they had, have, may have had, whether known or unknown, relating to the subject matter of the Quiet Title Action and Zoning Appeals.
12. **Release by Grimm** – Grimm and her successors, agents and assigns, ABSOLUTELY AND IRREVOCABLY RELEASE, ACQUIT, FOREVER DISCHARGE the Patricks and their predecessors, successors, representatives, and agents, and their heirs, successors, and assigns from any and all claims, demands, rights, causes of action, damages, losses, suits, judgments, penalties, liens, attorneys' fees, and expenses of any nature whatsoever which they had, have, may have had, whether known or unknown, relating to the subject matter of the Quiet Title Action and Zoning Appeals.
13. **Attorney's Fees.** Each party shall bear its own attorney fees and all other expenses incurred in connection with this dispute. Without limiting or excluding any other releases that may be provided within this Agreement, all claims for indemnification of or reimbursement for defense costs incurred in connection with this dispute are hereby specifically released.
14. **Warranties.** The parties represent and warrant that they have read all provisions of this Settlement Agreement and Release in full, have reviewed those provisions with the attorney of their choice, and understand those provisions and agree to be bound thereby. Each of the parties hereby declares and represents that no promise, inducement, or representation has been made to it by the other, or by anyone acting on behalf of the other, to induce the execution of this Settlement Agreement and Release, save only those considerations which are expressly set forth in this Settlement Agreement and Release.
15. **Execution of Documents.** This Settlement Agreement and Release shall be executed in multiple originals and may be executed at different times by the parties hereto. The parties agree that any fully executed copy of this Settlement Agreement and Release shall be deemed an original.
16. **Counterparts.** This Settlement Agreement and Release may be executed in multiple counterparts.
17. Unless otherwise indicated, the failure to perform any condition of this agreement shall not relieve the other parties of their responsibility to complete the covenants stated herein,
18. **Amendment.** This Settlement Agreement and Release may be amended only in a writing signed by all parties.
19. **Applicable Law.** The terms and conditions of this Settlement Agreement and Release shall be governed by the laws of the Commonwealth of Pennsylvania.
20. **Jurisdiction.** The Court of Common Pleas shall retain jurisdiction to resolve any matters arising out of this Settlement Agreement.
21. **Binding Agreement.** This Settlement Agreement and Release shall be binding upon and inure to the benefit of the parties and their respective representatives, successors, and assigns.

Witness	Bridget Patrick
Witness	Janice E. Grimm
Witness	Carl E. Patrick

Commonwealth of Pennsylvania v. Otis Campbell

Post-Conviction Relief Act—Timeliness of Filing Petition—After-Discovered Evidence Rule—42 Pa.C.S.A. §9545(b)—42 Pa.C.S.A. §9545(b)(2)

1. Defendant/Petitioner was convicted of first-degree murder and sentenced to a term of life imprisonment. Judgment of sentence was affirmed by the Superior Court and defendant's later Petition for Allowance of Appeal was denied.
2. The trial court has no jurisdiction to address an untimely filed petition under the Post-Conviction Relief Act. The Act requires all petitions to be filed within one year of the date judgment became final.
3. The petition in this case was filed approximately five years after the limitations period under the PCRA, and is time-barred.
4. If the PCRA claimant seeks relief on the basis of after-discovered evidence, the Act provides an exception to the one year time limitation, and requires petitions in that situation to be filed within 60 days of the discovery of the evidence.
5. The petitioner sought relief arising out of purportedly after-discovered evidence, asserting that the Commonwealth failed to produce evidence concerning the victim's criminal record. In support of this claim, the petitioner attached a copy of the victim's criminal record, with the notation "COMPILED 6/5/2006."
6. Although the clerk of courts did not receive the petition until after 60 days beyond the discovery of the evidence according to the notation, the court gave the petitioner the benefit of the Prisoner Mailbox Rule, because petitioner produced an institutional verified and dated cash slip showing mailing within the 60 day period.
7. When the co-defendant (petitioner's brother) filed his own PCRA petition a month later raising the identical claim concerning after-discovered evidence, with a notation suggesting that the evidence was actually discovered in 2000, not 2006, and the brothers were housed in the same facility at the filing of the petitions, the court doubted that the petitioner actually did not know of the evidence until 2006.
8. Even giving the petitioner the benefit of the doubt, the petitioner testified at trial that the victim had a well-known reputation for violence, including the victim's participation in gang activities and shoot-outs. Therefore, there was no reasonable argument that he could not have, in the exercise of diligence, obtained the victim's criminal record prior to 2006. The petition was time-barred, and the court had no jurisdiction to entertain the petition.

(Elizabeth F. Collura)

Otis Campbell, *pro se*.

Jesse A. Torisky for the Commonwealth.

No. CC 1994-0015246. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniels, P.J., July 10, 2009—The Defendant has appealed from this Court's Order of June 18, 2007, which dismissed his Amended Post-Conviction Relief Act Petition without a hearing. A review of the record reveals that because the Defendant's Petition was untimely filed, this Court was without jurisdiction to address it. The Petition was, therefore, properly dismissed, and this Court's Order should be affirmed.

By way of a brief review, the evidence presented at trial established that in early November, 1994, the Defendant's brother, Robert Mickens, asked a woman named Laydell Cabbagestalk to hold a gun for him. Mrs. Cabbagestalk put the gun in a closet at her home on Beltzhoover Street. At some point shortly thereafter, Mrs. Cabbagestalk's grandson, Bruce Cabbagestalk, retrieved the gun at the behest of a visitor, Saint John Williams, and gave it to him.

Robert Mickens returned the next day and asked Mrs. Cabbagestalk for the gun. When she found it missing, Mickens became enraged and demanded the return of his gun. He made several visits to the Cabbagestalk home over the next day, continuing to demand his gun. Frightened of retribution, Bruce Cabbagestalk fled to the home of relatives in Monroeville, while Mrs. Cabbagestalk and her daughter, Charmaine Logan, decided to give Mickens \$500 for the gun.

On the evening of November 3, 1994, before the women could get to the bank, Mickens appeared at the Cabbagestalk home with his brother, the Defendant, Otis Campbell. Saint John Williams was also present. There was another verbal altercation between Mickens and Williams, and eventually Bruce Cabbagestalk was called at his relative's home in Monroeville. Bruce eventually admitted that he had taken the gun and given it to Williams. While Bruce was still on the phone, Campbell shot Williams in the kitchen of the Cabbagestalk home and fled before the police arrived.

The Defendant was charged with one (1) count of Criminal Homicide.¹ He was tried jointly with Robert Mickens, this Court having granted the Commonwealth's motion to join the cases for trial. At the conclusion of the trial, the Defendant was found guilty of first-degree murder and sentenced to a term of life imprisonment. A direct appeal was not initially taken, but in 1997, the Defendant sought and received a reinstatement of his appellate rights *nunc pro tunc*. The judgment of sentence was eventually affirmed by the Superior Court on March 9, 1999 and the Defendant's subsequent Petition for Allowance of Appeal was denied on December 15, 1999.

No action was taken until August 21, 2006, when the Defendant filed a *pro se* PCRA Petition. Counsel was appointed to represent the Defendant and an Amended Petition followed. After giving the appropriate notice, this Court dismissed the Amended Petition without a hearing on June 18, 2007. This appeal followed.²

On appeal, the Defendant raises layered ineffectiveness claims regarding an alleged *Brady* violation and a challenge to the jury instructions.

Initially, this Court notes that pursuant to 42 Pa.C.S.A. §9545(b), any and all PCRA Petitions, "shall be filed within one year of the date the judgment of sentence became final..." 42 Pa.C.S.A. §9545(b)(1), which, in this case, would be by March 14, 2001.³ With regard to the Defendant's claim of error in the jury instructions, there is no time limitation exception asserted, and this Court sees no reason why collateral relief could not have been sought on this issue prior to March 14, 2001. As such, this claim of error is easily dismissed as time-barred.

However, the Defendant does appear to assert an after-discovered evidence exception on the *Brady* claim. Specifically, he asserts that the Commonwealth failed to provide him with the criminal record of the victim, Saint John Williams, which, he now alleges, requires the granting of a new trial. In support of his claim, he has attached a copy of Williams' criminal record, which

bears the notation "COMPILED: 6/5/2006."

The Post-Conviction Relief Act provides an exception to the time limitation requirements for after-discovered evidence when "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." 42 Pa.C.S.A. §9545(b)(1)(ii). In such a situation, the PCRA Petition must be filed within 60 days of discovery of the evidence. 42 Pa.C.S.A. §9545(b)(2).

As noted above, the Defendant's pro se PCRA Petition was not received by the Clerk of Courts until August 21, 2006, which would seem to render any claims of after-discovered evidence regarding Williams' criminal record untimely. However, on August 8, 2006, this Court had received a letter from the Defendant inquiring as to the status of his pro se Petition, which he alleged was filed on July 10, 2006. Attached to the August 8, 2006 letter was a copy of an institutional cash slip noting mailing to the Clerk of Courts on July 9, 2006. In light of the institutionally verified and dated cash slip, this Court will give the Defendant the benefit of the Prisoner Mailbox Rule with regard to the alleged July, 2006 mailing date.

However, the application of the Prisoner Mailbox Rule does not end the timeliness inquiry in this particular case. Reference is made to the case of the Defendant's brother and co-Defendant, Robert Mickens. Mr. Mickens raised this identical *Brady* claim regarding Saint John Williams' criminal record one month later, in August, 2006. However, in support of his claim, Mickens attached a copy of Williams' criminal record generated on July 26, 2000.⁴ Given the fact that the brothers were housed in the same facility at the time of the filing of these Petitions, it seems to this Court highly unlikely that the information regarding Williams' criminal record was known to Mickens since July, 2000, but not to the Defendant until June, 2006.

Even if this Court were to believe that the information was unknown to the Defendant until June, 2006, (which it does not), the Defendant has not made a satisfactory showing that the evidence could not have been discovered earlier in the exercise of due diligence. At trial, the Defendant presented a defense of self-defense and argued that the victim had a well-known reputation for violence. In fact, he himself testified to his knowledge of this reputation:

Q. (Mr. Parker): Did you know other people who know [sic] Mr. Williams?

A. (Otis Campbell): Yes.

Q. And had you ever been involved in conversation where people were talking about Mr. Williams?

A. Yes.

Q. Based on these conversations, did you come to learn, did you come to learn of Mr. Williams' reputation of for [sic] being a violent person?

A. Yes.

Q. What was that reputation?

A. He—just stay out of his way.

Q. Why was that?

A. Because I am saying, he just, he ain't—he won't take no for an answer, put it like that.

Q. Did he—

A. If you say yes, it's a [sic] apple, and he says no, to you, it's no apple, it's a [sic] orange, he's just like a trouble maker; you know, you know, what I am saying?

Q. Did he have a reputation for being violent?

A. Yes.

Q. Did, if you know, do you know whether or not he had a reputation for being involved in gang activities?

A. Yes.

Q. What was that reputation?

A. Yes, like one time I heard that he did—

Q. I am going to ask you about specific things. What was his reputation that you heard about him being involved in gang activities?

A. Shoot outs, he was involved in gangs; he had shoot outs.

(Trial Transcript, p. 533-34). In addition to this testimony, the trial transcript contains several other references to Williams' violent propensities, habit of carrying a gun, gang activity and possible involvement in a murder. (See e.g., T.T., p. 178, 487, 488).

In light of the references at trial and the Defendant's own testimony, it is clear that the Defendant knew Williams to be a violent man and one who was possibly involved in criminal activity. Thus, there is no reasonable argument that he could not have, in the exercise of due diligence, made efforts to obtain Williams' criminal record before 2006. Given the particular factual scenario at issue and Defendant's failure to explain why this information could not have been discovered earlier with the exercise of due diligence, he has failed to satisfy the after-discovered evidence exception to the time limitation requirements of the Post-Conviction Relief Act. See *Commonwealth v. Yarris*, 731 A.2d 581, 590 (Pa. 1999). As such, this claim is time-barred.

Inasmuch as "the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner." *Commonwealth v. Mazzarone*, 856 A.2d 1208, 1210 (Pa.Super. 2004). See also *Commonwealth v. Bennett*, 842 A.2d 953, 956 (Pa.Super. 2004) and *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). This Court is bound by the time limitation provisions of the Post-Conviction Relief Act and, therefore, properly dismissed the Defendant's Amended Post-Conviction Relief Act Petition.

Accordingly, for the above reasons of fact and law, this Court's Order of June 18, 2007 must be affirmed.

BY THE COURT:
/s/McDaniels, P.J.

Date: July 9, 2009

¹ 18 Pa.C.S.A. §2501.

² The preparation of this Opinion was delayed as the record and transcripts were in the possession of the Pennsylvania Superior and Supreme Courts for the appeal of the co-Defendant, Robert Mickens, and were unavailable to this Court.

³ The Defendant's judgment of sentence having become final on March 14, 2000.

⁴ This Court determined that Mickens' PCRA Petition was untimely due to his failure to file within 60 days of the discovery of the criminal record.a